

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHER DISTRICT OF FLORIDA
3 FORT LAUDERDALE DIVISION

4 IN RE:

NO.: 09-34791-RBR

5 ROTHSTEIN ROSENFELDT ADLER, P.A.
6
7

8 VIDEOTAPED

9 DEPOSITION

10 OF

11 JOHN JACK SCAROLA
12
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15 350 East Las Olas Boulevard

Fort Lauderdale, Florida

16 July 2, 2013

Scheduled for 10:00 a.m.

17 Commencing at 10:07 a.m. to 5:23 p.m.
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1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 FORT LAUDERDALE DIVISION

4 IN RE:

CHAPTER 7

5 BANYON 1030-32, LLC
6 BANYON INCOME FUND, L.P.

CASE NOS: 10-36691-RBR
11-40929-RBR

7 Debtors.

Jointly Administered Under
Case No. 10-33691-RBR

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10 ALSO PRESENT:

11 Patricia Diaz, FPR, RPR

12 Dean J. Chimerakis, Videographer

Custom Video Services, Inc.

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1 THE VIDEOGRAPHER: Today's date is July 2nd,
2 2013. The time is approximately 10:10 a.m. Eastern
3 Standard Time. We are here to videotape the
4 deposition of John Jack Scarola in regard to
5 Rothstein, Rosenfeldt, Adler, PA, Case 09-34791
6 BKCRVR.

7 The court reporter is Patty Diaz with
8 Ouellette and Mauldin Court Reporting. My name is
9 Dean Chimerakis, videographer, with Custom Video
10 Services of Miami.

11 Will counsel please state your appearance for
12 the record?

13 MR. HUTCHINSON: Wayne Hutchinson with
14 McGuireWoods on behalf of TD Bank, N.A., and with
15 me is Joe Sheerin.

16 MR. GENOVESE: John Genovese, Genovese,
17 Joblove and Battista on behalf of Herb Stettin.
18 Along with me is my colleague, Michael Friedman.

19 MR. RIGOLI: Jason Rigoli, Furr & Cohen on
20 behalf of Robert Furr, Chapter 7 Trustee for Banyon
21 1030-32 and Banyon Income Fund.

22 MR. MOSKOWITZ: Adam Moskowitz, Bill Scherer
23 and Javi Lopez on behalf of the plaintiffs in the
24 case.

25 MR. MULLIN: John Mullin from Tripp, Scott on

1 BY MR. HUTCHINSON:

2 Q. And are you appearing here today pursuant to
3 this subpoena?

4 A. I am.

5 Q. And this subpoena includes a document request,
6 does it not?

7 A. It does.

8 Q. And have you produced all documents that are
9 responsive to the request included therein?

10 A. I believe I have.

11 Q. Does that include some documents that you have
12 brought with you here today?

13 A. That is correct.

14 Q. Based on what was previously produced and what
15 you brought here today, you believe that all documents
16 responsive to these requests have now been provided.
17 Correct?

18 A. I don't have personal knowledge of the
19 production that was not made by me. I am told that you
20 have already received duplicate copies of most of the
21 materials that I brought today, but I have brought with
22 me all of those materials in my possession that are
23 responsive to the subpoena.

24 Q. And you are fine with us looking through those
25 materials to confirm that we have them and if not,

1 making any copies that we need to make so that we have
2 them for our records?

3 A. Yes. I know that there are documents that are
4 included in the group of documents that I brought this
5 morning that were not produced to you because they are
6 my personal notes with regard to my review of the other
7 materials.

8 Q. But you are not aware of any additional
9 materials that either have not been provided or are not
10 with you here today?

11 A. I am not.

12 Q. Let me show you what I marked -- is marked as
13 Exhibit 2.

14 (Exhibit No. 2, Subpoena for Christian Searcy,
15 was marked for identification.)

16 A. Yes, sir.

17 BY MR. HUTCHINSON:

18 Q. Do you recognize Exhibit 2, sir?

19 A. I do.

20 Q. What is Exhibit 2?

21 A. Exhibit 2 is a copy of a subpoena that was
22 accepted by my office on behalf of Christian Searcy and
23 I have seen a copy of this subpoena as well.

24 Q. And am I correct that this subpoena also
25 includes certain document requests?

1 A. It does.

2 Q. And we have not received a separate response
3 to this subpoena from your law firm. Is your document
4 production individually supposed to respond to this
5 subpoena as well?

6 A. It is.

7 Q. So as we sit here today, you have no knowledge
8 of additional documents responsive to the request,
9 including Exhibit 2, that are responsive therein that
10 have not either been provided to us previously or are
11 not in the materials that you brought here today?

12 A. That is correct. Certainly, it's possible
13 that I may have overlooked something, but I don't think
14 so.

15 Q. Mr. Scarola, in what fields are you an expert?

16 A. I am a trial lawyer who has been practicing in
17 the area of litigation since 1972. I am Board-certified
18 in personal injury and in business litigation as well
19 and I believe that both certifications have been in
20 place since they were offered by the Florida Bar.

21 Q. And if you were going to list the fields in
22 which you believe that you are an expert, what fields --
23 how would you describe those fields and what would they
24 be?

25 A. Well, for purposes of the deposition today, I

1 have been asked to express opinions with regard to the
2 punitive damage value of claims against TD Bank and I
3 present myself as having sufficient expertise in that
4 area to express those opinions.

5 Q. So it's your understanding that your opinions
6 in this matter are limited to the value of potential
7 punitive damages claims against TD. Is that correct?

8 A. That certainly is the primary focus of what I
9 have been asked to do, and while I may have formed some
10 tangential opinions that relate to that primary area,
11 that is the focus of what I have done.

12 Q. What qualifies you as an expert on punitive
13 damages and the values of punitive damages claims?

14 A. The total of 40 years experience that I have
15 had litigating both criminal and civil cases, including
16 many punitive damages claims.

17 Q. At what point during that 40-year career did
18 you become an expert on valuating punitive damages
19 claims?

20 A. I cannot tell you the point in time at which
21 someone would have independently recognized my
22 expertise. It has been an evolving process, so that's a
23 question that I can't answer for you, except to tell you
24 that it is my personal assessment that I am certainly
25 there now.

1 Q. Are there any specific factors that you
2 believe makes you qualified to be an expert on the
3 valuation of punitive damages claims other than your
4 general experience?

5 A. Yes. It is an area of the law that I have
6 studied. It is an area of the law that I have focused
7 study upon. That is, I am sure that over the course of
8 particularly the last 35 years I have taken CLE courses
9 that have dealt with the topic of punitive damages as
10 well as having taught multiple courses dealing with the
11 topic of punitive damages.

12 So, it is as a consequence of practical
13 experience, formal education and self-study that I have
14 accumulated the degree of expertise that I have in this
15 area.

16 Q. Let's talk about the CLE courses that you have
17 taught that deal with the valuation of punitive damages
18 claims. Can you please tell me about those courses,
19 their titles and when they were offered?

20 A. I'm sorry, but I cannot give you the course
21 titles nor can I tell you the specific dates on which
22 the courses were offered.

23 What I can tell you is that I have lectured on
24 both the state and local level on the topic of punitive
25 damages and have also been invited to give lectures on

1 punitive damages in front of at least one other state
2 Bar Association.

3 Q. What state Bar Association was that that you
4 are referring to?

5 A. Ohio.

6 Q. Were they the sponsor of the continuing
7 education class?

8 A. They were.

9 Q. And where was that lecture?

10 A. It actually occurred when that Bar Association
11 met in Palm Beach County.

12 Q. And when was that?

13 A. I can't give you the date.

14 Q. Was it in the last five years?

15 A. I'm not sure.

16 Q. What's your best estimate of when that would
17 have been?

18 A. Approximately, five years ago.

19 Q. And did you prepare materials for that CLE
20 presentation?

21 A. I don't know whether I prepared materials
22 specifically for that CLE presentation or whether I
23 relied upon materials previously prepared and having
24 lectured on the topic prior to that lecture.

25 Q. Would you still have the materials that you

1 would have used in these past lectures?

2 A. Probably some of them.

3 Q. Is the information contained in those
4 materials anything that you relied upon in forming the
5 opinions in this case?

6 A. The information contained within those
7 materials include principles that I relied upon in
8 formulating my opinions in this case, I think would be a
9 more accurate way to state the relationship between
10 those materials and my opinion.

11 Q. And to the extent that you can find any of
12 those ---

13 A. You've got them.

14 Q. Okay. Are those materials with you here
15 today?

16 A. They are. If they exist, they are in that
17 box.

18 Q. Thank you very much.

19 A. You are welcome.

20 Q. Other than the lectures at the Ohio State Bar
21 Association, were your other CLE lectures all
22 sponsored -- were the classes all sponsored by the
23 Florida Bar Association?

24 A. No.

25 Q. Who were the other CLE classes sponsored by

1 wherein you lectured on punitive damages?

2 A. Palm Beach County Bar Association, Palm Beach
3 County Justice Association, Florida Justice Association.

4 Q. And over how many years did those lectures
5 occur?

6 A. Certainly within the past 20 years, and I
7 don't know that I can accurately narrow it down beyond
8 that. It's a topic that I have been dealing with
9 significantly over at least the last 20 years.

10 Q. Have you lectured on the punitive damages
11 aspect of the Florida Tort Reform Acts that were
12 implemented in the late 1990s?

13 A. I have.

14 Q. What would have been your topics on -- what's
15 been the subject matters of those lectures on those
16 topics?

17 A. The implications from both the legal and
18 practical standpoint of the legislative changes.

19 Q. And what do you recall about those
20 implications?

21 A. I recall that the Florida legislature has,
22 from time to time, been imposing various restrictions on
23 the common law ability to recover punitive damages.

24 Q. In your opinion, does the Florida Legislature
25 have the right to do that?

1 A. It is my personal opinion that the Florida
2 Legislature has a limited right to deal with imposing
3 restrictions on the ability to recover punitive damages,
4 that there are constitutional limitations on how those
5 restrictions may be imposed.

6 Q. What constitutional limitations are you
7 referring to?

8 A. The due process and equal protection clauses
9 of both the United States Constitution and the Florida
10 Constitution.

11 Q. Are you claiming -- is it your -- are you
12 offering an opinion in this matter that there is a
13 property right with respect to a punitive damages claim?

14 A. No. I am not offering that opinion. I am
15 assuming for purposes of the opinions that I will be
16 expressing today that the current legislative
17 limitations that have been imposed upon the ability to
18 recover punitive damages pass constitutional muster.

19 Q. They do pass constitutional muster?

20 A. I have assumed that for purposes of the
21 opinions that I am expressing today.

22 Q. So, you are not offering an opinion in this
23 matter that the current statutes limiting punitive
24 damage awards are somehow unconstitutional or not
25 applicable to this matter?

1 A. I am not offering that opinion today.

2 Q. And you are not planning on offering that
3 opinion at the confirmation hearing?

4 A. I don't plan on offering that opinion at the
5 confirmation hearing, no.

6 Q. Let's go back. You talked about that you've
7 lectured on the practical implications of the new -- of
8 the punitive damages tort reform that was implemented in
9 the late 1990s. What is your understanding of the
10 practical implications of those reforms?

11 A. That really is a very broad question and I
12 would prefer that it be more focussed before I attempt
13 to answer it.

14 In what regard?

15 Q. Well, are there limits on the -- the amount of
16 punitive damages? Is it your understanding there are
17 limits on the amount of punitive damages that can be
18 recovered as a result of such reforms?

19 A. Yes, under some circumstances.

20 Q. And what are those circumstances?

21 A. Those that are specifically described in the
22 statute.

23 Q. Do you recall any of those circumstances
24 without referencing the statute?

25 A. I think I can recall some of them without

1 referencing the statute. Certainly, if you want the
2 most accurate answer I am able to give you, I've got a
3 copy of the statute in the materials that have been
4 provided, and it would be easier to have it in front of
5 me. But if what you would like to do is test my memory,
6 you know, I will play that game with you.

7 Q. Well, we are not playing games.

8 A. Okay.

9 Q. But what do you recall about the statutory
10 limitations?

11 A. I recall that there are limitations that would
12 impose a three times compensatory damage limit under
13 some circumstances, limitations that impose a four time
14 compensatory damage limitation under some circumstances.
15 There is expressed statutory language that indicates
16 that there is no statutory limitation under other
17 circumstances, and I recall that there is specific
18 language in the statute that indicates that the statute
19 is primarily applicable to products liability claims.

20 Q. Are you offering an opinion in this matter
21 that the statutes are somehow not applicable to the
22 claims at issue?

23 A. It is my opinion that the circumstances of the
24 punitive damage claims against TD Bank take those damage
25 claims outside the statutory limitations.

1 Q. Is that -- is it your opinion that it's
2 outside the statutory limitations because they are not
3 product liability claims?

4 A. It's my opinion that they are outside the
5 statutory limitations for multiple reasons; one, because
6 they are not within those provisions of the statute that
7 impose limitations, but secondly, because the nature of
8 the misconduct is such that I believe that that
9 misconduct takes the claims outside of the statutory
10 limitations.

11 Q. And we will certainly get into that in more
12 detail, but generally, are those the two reasons why you
13 believe that the conduct at issue in the underlying
14 claims in this matter are outside the punitive damages
15 limitations?

16 A. Generally, yes. When we are talking about
17 punitive damages limitations right now, we are simply
18 focusing on statutory limitations.

19 Q. Yes, sir.

20 Did you have any involvement with the punitive
21 damages tort reform that was implemented in the late
22 1990s?

23 A. I am not sure what it is you are asking me.
24 If you are asking whether I had any involvement in
25 formulating the law, the answer to that question is I

1 did not.

2 Q. Who did? To your knowledge, who did formulate
3 the law?

4 A. The Florida Legislature.

5 Q. Do you have any idea who wrote the law?

6 A. I don't know the names of any of the
7 draftsmen, and I would be surprised if the end result
8 were not the product of input from multiple sources.

9 Q. Do you have any personal knowledge of that?

10 A. I don't, no, at least none that I recall.
11 There may have been some point in time when I had
12 occasion to attempt to review the legislative history,
13 but I don't remember that.

14 Q. Would the draftsmen of the punitive damages
15 statute be the best resource in terms of trying to
16 determine the intent behind the statutes?

17 A. Not necessarily, no.

18 Q. Who would be?

19 A. The Florida Supreme Court ultimately.

20 Q. And the Supreme Court looks to legislative
21 history at times to determine the intent of the statute;
22 does it not?

23 A. If it is necessary to go beyond the plain
24 meaning of the language of the statute, that is a
25 consideration that the Court might view. I don't -- I

1 don't know that that would be necessary under the
2 circumstances of this statute and it certainly does not
3 appear to have been necessary up to this point in time.

4 Q. But you are not going to offer any opinions in
5 this matter on the nature and the intent of the statute
6 beyond the statutory language. Correct?

7 A. That is correct.

8 Q. And you have no personal knowledge of the
9 nature and intent of the enactment of the statute.
10 Correct?

11 A. I do not have any personal knowledge regarding
12 the drafting process nor the deliberative process of the
13 Legislature, nor do I think that either of those matters
14 is relevant.

15 Q. Do you know what groups were involved in the
16 lobbying effort for the tort reform effort?

17 A. I can make reasoned assumptions in that
18 regard, but I don't have any direct knowledge.

19 Q. In addition to the CLE courses you have taken
20 and taught on punitive damages, you also said that you
21 have done a good bit of studies conducted for punitive
22 damage purposes. Is that correct, or you have
23 researched punitive damages?

24 A. I have, yes.

25 Q. Can you please describe those research efforts

1 over the years?

2 A. I have read case law. I have read treatises.
3 I have read articles in professional journals. That's
4 what comes to mind immediately.

5 Q. Is there any treatise out there that you have
6 read that you believe to be the most authoritative
7 treatise on the status of damages in the State of
8 Florida?

9 A. There is no treatise that I would accept as
10 generally authoritative on all issues with regard to
11 punitive damages.

12 Q. Is there any treatises that you would accept
13 as authoritative on some of the issues with respect to
14 punitive damages?

15 A. Well, that would depend upon a particular
16 issue and my review of the way in which the treatise
17 treats that issue. So, I can't answer that broadly.

18 Q. Are there any issues in this matter that you
19 intend to opine upon that you believe a certain treatise
20 would be authoritative?

21 A. I have not expressly reviewed any treatise for
22 purposes of formulating my opinions in this matter and
23 ascertaining whether those opinions conform with that
24 treatise so I can't answer that question.

25 What I will tell you is that I have assembled

1 over the years some fairly extensive research materials
2 with regard to punitive damages. They certainly don't
3 include everything that I have reviewed, but it has been
4 my standard operating procedure as a trial lawyer to
5 preserve copies of materials that I think may be of some
6 significance with regard to a matter that I am currently
7 involved in or that I might reasonably anticipate would
8 become relevant to future matters, and I have kept those
9 research files and produced them for you today.

10 I selected from those files the punitive
11 damage files that I thought might be most relevant to
12 the inquiry that is being conducted.

13 Q. Thank you. So you keep a punitive damage --

14 A. I am not sure once you see them you are going
15 to want to say thank you, but I have them here.

16 Q. We appreciate it. How many times ---

17 A. Nor do I think you are going to appreciate it
18 when you get a chance to look at them, but they are
19 here.

20 Q. Thank you.

21 How many times have you testified as an expert
22 on punitive damages?

23 A. I don't have a recollection of ever having
24 served as a punitive damage expert before today.

25 Q. Have you ever been ---

1 A. I am a virgin.

2 Q. Have you ever -- I will move on.

3 Have you ever been asked to serve as a
4 punitive damages expert before today?

5 A. I have not, no.

6 Q. Have you ever heard of a punitive damages
7 expert before today?

8 A. Certainly not in the context of someone
9 testifying about the value of a punitive damage claim
10 but there are -- there are certainly a lot of folks out
11 there who have training and experience that formulate
12 opinions with regard to the punitive damage value of
13 cases in the ordinary course of their litigation
14 practice.

15 Q. But you have never heard -- how long, sir,
16 have you been litigating cases?

17 A. Since 1972.

18 Q. Since 1972, have you ever heard of another
19 person offering an opinion as to the value of a punitive
20 damages claim?

21 A. Many times, yes.

22 Q. And --

23 A. As a routine matter.

24 Q. Testifying in court?

25 A. No, sir. No. That wasn't the question.

1 That's not how I understood your question.

2 Q. I'm sorry. Then let me repeat or rephrase my
3 question.

4 Since 1972, have you ever heard or seen
5 someone testify as an expert as to the value of a
6 punitive damages claim?

7 A. You know, as you are asking that question, I
8 am thinking back to one occasion where I believe that,
9 in fact, did occur in a case that I personally
10 litigated.

11 Q. Can you tell me about that case and the
12 circumstances of that testimony?

13 A. Yes. The case was a claim against Bankers
14 Multiple Line Insurance Company. The full style of the
15 case was Farish versus Bankers Multiple Line. It was a
16 tortious interference claim against John D. MacArthur
17 and Bankers Multiple, which was a liability insurer that
18 was owned by MacArthur.

19 Joseph Farish was a trial lawyer who had been
20 hired by the widow of a young man who was walking down
21 the street when a truck came by carrying concrete
22 culverts. The truckload was not properly secured. A
23 culvert fell off the truck and crushed him as he was
24 walking down the street. The truck was owned by a
25 MacArthur Company and insured by Bankers Multiple Line

1 Insurance Company.

2 The widow was an employee of John D. MacArthur
3 at a hotel that MacArthur also owned called The
4 Colonnades, and when MacArthur found out about the
5 widow's claim against his company and his insurance
6 company, he befriended the widow and convinced her to
7 terminate the services of MacArthur and to retain the
8 services of a young woman who had virtually no
9 litigation experience whatsoever who proceeded then to
10 settle the widow's claim very cheaply.

11 I represented Mr. Farish in a tortious
12 interference claim, and one of the issues was the value
13 of the underlying case. And there was expert witness
14 testimony that was given in that case about the value of
15 the claim absent the tortious interference.

16 I am blanking on the name of the trial lawyer
17 or trial lawyers who gave that testimony. That was
18 probably 25 years ago.

19 Q. So you did not present such testimony?

20 A. I'm surprised myself by remembering how much I
21 remembered about that.

22 Q. You did not present such testimony?

23 A. I did not present the testimony, no.

24 Q. In all your years of trying cases, have you
25 ever retained an expert to opine on the value of

1 punitive damage claims that you or your client was
2 asserting?

3 A. Only the circumstances that I just described,
4 and -- well, that's the best answer I can give at this
5 time.

6 Q. Other than the research and studies that you
7 have previously described, have you performed any other
8 type of research during your career that supports your
9 purported expertise?

10 A. The process of evaluating punitive damages
11 claims is a process that goes on on a very frequent
12 basis in the course of my practice. So, to that extent,
13 the answer to your question is certainly yes.

14 Q. So you are saying you evaluate the punitive
15 claims of your own cases?

16 A. And sometimes -- well, often the cases of
17 others in my law firm and occasionally the cases of
18 lawyers outside my law firm who seek my opinion or my
19 firm's opinions with regard to the value of their cases.

20 Q. So, other than evaluating the claims that you
21 just described, your own cases, others in the firm,
22 other lawyers and so forth, have you done any other
23 research during your career that supports your purported
24 expertise?

25 A. The study that I have described to you

1 earlier.

2 Q. Other than what we have talked about here
3 today?

4 A. I can't think of anything else that would
5 directly be relevant. Something else may come to mind.
6 If it does, I will let you know. That's all I can think
7 of right now.

8 Q. Okay. You referred to the process of
9 evaluating a punitive damages claim.

10 A. Yes, sir.

11 Q. Is that a process that you developed or was
12 that developed by some other punitive damages expert?

13 A. It is a process that has developed over the
14 course of my personal practice. That is, I haven't
15 taken somebody else's evaluative process and adopted
16 that as my own.

17 Q. And is your process an accepted process in the
18 legal industry for evaluating the value of punitive
19 damages claims?

20 A. I think the answer to that question is yes.

21 Q. Okay. And how do you know that it's -- would
22 you say it's widely accepted in the legal industry as a
23 process for evaluating the value of punitive damages
24 claims?

25 A. Yes.

1 Q. Has your method been published?

2 A. It has been.

3 Q. Where has this been published?

4 A. It has been published in court opinions of
5 which I am aware. It has been published in legal
6 treatises of which I am aware, and it has been published
7 in the CLE materials that I, myself, have written in
8 connection with lectures in this area that I have given.

9 Q. Okay. So, there is a court opinion out there
10 that discusses your internal process for evaluating the
11 value of punitive damages claims?

12 A. There is a court opinion out there that
13 addresses the issue of how punitive damages should be
14 evaluated, yes.

15 Q. And let's make sure we are talking, using the
16 same words here. How a punitive damages claim should be
17 evaluated versus how you -- how one values a purported
18 punitive damages claim. Are we talking about the same
19 thing?

20 A. That's a distinction that I don't understand.
21 Maybe I can be helpful to you here so we don't spend a
22 lot of time mis-communicating.

23 Q. That would be great.

24 A. There are authorities that identify
25 aggravating and mitigating circumstances that are

1 appropriately taken into consideration in assessing the
2 amount of punitive damages necessary to serve the dual
3 purpose of punitive damages recognized in the State of
4 Florida, punishment and deterrence. The case that most
5 specifically addresses those factors is the
6 Johns-Manville case, which is included in the materials
7 that have been provided to you.

8 Q. Just so we are clear, when we are talking
9 about the publication of your process to evaluate
10 punitive damages, do these cases say this is how Jack
11 Scarola does it and we think that that's the proper way
12 to do it, or do these cases discuss different factors
13 that a court should consider in evaluating punitive
14 damages and you have adopted parts of that in your
15 process?

16 A. There is no published opinion that attributes
17 this process to me. There are published opinions that
18 identify appropriate factors to be taken into
19 consideration by both judges and juries in determining
20 the appropriate amount of punitive damages necessary to
21 serve the dual purpose of punishment and deterrence.

22 Q. Are there any publications, other than the
23 court opinions, that discuss Jack Scarola's process,
24 your individual process that you have utilized in this
25 matter to evaluate or to place a value on the potential

1 punitive damages claims in the underlying cases?

2 A. Except for my own materials, which obviously
3 include my name, I am not aware and would be very
4 surprised to find any case or treatise or other
5 publication that attributes the identification of
6 aggravating and mitigating circumstances to Jack
7 Scarola. This is not something that I authored, except
8 to the extent that it's incorporated in CLE outlines.
9 It is a recognition of the appropriateness of
10 specifically identified factors in both cases and
11 treatises to assess the appropriate amount of punitive
12 damages in order to serve the dual function of
13 punishment and deterrence.

14 Q. Punishment and deterrence, are those the
15 purposes of punitive damages under Florida law?

16 A. Yes, sir.

17 Q. Are punitive damages under Florida law meant
18 to compensate a plaintiff?

19 A. They are not, except to a limited extent that
20 is recognized in the case law, and that is that there is
21 a recognition in the case law that the plaintiff who
22 undertakes the prosecution of a punitive damage claim is
23 serving a function in effect as a public prosecutor to
24 preserve the integrity of the judicial system and to
25 preserve appropriate standards within, in this context,

1 the business community. So, to motivate individuals to
2 undertake the difficult task of prosecuting a punitive
3 damage claim, one of the factors that is taken into
4 consideration are the costs involved in prosecuting that
5 claim.

6 Q. And what case ---

7 A. So punitive damages help to compensate the
8 plaintiff for undertaking that broader societal purpose.

9 Q. To recoup the costs incurred in protecting
10 society's or the state's interest in pursuing punitive
11 damages?

12 A. Yes, sir.

13 Q. And what case do you believe best describes
14 that function?

15 A. Well, I know it's described in more than one
16 case, but the one that comes to mind immediately is
17 Johns-Manville.

18 Q. What is your process for placing a value on
19 potential punitive damages claims?

20 A. It is to review the evidence in the light of
21 recognized aggravating and mitigating circumstances, to
22 assess the way in which those factors impact upon the
23 intended purpose of punitive damages to punish the
24 wrongdoer and to deter others similarly situated from
25 engaging in the same kind of wrongdoing, to review any

1 statutory limitations that might apply and to consider
2 any constitutional limitations that might apply in
3 arriving at an opinion as to what I believe the range of
4 punitive damage value of a case is likely to be.

5 I would also take into consideration the
6 extent to which the same or similar circumstances have
7 already been assessed by an independent finder of fact.

8 Q. Let me make sure I got all of this down. It
9 seems like there is several different factors. First,
10 the evidence with respect to the claims at issue. You
11 would review that. You would review any statutory
12 limitations.

13 A. May I interrupt for just a moment?

14 Q. Yes, sir.

15 A. Because the evidence I am reviewing is
16 particularly that evidence that relates to the
17 aggravating and mitigating circumstances with respect to
18 punitive damages. I would not necessarily find it
19 necessary to review all of the evidence with respect to
20 a given matter and have not undertaken to attempt to
21 review all of the evidence with regard to this case.

22 Q. Would you review any of the evidence to
23 ascertain the viability of the underlying claims?

24 A. Certainly to some extent, yes, and I need in
25 circumstances such as this to make some assumptions with

1 regard to the viability of the underlying case and have
2 done so here. Obviously, if this is were my own case, I
3 would be assessing all of the evidence with regard to
4 the viability of the underlying case.

5 Q. You said you had made certain assumptions in
6 this matter concerning the viability of the underlying
7 claims. Correct?

8 A. That is correct.

9 Q. What assumptions have you made?

10 A. That the underlying claims are accurately
11 described in the complaints that I have reviewed, that
12 they are accurately described in court orders that I
13 have reviewed, that they are accurately described in
14 pleadings and memoranda that I have reviewed, and to a
15 limited extent that they have been accurately described
16 in verbal communications that I have had with both
17 Mr. Moskowitz and Mr. Scherer.

18 Q. So, for your analysis of the viability of the
19 underlying claims in this matter, are you accepting all
20 of plaintiffs' allegations to be true?

21 A. Yes. I have accepted the allegations in the
22 complaint to be true to the extent that any particular
23 allegation was or is shown not to be accurate that may
24 or may not affect my opinion, and that's something that
25 I would need to view in the context of the overall case.

1 Q. And are you accepting all of the
2 representations from Mr. Scherer and Mr. Moskowitz as
3 true with respect to the underlying facts?

4 A. They have been very limited, but I have
5 assumed that what they have told me is true, yes.

6 Q. And what have they told you?

7 A. I probably need to look at my notes to
8 identify for you, if I am able, specific representations
9 that have been made by them.

10 Q. To the extent ---

11 A. Most of what we talked about are matters that
12 were separately identified in the materials that I
13 reviewed and I am not sure I can separate out the verbal
14 representations that they made to me from the materials
15 themselves, except to the very limited extent that they
16 spoke about deposition testimony that was very recently
17 taken that I have not reviewed transcripts of.

18 Q. To the extent you are relying on any
19 representations from Mr. Scherer, Mr. Moskowitz on with
20 respect to the underlying facts, would those
21 representations be reflected in your notes that you have
22 provided here today?

23 A. I believe that they would be. I can also tell
24 you that there wasn't anything that I remember as I sit
25 here right now that altered the opinion that I had

1 formed before those depositions were taken. That is,
2 the information simply corroborated and reinforced those
3 opinions. It did not change them.

4 Q. You said there was some information that was
5 relayed to you by Mr. Scherer and Mr. Moskowitz
6 regarding recent depositions that have been taken. What
7 factual information do you recall from those
8 conversations?

9 A. I remember discussions about the testimony of
10 a corporate representative and disclosures concerning
11 information that has been relayed to TD Bank's board of
12 directors confirming that the board has been
13 periodically and routinely updated with respect to what
14 is going on in connection with this litigation. There
15 was some discussion about the apparent absence of any
16 significant change in policy practice or procedure on
17 the part of TD Bank that was identified as having been
18 intended to address the issues that give rise to
19 TD Bank's liability in these matters, some discussion
20 with regard to the absence of disciplinary action tied
21 to the misconduct that occurred in connection with these
22 matters. That's what I am able to recall off the top of
23 my head.

24 MR. MOSKOWITZ: Whenever you think appropriate
25 for a five-minute break, we have been going for

1 about an hour. But whenever you think -- you are
2 done ---

3 MR. HUTCHINSON: Let me just followup on a
4 couple of those answers, then it would be probably
5 a good place stop.

6 MR. MOSKOWITZ: Sure.

7 BY MR. HUTCHINSON:

8 Q. You discussed or you mentioned discussion
9 about reports being given to the TD board relating to
10 this litigation. What timeframe is your understanding
11 that these reports to the board were made?

12 A. I don't have a specific recollection of the
13 timeframe when the reports began, but my impression
14 right now is that they have been going on for some
15 significant period of time, which was not a surprise to
16 me in any respect. I would have been very surprised had
17 that not been occurring given the magnitude of these
18 claims, and I have assumed that the board was being kept
19 informed with regard to this litigation over an extended
20 period of time.

21 Q. And, again, just so we are clear here, your
22 understanding is reports concerning the litigation, this
23 litigation, the underlying litigation. Correct?

24 A. Well, when I am referring to this litigation,
25 I am referring broadly to TD Bank's implication in the

1 Rothstein Ponzi scheme.

2 Q. TD Bank's involvement in the numerous
3 litigation matters that are pending, is that what you
4 are referring to?

5 A. Well, it's my understanding that there are
6 some litigation matters relating to TD Bank that TD Bank
7 has settled.

8 Q. Correct.

9 A. So, I am not only talking about pending
10 litigation. I am talking about TD Bank's overall
11 involvement in the Rothstein Ponzi.

12 Q. But you are also -- you are not talking about
13 any -- it's not your understanding that the reports to
14 the board prior to the implosion of the Ponzi scheme.
15 Correct?

16 A. I don't have any reason to believe that there
17 were specific reports regarding the Ponzi scheme at any
18 time before the implosion of the Ponzi scheme. There is
19 certainly reason to believe that the magnitude of the
20 transactions that were being conducted locally in South
21 Florida may have reached the board's attention, but I
22 don't recall seeing any direct evidence that would
23 either confirm or deny that basic assumption.

24 Q. And you don't have any personal knowledge on
25 that issue. Correct?

1 A. I have never been invited to a TD board bank
2 meeting. I don't expect I ever will be. If there were
3 any chance of that before, it's gone now. And there was
4 probably no chance of that before either.

5 MR. HUTCHINSON: Adam, this is as good a time
6 as any to take a break.

7 THE VIDEOGRAPHER: We are off the record.

8 It's 11:05.

9 (A recess was taken from 11:05 a.m. until
10 11:15 a.m.)

11 THE VIDEOGRAPHER: It's 11:15 a.m. We are
12 back on the video record.

13 BY MR. HUTCHINSON:

14 Q. Mr. Scarola, I believe you previously
15 testified that in forming your opinions in this matter
16 you accepted the allegations of the -- the plaintiff's
17 allegations in the complaint as true. Correct?

18 A. Yes, sir, that's correct.

19 Q. And you accepted the representations by
20 plaintiff's counsel as true. Correct?

21 A. That is also correct.

22 Q. Did you do any research to verify the veracity
23 of those allegations and representations?

24 A. Well, I certainly took other materials into
25 consideration that corroborated those representations.

1 Those include court orders and related jury verdicts.

2 Q. Okay. What court orders are you referring to?

3 A. I remember in particular an order from Judge
4 Good.

5 Q. What did that order pertain to?

6 A. It pertained to significant litigation
7 misconduct.

8 MR. MOSKOWITZ: Judge Cooke, you mean?

9 A. Yes, thank you. Judge Cooke, sorry. That's
10 what happens when you take all my materials away from me
11 and test my 66-year old memory.

12 BY MR. HUTCHINSON:

13 Q. If, at any time, you need your materials, sir,
14 just ask and you are welcome to have them back.

15 A. Sure. Give them all back to me. Yes, if you
16 are offering them to me, I'd rather have them.

17 MR. HUTCHINSON: Just give him back the
18 originals. We've got the copies.

19 THE WITNESS: We can proceed and when you get
20 them assembled, just send them all this way.

21 BY MR. HUTCHINSON:

22 Q. So your recollection is an order from Judge
23 Cooke?

24 A. Yes.

25 Q. What's your recollection of Judge Cooke's

1 order?

2 A. That it dealt with significant litigation
3 misconduct.

4 Q. In what matter?

5 A. On the part of TD Bank.

6 Q. In what matter?

7 A. I don't remember the name of the case offhand.

8 Q. Was it in the Coquina matter?

9 A. Yes.

10 Q. And what's your understanding of the status of
11 the Coquina matter?

12 A. I believe that it is on appeal.

13 Q. Any other court orders that you remember?

14 A. I think I have reviewed something from Judge
15 Streitfeld.

16 Q. What do you recall about what you reviewed
17 from Judge Streitfeld?

18 A. I don't remember right now, but it's in my
19 materials.

20 MR. MOSKOWITZ: Do you want to hand him the
21 materials? I thought we had agreed we would do
22 that.

23 A. All of the case related materials that I
24 reviewed are in this bankers box. Most of it assembled
25 into large binders so that's what I have reviewed.

1 BY MR. HUTCHINSON:

2 Q. Okay. But you don't have any independent
3 recollection of what you reviewed from Judge Streitfeld?

4 A. If this is a memory test, I just failed. I
5 just know that Judge Streitfeld has been involved in
6 these matters. I have read references related to Judge
7 Streitfeld's concern about the manner in which the
8 litigation has been conducted by TD Bank. I remember
9 either reading directly or having information provided
10 to me indirectly about Judge Streitfeld's reaction to
11 learning about substantial transactions that occurred in
12 Rothstein's IOTA account and the significance that Judge
13 Streitfeld attributed to TD Bank's failure to
14 appropriately address those IOTA transactions.

15 Q. Anything else that you recall?

16 A. Not off the top of my head, no.

17 Q. Are you aware of any alleged underlying
18 discovery misconduct in the Beverly or Marlin actions
19 themselves?

20 A. I don't remember anything specifically.

21 Q. Did you review Mr. Scherer's deposition at
22 that point?

23 A. I did not, no. That was only recently taken
24 and I have not reviewed that transcript.

25 Q. If Mr. Scherer testified that there are no

1 allegations of discovery misconduct in those cases
2 themselves at this point, would you agree with that?

3 A. I would have no reason to doubt Mr. Scherer's
4 testimony in that regard. I don't know that it's
5 particularly significant in the overall context of this
6 matter, but I wouldn't question his accuracy.

7 Q. Why would you say that it's not particularly
8 significant in this matter?

9 A. Because the magnitude of the litigation
10 misconduct that occurred in related matters and the
11 extent to which TD Bank has engaged in efforts to cover
12 up its misconduct, whether those efforts occurred in
13 this particular case or whether those efforts took place
14 in the related litigation really wouldn't make very much
15 difference in terms of assessing the aggravating impact
16 that those efforts would have in evaluating a punitive
17 damage claim.

18 I will volunteer a little bit more that may be
19 helpful to you. It is my opinion that evidence with
20 regard to that litigation misconduct would be relevant,
21 admissible and highly probative in the second phase of a
22 punitive damage claim against TD Bank.

23 Q. And what do you base that opinion on?

24 A. My understanding of Florida law.

25 Q. And what is that Florida law that you are

1 referring to?

2 A. Well, again, the best synopsis of that law as
3 it relates to this case is Johns-Manville.

4 Q. What is does Johns-Manville say on that point?

5 A. That litigation misconduct efforts to cover up
6 the ratification of misconduct are highly probative
7 aggravating factors. The wrongdoer's response to the
8 wrongdoing is extremely significant, which obviously
9 makes good common sense as well to anyone who has ever
10 been a parent, or, for that matter, has had any
11 involvement in the criminal law.

12 Q. Okay. Well, we've got a lot to cover here so
13 let's go back and start from the beginning, sir.

14 What is your -- in which matters do you
15 believe this alleged litigation misconduct occurred?

16 A. It certainly occurred in Coquina and I am --
17 as I sit here right now, I am not sure which other
18 cases.

19 Q. So you are offering an opinion on this and you
20 don't even know which matters the conduct occurred in?

21 A. Well, it occurred in the matter of
22 prosecutions against TD Bank for TD Bank's involvement
23 in the Rothstein Ponzi scheme.

24 Q. So, let's go to the Coquina matter. Has the
25 alleged misconduct in that matter been addressed by the

1 Court?

2 A. It has been addressed by the Court in Judge
3 Cooke's opinion, yes.

4 Q. And did Judge Cooke sanction TD as a result of
5 the alleged misconduct?

6 A. Yes.

7 Q. But it's your opinion that TD should be
8 punished or potentially punished again for the alleged
9 misconduct?

10 A. It is my opinion that the reaction of TD Bank
11 to the allegations of wrongdoing against it is a highly
12 relevant and material factor to be taken into
13 consideration in assessing the appropriate amount of
14 punitive damages in order to serve the dual purpose of
15 punishment and deterrence, and whether that misconduct
16 occurred in this particular prosecution or in an earlier
17 prosecution where the issues were being addressed, where
18 the same issues were being addressed, is not of any
19 significance to me.

20 Q. Do you know whether it's of significance to
21 Judge Streitfeld?

22 A. I don't know whether it's of significance to
23 Judge Streitfeld, but I would be surprised if it were of
24 significance to Judge Streitfeld in his assessment of
25 the appropriate amount of punitive damages because I

1 have a great deal of respect for Judge Streitfeld's
2 legal acumen and I am sure that he would recognize the
3 relevance and materiality of that misconduct in a second
4 phase punitive damage proceeding.

5 Q. Have you reviewed the transcript from Judge
6 Streitfeld discussing this issue?

7 MR. MOSKOWITZ: Objection. Mischaracterizes
8 what actually occurred before Judge Streitfeld.

9 A. I am not aware that Judge Streitfeld has
10 addressed the issue that I am addressing and that is
11 whether evidence of TD Bank's coverup would be
12 admissible in a second stage punitive damages proceeding
13 in this case.

14 BY MR. HUTCHINSON:

15 Q. Are you aware that TD Bank filed motions in
16 the Beverly and Marlin matter to strike the allegations
17 of alleged discovery misconduct from other matters?

18 MR. MOSKOWITZ: Objection. Mischaracterizes
19 again what was actually filed.

20 A. I have some recollection of a related issue
21 having been raised but not reached as a consequence of
22 the stay imposed by the bankruptcy court. So, that's my
23 understanding.

24 BY MR. HUTCHINSON:

25 Q. Have you reviewed the transcript, sir?

1 A. I am not sure which transcript you are
2 referencing. What I reviewed is included in the
3 materials in this box. So, if that transcript is in the
4 box, I have at least looked at it to some extent. If
5 it's not in the box, I haven't seen it yet.

6 Q. Do you recall looking at a transcript where
7 Judge Streitfeld considered the motion to strike the
8 discovery allegations from the underlying Beverly and
9 Marlin claims?

10 A. I don't have a specific recollection of that,
11 no.

12 Q. Would that be important to you in formulating
13 your opinions in this matter?

14 A. Well, it depends on what the issue was that
15 was presented before the Court and the way in which the
16 Court resolved those issues, if they were resolved.

17 Q. I am going to show you what I am marking as
18 Exhibit 3, which is the transcript of the hearing before
19 Judge Streitfeld on May 17th, 2013?

20 MR. MOSKOWITZ: I'm sorry, Wen, is this in
21 some type of order?

22 Mine starts on Page 100 and then it goes
23 backwards and then forward and then it skips
24 around.

25 MR. HUTCHINSON: Sorry. You just must have a

1 bad copy.

2 MR. MOSKOWITZ: That's okay.

3 (Exhibit No. 3, Transcript of May 17, 2013
4 Hearing, was marked for identification.)

5 BY MR. HUTCHINSON:

6 Q. To your knowledge, sir, have you reviewed
7 Exhibit 3 before?

8 A. I don't remember.

9 MR. MOSKOWITZ: I'd guess I have an objection,
10 Wen. If you want him to -- he says he hasn't read
11 it, so if you want him to read the whole thing,
12 this is on a motion to strike certain allegations
13 in the complaint. It has nothing to do with
14 punitive damages or Phase 2, but if you are going
15 to ask specific questions about certain lines, I
16 kind of have to ask you to let him read most of the
17 transcript so he can understand the context,
18 because this is not about Phase 2 discovery. This
19 was your motion to strike certain sentences from
20 the complaint at this time.

21 But, please, proceed and we will take it
22 question by question.

23 BY MR. HUTCHINSON:

24 Q. If you will turn to Page 48, please.

25 A. I am there.

1 Q. Can you read the part where it starts:

2 "THE COURT: Well, that's problematic for a
3 number of reasons"?

4 MR. MOSKOWITZ: And then, again, Mr. Scarola,
5 I'd ask you, I guess, to read, you know, I don't
6 know how we are going to do this, but you can pick
7 out paragraph. This was a long hearing.

8 If you need to, you can also read, you know,
9 much of the other part of this transcript.

10 THE WITNESS: How far would you like me to
11 continue?

12 BY MR. HUTCHINSON:

13 Q. You can continue to the top of 49.

14 MR. MOSKOWITZ: And I would ask you to read at
15 least to Page 52 where the Court rules.

16 BY MR. HUTCHINSON:

17 Q. Yes, the Court issues an order on 52 striking
18 those paragraphs?

19 A. So I should continue to read all of Page 49?

20 Q. I don't think you need to, but you can read
21 whatever you think you need to, but if you go to 52 ---

22 A. Well, I don't know the purpose for which you
23 are asking me to read so I don't know. I can't make a
24 judgment about what I need to read, so why don't you
25 tell me what you'd like me to read?

1 Q. Well, wouldn't you agree that on Page 48 of
2 this transcript, Judge Streitfeld says that you are
3 suggesting that another case a jury can give punishment
4 again for the same conduct, I have a real problem with
5 that. Do you see that?

6 A. So do I.

7 Q. Isn't that what you are suggesting?

8 A. No. No, I am not suggesting that. I am
9 suggesting that it is relevant and material information
10 that would be admissible in a second stage proceeding.
11 I think that it would be necessary through appropriate
12 jury instructions to assure that the jury was not
13 imposing punishment for misconduct other than the
14 misconduct that was involved with these particular
15 plaintiffs.

16 There is a very good analogy that Judge
17 Streitfeld has dealt with repeatedly in the past and
18 that is in the context of tobacco cases. And I know how
19 Judge Streitfeld has dealt with that before as a
20 consequence of my personal experience in the prosecution
21 of tobacco cases, so I don't have any reason to believe
22 that his rulings in this case would be inconsistent with
23 what he has done previously.

24 Q. And what are you referring to as to what he
25 has done in the tobacco?

1 A. What I am referring to is that these issues --
2 these issues are dealt with by appropriate instructions
3 to the jury and that doesn't mean exclusion of the
4 evidence. It means informing the jury as to the manner
5 in which the evidence is to be used by it.

6 Q. And how is the jury to use this evidence?

7 A. Which evidence are you talking about?

8 Q. The evidence that you have taken as true from
9 the representations of plaintiff's counsel.

10 A. You mean the evidence of an ongoing course of
11 attempts to cover up wrongdoing and the refusal to
12 acknowledge any wrongdoing and the ratification of
13 wrongdoing?

14 Q. Is that what they have represented to you?

15 A. Is that what who has represented to me?

16 Q. Plaintiffs' counsel. Is that the evidence
17 that you are referring to?

18 A. That's what the record materials that I have
19 reviewed indicates that there has been a coverup, that
20 there has been a refusal to acknowledge any wrongdoing
21 with respect to that coverup, and that there has been an
22 effective ratification of the wrongdoing as a
23 consequence of a persistent refusal to acknowledge any
24 misconduct, to punish the misconduct or to address the
25 misconduct through appropriate changes to policy,

1 practice and procedure.

2 Q. Okay. And we will get into that in minute
3 detail and your total understanding of the alleged
4 misconduct. Let's go back to the question that we were
5 addressing.

6 A. I thought that that's what I was doing. I'm
7 sorry if I misunderstood your question.

8 Q. You were saying how Judge Streitfeld handles
9 similar issues in the tobacco cases.

10 A. Yes, sir.

11 Q. And how does he handle such issues, or did he?

12 A. Evidence with regard to the magnitude of the
13 wrong is admitted in tobacco cases, including the number
14 of other victims of the tobacco industry's longstanding
15 pattern of wrongdoing.

16 Q. But you are saying ---

17 A. That evidence gets admitted.

18 Q. But the jury -- you are saying the jury should
19 not punish based on that evidence. Correct?

20 A. What I am saying is that there is a recognized
21 constitutional limitation on imposing punishment against
22 a defendant in a case being prosecuted by one plaintiff
23 for injury that has occurred to other plaintiffs. That
24 doesn't mean that the jury is not informed -- God bless
25 you -- is not informed about those other injuries. It

1 is essential for the jury to know about the magnitude of
2 the wrong and the extent, nature and length of coverup
3 activities.

4 And to draw an analogy for you, when you are
5 prosecuting a criminal case with the exception of the
6 Williams' rule evidence, you are only looking at one
7 crime during the proceedings before the jury that
8 address the issue of guilt or innocence. But when it
9 comes to sentencing, there is a presentence
10 investigation that's conducted and you take a look at
11 the entire history of wrongdoing on the part of the
12 criminal defendant in order to determine what an
13 appropriate punishment is. Has this individual shown
14 remorse or hasn't the individual shown remorse? Is
15 there an admission of wrongdoing? Was there an effort
16 to cover it up, and those same kinds of factors are
17 appropriately taken into consideration based upon
18 relatively clear Florida precedent in determining what
19 an appropriate amount of punitive damages should be to
20 serve the purpose of punishment and deterrence.

21 Q. What Florida precedent supports your opinion
22 that the jury should be able to consider alleged
23 discovery conduct in another case when that plaintiff
24 was not involved in that case?

25 A. Let me make sure that you understand what my

1 position is in that regard. It is that the jury should
2 clearly be permitted to consider the course of conduct
3 relating to the pattern of wrongdoing in the case being
4 prosecuted before the jury, even if that pattern of
5 wrongdoing involves injuries to other plaintiffs.
6 That's my position.

7 Q. What is the pattern of wrongdoing in the
8 Beverly and Marlin actions that you are referring to?

9 A. TD Bank's participation in the Rothstein Ponzi
10 scheme.

11 Q. Okay. So, you are talking pre-blowup, pre-
12 blowup of the Ponzi scheme?

13 A. And -- and post-blowup of the Ponzi scheme as
14 well.

15 Q. What wrongdoing has occurred in the Beverly
16 and Marlin matters post-blowup?

17 A. It is my position that the efforts to cover up
18 involvement in the Rothstein Ponzi scheme are relevant
19 and material to all of the victims of the Rothstein
20 Ponzi scheme.

21 Q. Can we go back and can you answer my question,
22 sir?

23 A. I thought that I had and if I didn't that's as
24 a result of my not understanding your question. I
25 apologize.

1 Could you try to ask it of me in a different
2 way.

3 Q. I am going to ask you to answer the question I
4 asked. What wrongdoing has occurred in the Beverly and
5 Marlin matters post-blowup?

6 MR. MOSKOWITZ: Objection. I think it was
7 already asked and answered.

8 A. Well, we dealt with that issue before and you
9 have asked me to assume that Mr. Scherer has
10 acknowledged that there was no litigation misconduct
11 directly in the Beverly and Marlin matters and I have
12 accepted that representation. So, if the question is
13 was there any litigation misconduct in the Beverly and
14 Marlin matters, there is no reason for me to change the
15 answer that I gave you previously. I accept the
16 accuracy of Mr. Scherer's testimony.

17 BY MR. HUTCHINSON:

18 Q. Are there any cases that you can point to that
19 support your opinion relating to the jury's
20 consideration, the Beverly and Marlin jury's
21 consideration of the litigation misconduct in the other
22 matters?

23 A. Johns-Manville. I am sure there are others
24 but that's the one that I deal with most frequently and
25 have found to be most persuasive.

1 Q. Any others that support your position?

2 A. As I said, I am sure there are but they are
3 not cases or citations that I have memorized.

4 Q. If you will turn to Page 52 of Exhibit 3 --

5 A. I am there.

6 Q. -- do you see where the Court states, "But
7 right now those allegations don't belong in this
8 pleading"?

9 A. Can you give me a line number, please?

10 Q. Starting at line ten, "The motion to strike
11 paragraphs 18, 19, 180 to 185 is granted."

12 MR. MOSKOWITZ: Objection, the document speaks
13 for itself. And, again, it's taking it out of
14 context because on Page 47 he says, "We haven't yet
15 reached punitive damages." So you are showing him
16 something that is not what the Court actually
17 ruled.

18 BY MR. HUTCHINSON:

19 Q. Were you aware that the Court struck the
20 discovery allegations from those complaints?

21 A. The discovery misconduct allegations from the
22 complaint.

23 Q. Correct.

24 A. Yes, I was aware of that. I was also aware
25 that the punitive damage motion, the motion for leave to

1 amend to assert a claim for punitive damages had not yet
2 been reached by the Court.

3 Q. And still has not. Correct?

4 A. That's my understanding, yes.

5 Q. And it's your understanding that there are no
6 punitive damages claims currently in Beverly or Marlin?

7 A. It is my understanding that procedurally that
8 issue has not yet been reached as a consequence of the
9 imposition of the bankruptcy stay. That is not a factor
10 that I consider to be significant because of the very
11 obvious conclusion that once that issue is reached, the
12 motion for leave to assert a claim for punitive damages
13 will be granted.

14 Q. And where did you get the understanding that
15 the bankruptcy stay somehow affected the motion practice
16 with respect to the pleadings?

17 A. It's my understanding that the bankruptcy stay
18 precluded in general the ongoing prosecution of this
19 claim.

20 Q. Where did you get that understanding from?

21 A. I don't recall.

22 Q. Are you aware that we have continued to argue
23 motions on the pleadings and Judge Streitfeld indicated
24 that he was proceeding with anything relating to the
25 pleadings, that it was simply discovery that was stayed?

1 A. I don't know that I was specifically aware of
2 that, but the stay of discovery would certainly have an
3 impact on proceeding with a motion for leave to amend to
4 assert a claim for punitive damages. So, I don't know
5 that that's a distinction that is of much significance
6 to me.

7 Q. Okay. Let's discuss how your theory of this
8 discovery misconduct is relevant to Beverly and Marlin
9 actions and how it comes into evidence. You are saying
10 it comes into evidence during a separate punitive phase.
11 Is that correct?

12 A. Current State of Florida law requires upon
13 motion of either party that the proceedings be
14 bifurcated, that the issues of compensatory liability
15 and the amount of compensatory damages together with
16 entitlement to punitive damages are tried in the first
17 phase.

18 Assuming the jury determines that it is
19 appropriate to consider the issue of punitive damages,
20 there is a second phase where the amount of punitive
21 damages is addressed and evidence not otherwise
22 admissible in the first phase is admissible in the
23 second phase.

24 I would think it unlikely that evidence with
25 regard to the litigation misconduct would come in in its

1 entirety in the first phase of the proceedings. I think
2 it very unlikely that evidence with regard to the
3 litigation misconduct, including litigation misconduct
4 to cover up the very same wrongdoing that led to the
5 injury to these plaintiffs would be excluded in a second
6 phase proceeding, very unlikely that it would be
7 excluded.

8 Q. So your opinion is that it would come in when
9 determining the amount of punitive damages, but would
10 not come in in the first phase when determining whether
11 punitive damages were warranted?

12 A. That's not quite what I said. What I said was
13 that there may very well be some exclusion of litigation
14 misconduct relating to other cases in the first phase of
15 the trial. It is highly unlikely that any of that
16 litigation misconduct evidence would be excluded in a
17 second phase.

18 I can -- I can envision the admission of at
19 least some of the evidence with regard to litigation
20 misconduct in Coquina coming in in Beverly and Marlin in
21 the first phase.

22 Q. On what basis?

23 A. On the basis that it is relevant to the issue
24 of whether punitive damages should be assessed.

25 Q. And why is it relevant?

1 A. Because of all of those factors that are
2 identified in Johns-Manville having been addressed and
3 approved in general terms in -- by the Florida Supreme
4 Court as appropriate to consider in determining whether
5 punitive damages ought to be assessed.

6 Q. And, again, your basis is primarily
7 Johns-Manville for this. Correct?

8 A. Well, when you say my basis is primarily
9 Johns-Manville, that is not accurate. What I have tried
10 to convey to you is that that's the most convenient and
11 clear summary of relevant aggravating and mitigating
12 circumstances. So, it's the one that I turn to most
13 frequently because it provides that clear and convenient
14 summary.

15 Q. Let's talk about how this would work. So,
16 let's assume the Beverly case is tried first.

17 A. Okay.

18 Q. It was filed first. Correct?

19 A. I will accept your representation that it was.
20 I don't remember.

21 Q. So, it was -- Beverly was filed first. Assume
22 it's tried first. You are saying during the first phase
23 of Beverly trial there may be some evidence that comes
24 in with respect to the litigation misconduct in Coquina
25 and you believe there would certainly be evidence that

1 would come in with respect to that conduct in a punitive
2 damages phase. Correct?

3 A. Correct.

4 Q. And then assume the Beverly jury finds first
5 that punitive damages are warranted and then, you know,
6 listens to this additional evidence in Phase 2 and
7 assesses punitive damages against TD Bank. Okay. With
8 me?

9 A. So far.

10 Q. So, what happens in the Marlin matter that's
11 tried after Beverly?

12 A. What happens after Beverly?

13 Q. There is an award, a punitive award.

14 A. Is there subsequently an admission of
15 wrongdoing by TD Bank, an apology for the wrongdoing,
16 appropriate corrective measures taken and a payment of
17 the punitive damages, or is there a continuation of the
18 denial of wrongdoing, a continuation of the coverup and
19 a refusal to pay the punitive damage award?

20 Q. Assume all you have is a punitive damages
21 award on one day and the Marlin trial starts on the next
22 day.

23 A. Then it would be my position that it would be
24 very likely that the evidence admitted in the Marlin
25 trial would look very much like the evidence admitted in

1 the Beverly trial.

2 Q. So, this evidence just keeps -- each plaintiff
3 becomes, no matter what, that the litigation misconduct
4 had nothing to do with their case, had nothing to do
5 with their claims, and in no way injured them, keeps
6 getting presented trial after trial after trial?

7 A. Well, when you say in no way had anything to
8 do with injuring them, that's wrong. It did have
9 something to do with injuring them because it
10 complicated the prosecution of their claims and will
11 continue to prosecute the complicate -- the prosecution
12 of every victim of the Rothstein Ponzi scheme until
13 TD Bank finally says, you know what, we have been told
14 over and over and over again that what we did was wrong.
15 And it's time for us to take our heads out of the sand
16 and to stand up and acknowledge that what we did was
17 wrong, and to make sure that it never happens again,
18 instead of continuing to deny wrongdoing and ratifying
19 that wrongdoing.

20 So the answer to your question is, yes, they
21 keep being faced with the same evidence of what they did
22 wrong at least until they change their ways and the
23 purpose of punitive damages is finally served.

24 The wrongdoer has been punished enough and the
25 wrongdoer finally says, yes, I shouldn't have ever done

1 this. I realize it was wrong. I am ready to correct it
2 right now, and I am ready to pay all the penalties that
3 have been imposed upon me before.

4 That's when I think the evidence stops coming
5 in, maybe.

6 Q. Mr. Scarola, when were these cases filed,
7 Beverly and Marlin?

8 A. I don't remember the dates. I can look at the
9 pleadings, I am sure, and find out the -- it would
10 appear that the Marlin case was filed in 2013.

11 Q. Well, let's use that as an example.

12 A. Okay.

13 Q. How has any alleged litigation misconduct in
14 Coquina damaged the Marlin plaintiffs' prosecution of
15 their case filed in 2013 long after the order in Coquina
16 and Coquina's judgment came out?

17 A. The Marlin plaintiffs and the Beverly
18 plaintiffs have been obliged to litigate issues that
19 they never should have had to litigate if TD Bank did
20 the right thing.

21 Q. What issues?

22 A. TD Bank's liability for the underlying
23 misconduct.

24 Q. So you are saying because of alleged discovery
25 misconduct in Coquina, TD should admit underlying

1 liability in Beverly and Marlin?

2 A. What I am saying is that because of the
3 established litigation misconduct on the part of
4 TD Bank, which was specifically designed to conceal the
5 extent of TD Bank's involvement in the Rothstein Ponzi
6 scheme, victims of the Rothstein Ponzi scheme have been
7 obliged to undertake efforts to prove TD Bank's
8 underlying misconduct that would otherwise have been
9 unnecessary.

10 Q. Well, the alleged litigation misconduct was
11 made public long before the Marlin complaint was filed.
12 Correct?

13 A. Yes, accepting this date of filing, that's
14 true, uh-huh.

15 Q. So, it has in no way hampered the Marlin
16 plaintiff's prosecution of their matter.

17 A. Well, we are just not quite connecting. It is
18 my opinion and my understanding of the available record
19 evidence that TD Bank refused to acknowledge any
20 liability, that TD Bank actively sought to conceal
21 liability through the alteration of documents in
22 discovery, through the presentation of perjured
23 testimony, through the concealment of other documents to
24 a significant extent, and that TD Bank bank's coverup
25 and ratification of its misconduct continues even though

1 the extent of that wrongdoing has been publicly
2 disclosed, judicially recognized, but not yet
3 acknowledged or accepted by TD Bank.

4 Q. So, until TD admits liability on the
5 underlying Ponzi scheme claims, you believe that this
6 alleged litigation misconduct in other matters that was
7 made public long ago is relevant in these subsequent
8 matters?

9 A. I am the father of five children and the
10 grandfather of 15 and until my children and my
11 grandchildren are willing to acknowledge whatever minor
12 wrongdoing they may have been involved in, that
13 continues to impact upon the way in which I respond to
14 the things that they have done wrong.

15 Once they have acknowledged their wrongdoing
16 and accept responsibility for it, I don't need to
17 continue to say, you keep doing the same thing over and
18 over and over again, and the punishment doesn't need to
19 continue to escalate because they have been punished and
20 they have been deterred. But until they have been
21 punished and they have been deterred, the answer is,
22 yes, I keep bringing up the past until their punishment
23 has effectively altered their conduct.

24 TD Bank has had punishment assessed against
25 them. They have refused to acknowledge the

1 appropriateness of that punishment. They continue to
2 appeal it. They continue to contend we did nothing
3 wrong, and as long as they continue to appeal and to
4 contend that they did nothing wrong, then the facts of
5 the history of their misconduct are relevant and
6 material in deciding what is appropriate punitive
7 damages to be imposed against them.

8 Q. Let's get into detail of what your
9 understanding is of the alleged discovery.

10 MR. MOSKOWITZ: When would you like to take a
11 break? We have gone another hour. I certainly
12 want to let you do your depo.

13 MR. GENOVESE: Lunch was to arrive -- keep
14 asking questions. I will see when lunch is
15 arriving, give you that information. That will be
16 a convenient time in my mind.

17 Is that all right?

18 THE WITNESS: Sure. Assuming lunch is going
19 to be here within the next half-hour, that's fine
20 with me. Otherwise, I'd like to take a break
21 before lunch.

22 MR. GOLDBERG: Lunch is here already.

23 MR. GENOVESE: Whenever Wen wants to conclude
24 within the next half-hour.

25 THE WITNESS: That's fine.

1 BY MR. HUTCHINSON:

2 Q. Are you good going a little while longer?

3 A. I'm good going a little while longer, yeah.
4 I'm working without breakfast so I'd like to have lunch.

5 Q. Let's get in, you keep alleging all of your --
6 or talking about all this alleged litigation.

7 MR. MOSKOWITZ: Is this going to be like a
8 half-hour? I mean, he hasn't had breakfast at all.
9 We've got all day.

10 Do you want to eat now? We've got all day.

11 THE WITNESS: Let's go another 15 minutes.
12 Find a convenient stopping point in about
13 15 minutes from now.

14 BY MR. HUTCHINSON:

15 Q. Okay. Can you please describe your
16 understanding of the specifics of the alleged litigation
17 misconduct that you are referring to?

18 A. Yes, sir. There was a ---

19 Q. You are referring to a document, sir?

20 A. I am, yes.

21 Q. What document is that?

22 A. It's plaintiff's first request for production
23 of documents to TD Bank relating to the sanctions motion
24 filed in the Razorback Funding, LLC, et al., versus
25 Scott Rothstein matter, 17th Judicial Circuit Court,

1 Case Number 09-062943-19.

2 Q. Let me show you what I am marking as
3 Exhibit 4. Is Exhibit 4 what you are referring to, sir?

4 A. Yes, assuming that this document is an
5 accurate copy of all of the pages following the first
6 page, the first page is identical so I assume that it
7 is.

8 (Exhibit No. 4, Plaintiff's First Request for
9 Production of Documents to TD Bank, was marked for
10 identification.)

11 BY MR. HUTCHINSON:

12 Q. So what is your understanding of the first
13 alleged specific litigation misconduct?

14 A. The litigation misconduct that I am
15 referencing is the litigation misconduct that is
16 described in each of the introductory paragraphs to the
17 requests that are made in this document, specifically I
18 am referring to the description that is included on Page
19 5 under the title, background to this request, on Page
20 6, background to this request.

21 It continues on Page 7 and 8. On Page 8,
22 background to this request. It continues on Page 9,
23 Page 10, Page 11, Page 12. The description under
24 background to this request that appears on Page 13 and
25 continues onto Page 14, background to this request that

1 appears on Page 14, Page 15, Page 16 and Page 17. I am
2 also referring to the allegations in paragraph 13 of the
3 complaint and paragraphs 86 through 153 of the complaint
4 where allegations of wrongdoing are specifically
5 described in paragraphs 15, 17, 18 and 154 through 196
6 where post-collapse coverup facts are alleged.

7 Q. And you are referring to certain notes now,
8 sir?

9 A. I am, yes. These are notes that I prepared
10 myself when reviewing certain of the materials that were
11 provided to me.

12 Q. Okay. We will mark those in due course, but
13 who were the individuals that were responsible, to your
14 knowledge, for the alleged wrongdoing, and we will start
15 with the alleged wrongdoing on Page 5 of Exhibit 4?
16 It's a section titled, documents relating to the RRA
17 customer due diligence CDD form.

18 A. Uh-huh. The specific individuals whose
19 identity I have any knowledge of are those who are
20 identified by name within that document. I do not have
21 knowledge outside the scope of the documents that I have
22 described of involvement by other individuals by name.

23 Q. And, again, these are all documents drafted by
24 plaintiff's counsel. Correct?

25 A. I think that this particular document was

1 drafted by Mr. Moskowitz.

2 Q. And the comments in your notes were based on
3 receipt of information from plaintiff's counsel.

4 Correct?

5 A. Which comments in my notes? The specific
6 paragraphs in the complaint that I referenced?

7 Q. Answer me that. Well, you were reading from
8 your notes earlier. Correct?

9 A. When I identified the specific paragraphs in
10 response to your earlier question, I was reading from my
11 notes, that was not information that was provided to me
12 by plaintiff's counsel. That was my identification from
13 my reading of the complaint --

14 Q. Okay.

15 A. -- of the relevant paragraphs because I
16 assumed that -- I anticipated I would be asked a
17 question such as the one that you posed to me and I
18 didn't want to have to go through the complaint
19 paragraph by paragraph to identify the specific
20 paragraphs, so I made a note of them.

21 Q. Okay. Let's go back to Page 5 of the
22 Exhibit 4.

23 A. Yes.

24 MR. MOSKOWITZ: Wen, just for the record, I
25 think he has two things here, so it's different

1 from the exhibit. He has the request for
2 production and the interrogatories. So he is
3 flipping through those. I just don't want to make
4 a miscommunication.

5 He is on Page 5 of the interrogatories. I
6 don't know if you want to mark those after lunch.
7 You see, this is two things together.

8 THE WITNESS: Yeah, but what I am looking at
9 right now is the request to produce.

10 MR. MOSKOWITZ: Request for production.

11 BY MR. HUTCHINSON:

12 Q. Okay. Page 5?

13 A. Page 5 of the request for production.

14 Q. Isn't it true that even the plaintiffs allege
15 that this document, the CDD form, what was provided
16 to -- TD Bank provided that form in its electronic state
17 to outside counsel?

18 A. Yeah, that is true.

19 Q. And isn't the complaint with respect to that
20 is that outside counsel produced that in a black and
21 white form as opposed to a color form?

22 A. Yes, the gist of the complaint is that a
23 highly relevant legend at the top of the page was
24 obscured by the manner in which the production was made.

25 Q. And is it your opinion -- are you offering an

1 opinion here today that outside counsel's production of
2 that document that was provided to outside counsel in
3 full color, outside counsel's production of that in
4 black and white is evidence of some underlying scheme by
5 TD Bank to cover up certain conduct?

6 A. Yes.

7 Q. What evidence do you have that anyone at
8 TD Bank as opposed to their outside counsel was involved
9 in any such scheme to produce that document in anything
10 other than its electronic color form?

11 A. You are drawing a distinction that I do not
12 draw. TD Bank's outside counsel was acting as an agent
13 of TD Bank. What TD Bank's outside counsel did, TD Bank
14 was responsible for, and this was what I consider to be
15 part of an overall pattern of coverup.

16 Q. Sir, will you answer my question, please?

17 MR. MOSKOWITZ: Objection.

18 A. I did.

19 BY MR. HUTCHINSON:

20 Q. No, answer my question. What evidence do you
21 have that anyone at TD Bank was -- anyone at TD Bank,
22 not their outside counsel, was involved in the
23 production of this in a black and white format versus a
24 color format?

25 A. And I responded to that question by telling

1 you that you are drawing a distinction that I do not
2 believe is appropriate. What TD Bank's agents do is
3 conduct on the part of TD Bank.

4 If you are asking me, if the intent of your
5 question is to ask me to identify direct employees of
6 TD Bank as opposed to agents of TD Bank who were
7 involved in this particular misconduct, I can't do that.

8 Q. Sir, you are not here to determine what is
9 relevant and what is not and what distinctions should be
10 drawn and what distinctions should not be drawn. You
11 are here to answer questions. I would appreciate if you
12 would answer my questions and move forward.

13 MR. MOSKOWITZ: Objection. Move to strike.

14 MR. HUTCHINSON: You are not the Judge in this
15 matter and the Judge can decide what's relevant and
16 what's not.

17 MR. MOSKOWITZ: Why don't we take a break for
18 lunch now because we don't have to get to that
19 level. I think everything has been good today so
20 far.

21 MR. SHEERIN: There is a question pending.

22 MR. MOSKOWITZ: The question you're not here
23 to tell -- that's not a question, that's a lecture
24 to the expert witness.

25 Sir, that's a lecture to the witness. That's

1 not necessary here. Please, come on. That's not
2 necessary.

3 MR. HUTCHINSON: Can I finish that question?

4 MR. SCHERER: No.

5 A. I'm sorry, I haven't heard another question
6 yet.

7 BY MR. HUTCHINSON:

8 Q. So, is it true that you have no evidence or
9 understanding that anyone at TD Bank, any employee of
10 TD Bank was involved in that production of the document?

11 MR. MOSKOWITZ: Asked and answered three
12 times.

13 A. If you are drawing a distinction between
14 agents of TD Bank and direct employees of TD Bank, I
15 have no information that direct employees of TD Bank
16 were involved in this particular misconduct as opposed
17 to the agents of TD Bank.

18 MR. MOSKOWITZ: Would it be good to break now?

19 MR. HUTCHINSON: Yes. We can take a break.

20 THE VIDEOGRAPHER: We are off the record.

21 (Lunch recess.)

22 THE VIDEOGRAPHER: This is the beginning of
23 tape number two. The time is 12:46. We are on the
24 video record.

25

1 BY MR. HUTCHINSON:

2 Q. Mr. Scarola, before we broke, we were talking
3 about the CD form on page five of the Razorback request
4 for production. Do you recall that?

5 A. I do.

6 Q. The issue there was that outside counsel did
7 not produce it in color. Correct?

8 A. That certainly was one of the relevant issues
9 with regard to that document, yes.

10 Q. And if that same document has been produced in
11 color in the Beverly matter, would you agree that that
12 alleged misconduct has been rectified in the Beverly
13 matter?

14 A. I would agree that that portion of the coverup
15 has ended.

16 Q. And would you agree that that alleged
17 misconduct would not be relevant in the Beverly matter
18 since it has ended and been produced in color?

19 A. No, I would not agree to that.

20 Q. So, even if the production occurred in color
21 in Beverly, you still believe the prior production in
22 another matter in another format would be relevant to
23 the punitive damages in Beverly?

24 A. I believe that that aspect of the ongoing
25 coverup would be relevant in Beverly, correct.

1 Q. But you said it's not ongoing anymore, it's
2 ended?

3 A. No, no, what I have said is that that aspect
4 of the coverup has been uncovered. The coverup
5 continues. Because the coverup continues, all of the
6 efforts that have been part of the coverup remain
7 relevant and material.

8 Q. We won't go through all the alleged
9 allegations of what you are calling the coverup but --

10 A. Thank you.

11 Q. -- I just want to make sure that I understand
12 what allegations are encompassed of what you are calling
13 the coverup.

14 Is it the allegations with respect to that's
15 in these request for productions and the complaint
16 paragraphs that you referred to earlier?

17 A. And the interrogatories also that are part of
18 this package, yes.

19 Q. Okay. So, if we take all of that together,
20 that would be the universe of the alleged coverup as you
21 understand it?

22 A. That identifies all of the coverup aspects of
23 which I am aware, although I can't represent to you that
24 it encompasses all of the information with regard to
25 those aspects of the coverup. These are good summaries

1 of everything that I know --

2 Q. And it's what your --

3 A. And that's why I pointed to this.

4 Q. And it's what you are basing your opinions on.
5 Correct?

6 A. That's correct, yes.

7 Q. And you have no personal knowledge of the
8 veracity of any of the allegations contained within the
9 request for production, the interrogatories and the
10 interrogatory. Correct?

11 A. Well, I do have some personal knowledge to the
12 extent that I know these lawyers and know them quite
13 well. And I'm not dealing with allegations that have
14 been made by strangers. I am dealing with allegations
15 from individuals whom I believe to be highly respected
16 members of the Bar who certainly would not intentionally
17 misrepresent any of these things. So, I have accepted
18 their representations as being true.

19 Q. Have you ever disputed an allegation in your
20 years of practice since 1972 made by a highly respected
21 member of the Bar and a friend of yours?

22 A. Sure, yeah, that has occurred, but I have no
23 reason whatsoever to dispute any of these allegations.
24 If you want me to assume that some aspect of what I have
25 assumed to be true is not true, I will be happy to do

1 that for purposes of telling you whether it has any
2 impact upon the ultimate opinions that I'm rendering in
3 this matter, but I have assumed these representations to
4 be true. If there is a -- if there is a quotation in
5 here from a deposition or from a transcript, I have
6 assumed the accuracy of that. If it turns out not to be
7 accurate, then you point that out to me and I will tell
8 you what, if any, impact that has on my opinion.

9 Q. Is it your opinion that under Florida law if
10 an outside attorney is responsible for the alleged
11 discovery misconduct that the client should be punished
12 for that misconduct instead of the attorney?

13 A. Oh, I understand from Florida law that the
14 courts draw a distinction between misconduct in which
15 the client had no involvement and misconduct that the
16 client did not participate in or ratify, that the courts
17 will not hold the client responsible for that misconduct
18 but will visit the appropriate sanctions upon the lawyer
19 rather than the client. That, however, was not the case
20 with regard to this document as has been found by Judge
21 Cooke, and I have relied upon that finding.

22 Q. Let me show you what I am marking as
23 Exhibit 5, which is a document titled TD Bank Victims
24 Notice of Filing of Expert Disclosures.

25 A. Yes, sir.

1 (Exhibit No. 5, TD Bank Victims Notice of
2 Filing Expert Disclosures, was marked for
3 identification.)

4 BY MR. HUTCHINSON:

5 Q. Do you recognize Exhibit 5?

6 A. I don't know that I have seen this in its
7 final form. I have discussed its contents with counsel
8 but I don't know whether I've seen this in final form
9 now. I may have. I just don't remember.

10 Q. Are you aware it identifies you as an expert
11 witness?

12 A. That I do.

13 Q. And it describes the nature and substance of
14 your opinion?

15 A. I see that heading. I haven't had a chance to
16 read it yet.

17 Q. Did you draft the language with respect to the
18 nature and substance of your opinion?

19 A. I don't think I drafted the language, but I do
20 recall having discussed it with counsel.

21 Q. Did you review it for its accuracy before this
22 was filed?

23 A. That's what I don't remember. I can read it
24 right now for you and tell you whether I believe it to
25 be an accurate description if you'd like me to do that.

1 Q. Please do so.

2 A. Sure. Yes, I think that that's an accurate
3 general description of my anticipated testimony.

4 Q. Okay.

5 A. The focus will clearly be on the second and
6 third paragraphs as opposed to the first, but it is
7 accurate in its entirety.

8 Q. Are you predicting an outcome in the Beverly
9 and Marlin matters?

10 A. I am opining as to the value of the punitive
11 damage claims in those cases.

12 Q. So you're not predicting what would happen if
13 Beverly and Marlin were tried to a jury?

14 A. No, I think that inherent in my opinion is
15 what I believe is likely to happen if those cases were
16 tried to a jury. That's a different question than the
17 one you asked me am I predicting an outcome.

18 This case may very well be settled before it's
19 tried and I haven't -- I haven't attempted to form an
20 opinion as to the likelihood of settlement as opposed to
21 a trial outcome. I am focusing upon what I believe is
22 likely that a jury would do if these claims were
23 presented to a jury.

24 Q. Okay. So, you are opining -- let's just take
25 the Beverly action that was filed first -- as to what

1 the result in the Beverly matter would be if it were
2 tried to a jury.

3 A. Yes.

4 Q. And how many hours did it take you to reach a
5 decision or an opinion as to what would happen if the
6 Beverly matter were tried to a jury?

7 A. To the extent that my opinion is reflected in
8 this summary, it didn't take very long at all, and I --
9 I can look at my time sheets and I can tell you
10 approximately how long it took.

11 Q. That would be great.

12 A. The summary of my time.

13 Q. And are you referring to what I am marking as
14 Exhibit 6?

15 (Exhibit No. 6, Time Summary, was marked for
16 identification.)

17 A. I am referring to, yes, Exhibit 6.

18 BY MR. HUTCHINSON:

19 Q. And Exhibit 6 is a summary of all of the time
20 that you have expended in relation to your engagement in
21 this matter?

22 A. Probably not, but it is a summary of time that
23 I have spent. In other words, if the time is reflected,
24 it's time that I spent. There may have been time that I
25 spent that's not reflected. I don't think that there is

1 any significant amount of time reflected -- excuse me,
2 any significant amount of time that I have spent on this
3 matter that is not reflected but there certainly may be
4 some.

5 Q. These expert disclosures were filed on
6 June 19th. Correct?

7 A. Yes, that's what the certificate of service
8 says.

9 Q. And you state that -- your opinion was
10 disclosed on 6/19 that TD's victims' claims for aiding
11 and abetting, fraud and conspiracy to commit fraud by TD
12 Bank are viable, nonspeculative and valuable claims with
13 a high probability of success if tried to a jury.
14 Correct?

15 A. Yes, that is correct.

16 Q. And at that point your time sheets indicate
17 that you had spent approximately 5.1 hours on this
18 matter. Is that correct?

19 A. I will accept your math.

20 Q. How many plaintiffs are involved in the
21 Beverly and Marlin matters?

22 A. I don't remember counting them.

23 Q. Over 50?

24 A. I don't remember counting them.

25 Q. Do you have any idea, sir?

1 A. A lot.

2 Q. And you determined that each one of their
3 claims were viable, nonspeculative and valuable with a
4 high probability of success in 5.1 hours?

5 A. I viewed them collectively and not separately.
6 I did not believe that it was necessary to view them
7 separately.

8 Q. Each one of them are asserting individual
9 claims. Correct?

10 A. They are asserting individual claims arising
11 out of the same course of misconduct, arising out of the
12 same conspiracy to engage in that misconduct, arising
13 out of the same acts of aiding and abetting that
14 misconduct.

15 Now, if you ask me to assume that someone's
16 name is listed who was not an investor in the Ponzi and
17 is unable to prove that they invested in the Ponzi
18 scheme, that would change my opinion with regard to that
19 claim.

20 Q. So, how in the world did you determine in
21 5.1 hours that these plaintiff's claims in this massive
22 Ponzi scheme were viable, nonspeculative and valuable
23 with a high probability of success if tried to a jury?

24 A. Well, let me explain first that I approached
25 these matters with some significant degree of knowledge

1 regarding the general matters that gave rise to those
2 claims. I have been involved in at least tangentially
3 related litigation for, I guess it's now years, in that
4 I represent Bradley Edwards in a claim for abusive
5 process and malicious prosecution against Mr. Epstein,
6 whose criminal activities formed at least in part a
7 basis for some of Mr. Rothstein's solicitations. As a
8 consequence of the responsibilities that I have had in
9 representing Bradley Edwards, it has been necessary for
10 me to follow somewhat closely the prosecution of the
11 claims relating to the Rothstein Ponzi scheme.

12 I personally attended a fairly lengthy session
13 of Mr. Rothstein's deposition. I have read transcripts
14 of Mr. Rothstein's very lengthy testimony. I have
15 closely followed press reports with regard to these
16 matters. So, it was not without some sort of
17 significant degree of other knowledge that I was called
18 upon to form my opinions and I have, at least to some
19 extent, relied upon that knowledge gained independently
20 and built upon that foundation.

21 Q. Well, during all that other activity, what did
22 you learn about Mr. Beverly's claims against TD Bank and
23 his, the facts and circumstances surrounding his
24 investment?

25 A. I learned about all of the basic underlying

1 aspects of the Ponzi scheme. I learned about TD Bank's
2 involvement in aiding and abetting that scheme and in
3 conspiring to assist Mr. Rothstein in the perpetration
4 of his fraud. All of those facts, obviously, are highly
5 relevant to Mr. Beverly's individual claim. But, again,
6 I have not undertaken to separately evaluate each of the
7 individual claims being prosecuted by Mr. Moskowitz'
8 firm and Mr. Scherer's firm. And if you would like me
9 it assume some facts that would cause me to distinguish
10 any of the individual plaintiff's claims from the claims
11 generally being prosecuted against TD Bank, I would be
12 happy to do that, and I would tell you whether those
13 separate facts have any impact on my opinion or do not
14 have any impact on my opinion.

15 In light of the nature of the underlying
16 claims, I have seen no reason whatsoever to distinguish
17 TD Bank's liability to any of these victims from its
18 liability to any of the other victims.

19 Q. But you have not attempted to do so. Correct?

20 A. No, I have not. That has just -- that has not
21 been part of my evaluation, which is why I am telling
22 you if there are facts that you think would make a
23 difference, tell me what they are and I will tell you
24 whether I agree they would make a difference or not. I
25 am not aware of any.

1 Q. So in your 5.1 hours of preparation of your
2 opinions in this matter you didn't have concern to
3 determine whether there are any facts that make a
4 difference, did you?

5 A. It is incorrect to say that I have only had
6 5.1 hours with regard to these matters. There were
7 5.1 hours that were specifically devoted to my
8 performance of my responsibilities as an expert witness
9 in this case prior to the filing of this document on
10 June 19th.

11 My investigation continued, as is reflected in
12 my time records. There was nothing in the subsequent
13 investigation that causes me to alter my opinions in any
14 respect at all, and the knowledge, the fact or case
15 specific knowledge upon which I base my opinions began
16 to be accumulated significantly prior to having been
17 retained as an expert witness in this case. That's all
18 I am trying to communicate to you, and if there is
19 something -- I will tell you again, if there is
20 something that you think might make a difference, tell
21 me about it. I will tell you whether it does.

22 Q. And the subsequent investigation you are
23 referring to is the eight hours that you spent on this
24 matter since the disclosure of your expert opinions.
25 Correct?

1 A. Yes, sir, that's correct.

2 Q. So in total ---

3 A. Since the disclosure of what has now been
4 marked as Exhibit Number --

5 Q. Five?

6 A. -- 5, thank you. Yes.

7 Q. So, in total you have spent a total of --
8 before today, 13.1 hours on this matter?

9 A. No. I have spent 13.1 hours that have been
10 recorded since having been retained as an expert witness
11 but I have significant time involved relating to these
12 issues prior to my retention as an expert witness.

13 Q. Let's discuss an individual plaintiff,
14 Mr. Beverly. What claims is Mr. Beverly asserting?

15 A. He is asserting the claim that TD Bank
16 conspired with Scott Rothstein to engage in a fraud and
17 that TD Bank aided and abetted Scott Rothstein in the
18 perpetration of that fraud.

19 Q. And you have not gone through the elements of
20 both of those claims with respect to Mr. Beverly to
21 determine whether both of those claims for Mr. Beverly
22 are, in fact, viable and nonspeculative and valuable
23 claims with high probability of success if tried to a
24 jury?

25 A. That's not accurate. That is not accurate.

1 Q. So, you have gone through each plaintiff and
2 determined that each plaintiff can present evidence to
3 satisfy all of the elements of each of those claims?

4 A. I have viewed these claims as conspiracy and
5 aiding and abetting claims collectively. I have not
6 viewed them separately. I don't believe that there is
7 any need to view them separately. The only victim
8 specific element that exists is proving a causal
9 connection between TD Bank's conspiracy and aiding and
10 abetting and the particular loss that was suffered by a
11 specific plaintiff. So, if you want me to assume that
12 Mr. Beverly was not an investor in the Ponzi scheme and
13 didn't lose any money as a consequence of that
14 investment in the Ponzi scheme, I will make that
15 assumption on a hypothetical basis and I will then tell
16 you that Mr. Beverly doesn't have a viable claim but I
17 have read the complaint. I have told you that I have
18 assumed the accuracy of the complaint and the complaint
19 alleges otherwise.

20 Q. So you agree that for an aiding and abetting
21 claim, Mr. Beverly has to show that acts by TD Bank
22 proximately caused his damages. Correct?

23 A. Yes, I do agree with that.

24 Q. Okay. What acts by TD Bank proximately caused
25 Mr. Beverly's damages in this matter?

1 A. Mr. Rothstein's Ponzi scheme could not have
2 been carried out without the substantial assistance of
3 TD Bank. TD Bank's substantial assistance to
4 Mr. Rothstein enabled Mr. Rothstein to conduct the Ponzi
5 scheme. Mr. Beverly was an investor in the Ponzi
6 scheme. Mr. Beverly sustained a loss as a consequence
7 of that investment.

8 Q. Do you have any case law to support your
9 stance that TD's action would be sufficient for a
10 proximate cause finding when it had no interaction with
11 Mr. Beverly?

12 A. Yes.

13 Q. And what case law is that?

14 A. It is the general common law of the State of
15 Florida.

16 Can I cite to you a specific case as I sit
17 here right now? The answer to that question is, no, I
18 cannot. But it is for want of a better description,
19 Hornbook law that if you aid and abet or conspire to
20 commit a fraud, you are liable to the victims of that
21 fraud.

22 Q. If you prove the elements of that claim.
23 Correct?

24 A. Yes, you must prove that there was aiding and
25 abetting or conspiracy of a fraud before there is any

1 liability to the victims of a fraud. But if what you
2 are suggesting is that that somehow requires some direct
3 action between Mr. Beverly and any given plaintiff and
4 TD Bank, I reject that assertion.

5 Q. Okay. So, it's your opinion that while you
6 agree that each plaintiff has to show proximate
7 causation between a specific act of TD Bank and these
8 plaintiffs' injuries, that that doesn't require any
9 contact or involvement with these individual plaintiffs?

10 A. I cannot accept that compound question. There
11 is involvement with these plaintiffs by virtue of
12 TD Bank's participation in the conspiracy and aiding and
13 abetting the fraud. That is the required involvement.

14 Q. What's your understanding of the definition of
15 proximate causation, sir?

16 A. A proximate cause is a cause that
17 substantially and in natural and probable sequence
18 contributes to a given result.

19 Q. What's the difference in proximate causation
20 and but for causation?

21 A. I don't know that under the circumstances of
22 this matter I would draw any distinction between the
23 two.

24 Q. That wasn't my question, sir. What's your
25 understanding of but for causation under Florida law?

1 A. I'm sorry, but I really don't understand your
2 question.

3 Q. In all your years of practicing law, have you
4 ever heard of but for causation?

5 A. I have heard that phrase, yes.

6 Q. What is your understanding of what but for
7 causation means?

8 A. It means that in the absence of some conduct a
9 result would not have occurred.

10 Q. And is it your understanding that there is a
11 difference between proximate causation and but for
12 causation?

13 A. There may be under certain circumstances. I
14 don't believe there is any difference under the
15 circumstances of this case.

16 Q. Do you have any law supporting that?

17 A. I am not aware that that issue has been
18 addressed in this case so I couldn't have any law that
19 supports that in this case.

20 Q. What act was conducted by an individual
21 TD Bank employee that was the proximate cause of
22 Mr. Beverly's damages?

23 A. The gross disregard of all of the indications
24 of fraudulent financial transactions over an extended
25 period of time that enabled Mr. Rothstein to comingle

1 what effectively were trust funds being held by TD Bank
2 in a variety of different accounts, the misuse of IOTA
3 accounts, the use of a variety of fraudulent documents,
4 direct contact between victims of the Ponzi scheme and
5 TD Bank representatives in the solicitation of Ponzi
6 investments. You know, there are others, I am sure.
7 And, again, those are matters that are detailed in the
8 complaint and I have assumed the accuracy of the
9 allegations that are included in the complaint. They
10 form the factual basis for my opinions. So, if you want
11 to get it all, it's there.

12 Q. Let's go back -- I want your understanding of
13 what you are basing your opinions on that you had
14 formulated ---

15 A. I am basing my opinions on the allegations
16 included on the complaint.

17 Q. What's your understanding of how many of the
18 Beverly and Marlin plaintiffs had any contact,
19 communications or contact in any way with TD Bank?

20 A. I cannot tell you how many. I can tell you
21 that there have -- there were some that had some
22 contact. I cannot detail that contact for you, nor do I
23 believe that it is particularly relevant or material
24 whether these particular plaintiffs had any direct
25 contact or didn't have any direct contact.

1 What is significant is that Ponzi scheme
2 investors did have direct contact with TD Bank
3 representatives during the course of this Ponzi scheme
4 and that direct contact facilitated the investments and
5 the fraud.

6 Q. How many of the Beverly and Marlin plaintiffs
7 saw any documents produced by TD Bank?

8 A. I can't answer that question for you. I don't
9 know how many nor do I believe that that is significant
10 as long as there were some victims of the Ponzi scheme
11 who saw fraudulent documents produced by TD Bank that
12 demonstrates that TD Bank was aiding and abetting in and
13 conspiring to commit the overall fraud that gives rise
14 to liability to all of the victims of the fraud.

15 Q. So contacts with TD Bank were not important to
16 you in formulating your opinions in this matter?

17 MR. MOSKOWITZ: Objection. Mischaracterizes
18 the testimony.

19 A. That is clearly a misstatement of what I just
20 said.

21 BY MR. HUTCHINSON:

22 Q. Were contacts with TD Bank important to you in
23 formulating your opinion in this matter?

24 A. Yes, sir. The contacts that are described in
25 some detail in the complaint, they were significant to

1 me. Whether those contacts were specifically with
2 Mr. Beverly or any other named plaintiff in this case,
3 that's what is of less significance because regardless
4 of whether a particular named victim of the Ponzi scheme
5 had direct contact with TD Bank, TD Bank was aiding and
6 abetting and conspiring to commit this fraud.

7 Q. Can you give me any case that supports that
8 position?

9 A. No, I can't. As I told you -- as I sit here
10 right now, I cannot name a case for you that has ever
11 addressed that issue in this case. This case hasn't
12 reached the point where those issues could be addressed.

13 If you're asking me whether the general
14 proposition of law has been addressed by cases in the
15 past, that is the proposition that if an individual aids
16 and abets the commission of a fraud, that it doesn't
17 require direct contact between that victim and the aider
18 and abetter in order for the victim to recover, the
19 answer to that question is, yes, that proposition has
20 been addressed.

21 Can I give you the citation to the cases where
22 it has been addressed, not as I sit here today, no.

23 Q. Can you tell me any cases that support a
24 proposition that a plaintiff can show the proximate
25 causation required by the substantial assistance element

1 of aiding and abetting without any contact whatsoever
2 with the defendant?

3 MR. MOSKOWITZ: Objection. Asked and
4 answered.

5 A. Well, I can give you a line of cases in the
6 conspiracy area.

7 Q. I am not talking about conspiracy, sir. I am
8 talking about aiding and abetting.

9 A. No, as I sit here right now, I cannot cite a
10 case to you. It is what I consider to be a very well
11 accepted general proposition of law, but I haven't
12 memorized the case citations. I can't give it to you.

13 Q. During your 5.1 hours of engagement in this
14 matter before your opinion was disclosed, did you take
15 the time to go look at any Ponzi scheme cases to see
16 whether the substantial assistance element could be
17 satisfied and the proximate cause or climate thereunder
18 without any contact with the bank?

19 A. No, I did not. And if you are prepared to
20 cite to me binding authority that demonstrates that what
21 I have long understood to be the law of the State of
22 Florida is, in fact, not the law of the State of
23 Florida, I'd be happy to take a look at that and that
24 might change my opinion about the first part of my
25 disclosed opinion in that disclosure.

1 I don't think you are going to find that
2 binding authority but, you know, I have been practicing
3 law for 40 years. I have made mistakes before and if I
4 have made a mistake here, I promise you, I am ready to
5 acknowledge that. But I don't think I have.

6 Q. Sir, you are the expert here. I am just
7 asking whether you took the time to go back and confirm
8 the status of the law and the issues that you are
9 opining upon?

10 A. Every single day that I am engaged in
11 professional activities, I make decisions on the basis
12 of my understanding of existing law without reconfirming
13 that understanding every single time I have to deal with
14 a legal proposition. I didn't reconfirm it under this
15 circumstance nor do I consider it to be necessary to
16 reconfirm it under this circumstance.

17 Q. And, sir, we are not here as your part of your
18 everyday practice of law, are we?

19 We are here because you have been designated
20 as an expert witness to opine on the viability of these
21 underlying claims. Correct?

22 A. That is my understanding of why we are here,
23 yes.

24 Q. And you didn't take the time to go back and
25 confirm the law with respect to the underlying claims

1 before your opinion was disclosed, did you?

2 MR. MOSKOWITZ: Objection. Asked and answered
3 three times.

4 A. I did not take the time to do anything that I
5 considered to be absolutely unnecessary and superfluous.
6 There is probably a long list of things that we could
7 identify that I didn't take the time to do because I
8 considered it to be absolutely unnecessary and
9 inappropriate to waste anybody's time in doing it.

10 BY MR. HUTCHINSON:

11 Q. Are you offering an opinion in this matter
12 that TD Bank owed any of the Beverly and Marlin
13 plaintiffs a duty?

14 A. If you want to ask me that question, I would
15 render an opinion in that area, but the primary focus of
16 my testimony will be on the value of the punitive damage
17 claims in this case. Obviously, inherent in that
18 opinion is the opinion that there is underlying
19 compensatory liability. Without underlying compensatory
20 liability, there cannot be a punitive damage award.

21 Q. Did -- or how many of these plaintiffs were
22 TD Bank customers?

23 A. I can't answer that question for you. I don't
24 know.

25 Q. Are you aware that the law is well settled as

1 to whether a bank owes a non customer a duty to monitor
2 accounts or transactions?

3 A. Are you talking about a general duty to non
4 customers to monitor transactions or are you talking
5 about a duty not to aid and abet or conspire to commit a
6 fraud.

7 Q. You testified earlier that there were
8 transactions that TD should have caught. Correct?

9 A. I don't remember using those words.

10 Q. *you talked about disregard of all indicators
11 of fraudulent transactions, spent a period of time with
12 the trust funds. Misuse of IOTA accounts, do you
13 remember your testimony about that?

14 A. I do, yes.

15 Q. Is it your opinion in this matter that TD Bank
16 owed any duty to any of these plaintiffs with respect to
17 those transactions?

18 A. Yes. Yes, they did.

19 Q. And what is the relationship between TD Bank
20 and these plaintiffs that gives rise to any duty owed to
21 these plaintiffs?

22 A. There is a duty not to conspire to commit a
23 fraud and there is a duty not to aid and abet in the
24 commission of a fraud. This is not a negligence case.
25 These are conspiracy and aiding and abetting claims, not

1 negligence claims.

2 Q. Sir, when I asked you what specific acts were
3 done that proximately caused Mr. Beverly's harm, you
4 talked about failure to monitor accounts, IOTAs and
5 stuff that you talked about. Do you recall that?

6 A. I gave the testimony that I gave, yes.

7 Q. So what duty did TD Bank owe to Mr. Beverly to
8 monitor anything?

9 A. TD Bank had an obligation not to conspire to
10 commit a fraud and not to aid and abet in the commission
11 of a fraud.

12 Q. Okay, sir. That's not my question.

13 MR. MOSKOWITZ: Objection. He has answered it
14 twice. You don't like his answer but that's his
15 answer. That is his answer. That was your
16 question. That's his answer.

17 BY MR. HUTCHINSON:

18 Q. I am not talking about aiding and abetting.
19 I'm not talking about conspiracy. I am talking about
20 the answer you gave.

21 Does TD Bank owe any duty to Mr. Beverly to
22 monitor Rothstein's accounts?

23 MR. MOSKOWITZ: Same objection. He answered
24 four times already. Account monitoring it is not
25 the same as aiding and abetting. You know this is

1 Judge Streitfeld's ruling when he denied the motion
2 to strike those paragraphs on account monitoring.
3 He answered it. You shouldn't allow him to aid and
4 abet the conspiracy. That was his answer.

5 MR. HUTCHINSON: You can answer my question.

6 A. If what I have now told you more than once is
7 not responsive to your question it's because I don't
8 understand your question so you are going to have to ask
9 in a different way because what I have now said more
10 than once is the best answer that I can give to the
11 question that you have asked as I have understood it.

12 BY MR. HUTCHINSON:

13 Q. Does TD Bank owe any duty to non customers to
14 monitor other's account transactions for potential
15 wrongdoing?

16 MR. MOSKOWITZ: Objection. Asked and answered
17 five times.

18 A. It is the obligation of TD Bank not to aid and
19 abet a fraud and not to conspire in the commission of a
20 fraud. To the extent that TD Bank is placed on notice
21 that a fraud is being committed with its assistance, I
22 don't know that I need to go beyond that.

23 Once that point is reached, TD Bank clearly
24 owes a duty to those that are being defrauded, not to
25 aid and abet that fraud, not to conspire in the

1 commission of that fraud.

2 BY MR. HUTCHINSON:

3 Q. Let's go back to my original question.
4 What -- tell me the TD Bank employee and the specific
5 act that proximately caused Mr. Beverly's injuries?

6 MR. MOSKOWITZ: Objection. Asked and answered
7 a couple of times earlier.

8 A. Well, the one TD Bank employee that
9 immediately comes to mind is Mr. Spinosa. There are
10 others, including the other named defendants in this
11 action. The conduct on their part that aided and
12 abetted the fraud and that indicates participation in
13 the conspiracy is that conduct that is detailed in the
14 complaint. That's what I -- those are the facts that I
15 have assumed to be true and to the extent that I would
16 be called upon to express an opinion as to whether those
17 facts were adequate to give rise to liability as an
18 underlying predicate for my punitive damage claim, I
19 believe that they are clearly sufficient to give rise to
20 liability.

21 That opinion is confirmed by verdicts already
22 rendered against TD Bank.

23 BY MR. HUTCHINSON:

24 Q. If we can go back to my question, sir. As we
25 sit here today, can you name a single act by Mr. Spinosa

1 or any other TD Bank employee that proximately caused
2 Mr. Beverly's injuries?

3 MR. MOSKOWITZ: Asked and answered six times.

4 You can try one more, but then we are going to move
5 on, and if you want to go to Judge Ray, you can
6 tell him that Mr. Scarola needs to come back to
7 answer your questions. He has answered it I think
8 every which way respectfully stated. I don't think
9 we are going to get much more on this.

10 A. You are not going to get anymore. That's the
11 answer I have given you. It's the best answer I can
12 give. I'm sorry you don't like it, but I will not an
13 that same question again.

14 BY MR. HUTCHINSON:

15 Q. Okay. Let's talk about Mr. Minkowitz. Can
16 you name a single act by a TD Bank employee that
17 proximately caused Mr. Minkowitz' damages?

18 A. My answer would be exactly the same.

19 Q. That you couldn't name a single act as we sit
20 here?

21 A. That was not my answer. My answer would be
22 the same as the answer I gave. It would not be your
23 mischaracterization of my answer.

24 Q. So that's going to be your same answer for all
25 the plaintiffs. Correct?

1 A. Every single one of them. It would be exactly
2 the same response.

3 Q. So, other than what you have testified to, are
4 there any additional acts based on your expert opinion
5 that caused any of these, proximately caused any of
6 these plaintiffs their damages?

7 A. Only those acts specified in the complaint.
8 That is the extent of my knowledge.

9 Q. Have you spoken with any of the Beverly and
10 Marlin plaintiffs?

11 A. I don't know. Certainly not in connection
12 with or since my retention as an expert.

13 Q. How many of TD Bank's briefs did you read
14 before formulating your opinion in this matter?

15 A. Whatever is included in those materials that
16 have already been produced to you.

17 Q. As you sit here, do you recall reading any
18 TD Bank briefs on the ---

19 A. I think that there were some TD Bank materials
20 that were included in the materials that I reviewed.
21 Whatever it is, it's in there.

22 Q. Do you recall any, reading a single dismissal
23 brief?

24 A. I don't remember.

25 Q. Wouldn't -- you would agree that there are two

1 sides to every story, correct, wouldn't you, sir?

2 A. No, sir, I wouldn't.

3 Q. When you litigate cases one side is always a
4 hundred percent right and there no other side to the
5 story?

6 A. Oh, no, I certainly wouldn't agree to that
7 either, but I would not agree that there is always two
8 sides to every story. Sometimes there are defendants
9 that actually admit their wrongdoing.

10 Q. Did you make any attempt to evaluate,
11 understand, evaluate and understand the legal defenses
12 to plaintiff's claims in this matter?

13 A. I have some general understanding of the
14 defenses to this matter, yes, as a result of the
15 materials that I have read.

16 Q. In the 5.1 hours you spent formulating your
17 opinion, did you read any of TD's dismissal briefs in
18 the Beverly and Marlin matters?

19 MR. MOSKOWITZ: Objection. Mischaracterizes
20 every time you say 5.1 when Mr. Scarola has told
21 you there is an extensive history before this case.
22 I would ask you to stop saying it's 5.1 and I would
23 stop objecting to that.

24 MR. HUTCHINSON: You can answer the question.

25 A. The amount of time that has been involved in

1 the formulation of my opinions is not limited to those
2 hours that are reflected on this time sheet to the
3 extent that I have already explained that.

4 Q. Did you take the time to read any of TD's
5 dismissal briefs, sir?

6 A. I think that I have answered that question now
7 on more than one occasion. The answer remains the same.
8 I don't remember. The materials are right here. You
9 have had those, I understand, for some time in advance
10 of this deposition. Those are the materials that I
11 reviewed that are case specific to Beverly and Marlin.

12 Q. I didn't see any dismissal briefs in those
13 materials, sir.

14 Do you mind telling me whether you have any of
15 TD's dismissal briefs in those materials?

16 MR. MOSKOWITZ: Do you want him to spend an
17 hour to go through the material that we gave you?

18 If you're representing what's there and what's
19 not, we produced this to you well before the
20 deposition the materials you relied upon.

21 Whatever is in there, is in there. He tells
22 you he doesn't remember.

23 MR. HUTCHINSON: No, most of these materials
24 were produced this morning.

25 MR. MOSKOWITZ: The materials that we produced

1 to you are what we gave to him. These are copies,
2 as he told you.

3 The e-mail that we got was wrong. Somebody on
4 your team sent this fraudulent e-mail that you
5 never got any materials from Mr. Scarola. That was
6 a little offensive. We gave you the significant
7 materials that Mr. Scarola was provided.

8 MR. HUTCHINSON: But these briefs were not in
9 there.

10 MR. MOSKOWITZ: There are some few extra
11 materials, and that's why we have given you all
12 morning to go through them.

13 BY MR. HUTCHINSON:

14 Q. And I haven't seen any dismissal briefs.

15 And I just want to confirm you didn't take the
16 time to review any of TD's dismissal briefs before you
17 offered your opinion in this matter?

18 A. I will tell you, again, I don't remember. I
19 reviewed a lot of materials. If I reviewed dismissal
20 briefs, they are included in that banker's box in those
21 binders. If they are not in the banker's box and the
22 binders, I did not review them.

23 MR. MOSKOWITZ: He can take time now to go
24 through each materials if you want him to.

25 MR. SHEERIN: Sir, I'd also caution you that

1 the rules ---

2 MR. MOSKOWITZ: Wait, we have one lawyer. We
3 have one lawyer.

4 MR. SHEERIN: No, the rules of civility
5 require you to take great patience and great
6 caution before saying that lawyers committed
7 fraudulent conduct.

8 MR. MOSKOWITZ: I'm sorry, who are you?

9 MR. SHEERIN: I have been introduced to the
10 Court. I'm Joseph Sheerin of McGuireWoods.

11 MR. SCHERER: How do you spell your last name?

12 MR. SHEERIN: It's different than yours.

13 MR. SCHERER: Thank God.

14 MR. MOSKOWITZ: We have a rule in this
15 deposition. We have one lawyer on each side.
16 That's why I've been talking and not Mr. Scherer.

17 MR. SCHERER: I will be happy to stipulate that
18 you can and we will double team.

19 MR. MOSKOWITZ: We don't want that.

20 MR. GENOVESE: Since I am the only lawyer here
21 who is speaking for my client, Mr. Scherer, I
22 believe we may have sent an e-mail saying that we
23 hadn't received any documents. In fact, there was
24 a production to TD.

25 You referred to your team in your addressing

1 counsel. I don't think that's fairly directed at
2 him. We never received ---

3 MR. MOSKOWITZ: It came from your office.

4 MR. GENOVESE: We never received a production.
5 I'm not sure that we requested it or assumed we
6 would get it. So, your suggestion that this was
7 fraudulent was misplaced if directed at
8 Mr. Hutchinson.

9 MR. MOSKOWITZ: Absolutely. I will agree.

10 MR. SHEERIN: Thank you.

11 MR. MOSKOWITZ: Of course.

12 BY MR. HUTCHINSON:

13 Q. Mr. Scarola, in all your years of litigating
14 cases, are the facts developed in discovery usually
15 relevant to the outcome of a case?

16 A. That is the purpose of discovery, to uncover
17 relevant and material information.

18 Q. And how far has discovery proceeded with
19 respect to the Beverly and Marlin matters?

20 A. There has been very significant discovery
21 conducted with regard to the issues in the Beverly and
22 Marlin cases.

23 Q. Can you answer the question I asked, sir?

24 A. I did. That is my answer to your question.

25 Q. Well, I will ask the question again and see if

1 I can get an answer to the actual question I asked. How
2 far was discovery provided in the Beverly and Marlin
3 matters?

4 A. If you would like me to ignore the fact that
5 there has been very significant discovery conducted and
6 completed relating directly to the identical issues that
7 are raised in the Beverly and Marlin matters, I will do
8 that. I will ignore the fact that all of that other
9 discovery has been conducted and then if I ignore all of
10 the discovery conducted in those related matters, there
11 has not been very much discovery completed in Beverly
12 and Marlin before the discovery in those matters was
13 basically halted, as I understand it.

14 Q. And are you offering an opinion in this matter
15 that there is nothing that TD Bank could discover, no
16 evidence that TD Bank could discover during the discover
17 process that would change your opinion that there is a
18 high probability of success on all of these claims if
19 tried to a jury?

20 A. No, that clearly is not my opinion. I can --
21 I can imagine all sorts of scenarios that would have an
22 impact upon the viability of the Beverly and Marlin
23 claims, and I've made reference to one of them. If you
24 are able to prove that somebody has falsely and
25 fraudulently claimed to have been a Rothstein Ponzi

1 scheme investor when they never invested any money in
2 the Rothstein Ponzi scheme, that would have a pretty
3 significant impact on the viability of their claim.

4 I have assumed, as I will tell you again, that
5 the allegations in the complaint are true and those
6 allegations include the fact that all of these
7 plaintiffs were investors in the Rothstein Ponzi scheme.

8 Ask me to assume facts contrary to the
9 allegations in the complaint on a hypothetical basis, I
10 would be happy to do that, and then I will tell you
11 whether it has any impact on any of my opinions. I was
12 not an eyewitness to any of these things. I am obliged
13 as an expert to make certain assumptions. If you ask me
14 to make different assumptions, I will do that and I will
15 tell you whether those different assumptions have an
16 impact on my opinion.

17 Q. And if you spend very minimal time preparing
18 your opinion before it's released, you have to make a
19 lot more assumptions than you otherwise would. Isn't
20 that correct, sir?

21 A. No, not necessarily. I can't agree with that.

22 Q. In your -- the nature and substance of the
23 opinion you talked about -- well, first of all, we have
24 talked a lot about aiding and abetting. Let's talk
25 about the conspiracy claim.

1 What conspiracy claim -- you are saying that
2 the conspiracy claim is viable, nonspeculative and
3 valuable with a high probability of success. What
4 conspiracy claim are you talking about?

5 A. The conspiracy claim that is stated in the
6 complaint in the Beverly and Marlin cases.

7 Q. And what's your understanding of the
8 conspiracy claim because I don't have a good
9 understanding of it from the complaint so I am hoping
10 you as an expert who are opining on the veracity of the
11 conspiracy claim will have a better understanding of it
12 than I do?

13 A. The only understanding I have is the
14 understanding derived from the reading of the complaint.

15 (Exhibit No. 7, Conspiracy Chart, was marked
16 for identification.)

17 BY MR. HUTCHINSON:

18 Q. I am just seeing if I can nail this down. I
19 am marking this as Exhibit 7. I want to ask you to help
20 me fill this out, sir, if you would.

21 During your -- when you were researching the
22 veracity of this conspiracy claim, what's your
23 understanding -- if you will write in on Exhibit 7 what
24 your understanding of the agreement is of the conspiracy
25 claim?

1 MR. MOSKOWITZ: I'd object to this. I have
2 never seen where you ask an expert witness to write
3 into a chart that you had basic things. If you
4 have questions for him, he said he also needs to
5 see the complaint. I am sure you can make the
6 complaint available to him. He says the complaint
7 speaks for itself. So I object to making an expert
8 tell you agreement -- just for the record, it
9 says -- let me just say, this is a document you
10 have typed up yourself under the heading
11 conspiracy. It's something I guess you made. It
12 has number one, agreement; two, parties to
13 agreement; three, date of agreement; four, unlawful
14 act; five, common goal.

15 I would object to them having to write certain
16 things that you used. If you have questions for
17 him he will try his best to answer your questions
18 but I don't think an expert needs to write into
19 this kind of questionnaire that you've created for
20 him.

21 BY MR. HUTCHINSON:

22 Q. That's your objection and you noted for the
23 record but I am going to ask him because I don't
24 understand the conspiracy and you're the expert in this
25 case and you're the one that's opining on the veracity

1 and viability of this conspiracy claim. So, can you
2 please write in what your understanding is of the
3 agreement that forms the basis of this conspiracy?

4 A. No, sir. I am going to follow the direction
5 of the party that retained me in this matter. I have
6 been directed not to do that. I won't do it. I will be
7 happy to answer any questions that you have.

8 MR. HUTCHINSON: So are you instructing him
9 not to?

10 MR. MOSKOWITZ: I am not instructing him not
11 to answer. I just can't imagine -- I am going to
12 state my objection. I can't imagine a lawyer says
13 I have no idea and I am really confused. And I
14 think that's really hyperbole. I have no idea what
15 they are alleging.

16 The witness said I am relying upon the
17 complaint itself for my testimony. Obviously, it
18 speaks for itself. If you want to ask questions
19 about it, but I don't think it's appropriate of you
20 to require an expert of Mr. Scarola's stature to
21 sit there and fill in your questionnaire.

22 It's outside the scope of his testimony to
23 fill in your questionnaire. So I think it's
24 inappropriate. Of course, I am going to let
25 Mr. Scarola do what he's going to do. He has more

1 years experience than I do, but I think it's
2 inappropriate. If you have any questions we are
3 here for the full federal rules to answer them.

4 BY MR. HUTCHINSON:

5 Q. You are not receiving an instruction, sir, so
6 are you refusing to comply with my request?

7 A. I would be happy to answer whatever questions
8 you have.

9 Q. But you will not write out your understanding
10 of that the conspiracy claim of which you are opining on
11 the veracity on this matter?

12 A. That's correct. I don't choose to write out
13 answers to a compound question. I would be happy to
14 answer any questions that you have but I am not going to
15 write these out.

16 Q. Okay.

17 A. I would prefer to expedite this process and
18 that will slow it down rather than expediting it.

19 Q. Okay. So you are refusing to comply?

20 A. I am.

21 Q. What's your understanding of the alleged --
22 first of all, to prevail on a ---

23 A. Do you want this back?

24 Q. To prevail on a conspiracy claim, isn't it
25 true, sir, that the plaintiffs have to prove that there

1 was an agreement?

2 A. Yes, either expressed or implied.

3 Q. Among two parties?

4 A. At least two.

5 Q. Two parties to commit an unlawful act?

6 A. Correct.

7 Q. In pursuit of a common goal?

8 A. Yes.

9 Q. What is your understanding of the agreement
10 that forms the basis of the conspiracy claims and the
11 underlying matters?

12 A. There was an agreement to commit a fraud.

13 Q. And what fraud was there an agreement to
14 commit?

15 A. The Ponzi fraud, the sale of fraudulent
16 nonexistent interests in the settlement of, the
17 nonexistent interests in the settlement of legal claims.

18 Q. Is that the extent of the agreement?

19 A. I don't know if it extended beyond that, but
20 that certainly is a description of the essential terms
21 of the agreement.

22 Q. And what individuals were parties to that
23 agreement?

24 A. Scott Rothstein on the one hand, and TD Bank
25 on the other.

1 Q. I ask for individuals, sir.

2 TD Bank acts through its employees. Correct?

3 A. Yes, it does.

4 Q. So, what individuals with TD Bank made this
5 agreement with Mr. Rothstein?

6 A. At least Mr. Spinosa.

7 Q. Anyone else with TD Bank?

8 A. The other named defendants in the complaint.

9 Q. Do you remember their names?

10 A. Not offhand. I've got them in my notes and
11 the complaint themselves.

12 Q. Which complaint are you referring to, sir?

13 A. Both of them.

14 Q. When was this agreement made?

15 A. I don't recall the date.

16 Q. Isn't that important to your analysis to their
17 viability?

18 A. Only to the extent that it was within the
19 statute of limitations.

20 Q. What about with extent to when individuals
21 invested?

22 A. That would be a statute of limitations issue.

23 Q. It would have no impact on the elements of a
24 conspiracy claim?

25 A. I am not sure that I understand that question.

1 I don't understand that question.

2 Q. When did these individuals that are plaintiffs
3 that you are opining on their claims, when did they
4 start investing?

5 A. I don't recall those dates.

6 Q. Was that not important to your analysis of the
7 viability of their claims?

8 A. No, I am not saying that. What I am telling
9 you is that the specific date upon which an investment
10 was made was not a matter that I focused attention on
11 beyond noting that the claim was timely filed within the
12 statute of limitations and that these investments were
13 made during the ongoing Ponzi scheme in which TD Bank
14 was an aider and abetter and conspirator.

15 Q. So you are offering an opinion in this matter
16 that all investments at issue in the Beverly and Marlin
17 claim were made after there was some agreement between
18 Mr. Spinosa and Mr. Rothstein to conduct a Ponzi scheme?

19 A. Yes, and if that is an incorrect assumption,
20 any investment that was not in place during the ongoing
21 conspiracy would not be a viable claim.

22 Q. But you have done in your -- in your limited
23 time in preparing your opinions, you did not take the
24 time to figure out whether investments were made prior
25 to any alleged conspiracy?

1 A. I have assumed the accuracy of the allegations
2 included within the complaint. If any of those
3 allegations are proven not to be true, then I will be
4 happy to take that into consideration and I will let you
5 know whether that has an impact on my opinion or whether
6 it does not.

7 Q. Is there an allegation of when this agreement
8 was even made?

9 A. I don't recall a specific date. I don't know
10 as I sit here right now.

11 MR. MOSKOWITZ: We have been going about an
12 hour and 15 minutes. Whenever you think it's an
13 appropriate time, maybe give Mr. Scarola a
14 five-minute break.

15 MR. HUTCHINSON: I just have a couple
16 questions.

17 MR. MOSKOWITZ: Of course.

18 BY MR. HUTCHINSON:

19 Q. And what's your understanding of the common
20 goal with respect to this alleged conspiracy?

21 A. To defraud victims of their money.

22 Q. Which victims?

23 A. All of those who were investors in the Ponzi
24 scheme, including the named plaintiffs.

25 Q. So your -- it's your opinion, based on your

1 limited review of the record in this matter, that it was
2 Frank Spinosa's goal to defraud investors in the Beverly
3 and Marlin matter whom he never met, never had any
4 contact with and who invested through Banyon, it was his
5 goal to defraud those individuals?

6 A. Yes, sir.

7 Q. And you had -- you have seen no evidence that
8 supports that, have you?

9 A. No, that's not true. I have seen and heard
10 Scott Rothstein's testimony, personally. I attended a
11 session of his deposition. I have read his testimony
12 directly, but I have assumed the accuracy of the facts
13 alleged in the complaint.

14 If you would like me hypothetically to assume
15 that any of those facts are not true, I would be happy
16 to do that hypothetically and tell you whether that has
17 any impact upon the opinions that I have expressed.

18 Q. Sir, I am asking you about evidence. What
19 evidence?

20 A. Isn't Mr. Rothstein's testimony evidence?

21 Q. Did Mr. Rothstein testify that Frank Spinosa
22 intended to defraud Mr. Beverly?

23 A. Those words were not spoken.

24 Q. And do you believe Mr. Rothstein to be a
25 credible witness?

1 A. I believe that some of Mr. Rothstein's
2 testimony is credible. I would not rely upon
3 Mr. Rothstein's inherent uncorroborated credibility
4 myself.

5 Q. Can you tell me about Frank Spinoso's
6 knowledge of the Banyon investment setup and scheme?

7 A. No, nor do I think that that's particularly
8 relevant.

9 Q. Are you aware that mostly all these investors
10 invested through Banyon?

11 A. I am aware that most of these investors, if
12 not all of them, invested through Banyon.

13 Q. Did Mr. Rothstein have a separate conspiracy
14 with respect to the Banyon investments?

15 A. No, that is exactly the point that I am
16 attempting to suggest to you is of significance, that
17 is, that this was a general conspiracy to defraud anyone
18 and everyone who Mr. Rothstein, with the substantial
19 assistance of TD Bank, was able to entice to make these
20 investments.

21 Q. Who, again, were the individuals at TD Bank to
22 provide this substantial assistance?

23 MR. MOSKOWITZ: Objection. That was answered
24 seven times before. Why don't we take a break now
25 if that's okay.

1 MR. HUTCHINSON: Let's answer this question.
2 Then we will take a break.

3 MR. MOSKOWITZ: Asked and answered seven
4 times. I don't think he needs to answer it. It's
5 going to be the same answer, but go ahead.

6 A. Frank Spinosa. Rosanne Caretsky, the named
7 defendants in the action. I can't, from memory, give
8 you the names of other TD Bank employees that were
9 directly involved.

10 MR. HUTCHINSON: Let's take a break.

11 MR. MOSKOWITZ: Thank you.

12 THE VIDEOGRAPHER: We are off the record.

13 It's 2:01 p.m.

14 (A recess was taken from 2:01 p.m. to
15 2:22 p.m.)

16 THE VIDEOGRAPHER: Back on the record. It's
17 2:22.

18 (There was a discussion off the record.)

19 BY MR. HUTCHINSON:

20 Q. If you turn back to Exhibit 5 in your stated
21 opinions, the last sentence, the first paragraph says,
22 "based on the outcome of similar cases." What cases are
23 you referring to there?

24 A. Coquina, Razorback, the opinions issued in
25 this case thus far by Judge Streitfeld.

1 Q. Did you do anything to research the factual
2 background, the specific factual background of the
3 Coquina case?

4 A. No, I did not do anything to independently
5 research the factual background of the Coquina case. I
6 have relied upon what is contained within the materials
7 that were presented to me for review, nothing beyond
8 that.

9 Q. Do you know whether the Coquina plaintiffs had
10 any contact with TD Bank?

11 A. I am aware that there were Coquina plaintiffs
12 that did have contact with TD Bank, yes.

13 Q. Do you know whether any of the Coquina
14 plaintiffs receive written materials from TD Bank?

15 A. My understanding is there were Coquina
16 plaintiffs who did.

17 Q. And how about for Razorback with respect to
18 both of those topics?

19 A. You know, I don't recall specifically with
20 regard to Razorback. I am not sure one way or another.

21 Q. So it's your understanding, at least at some
22 level, that the facts in Coquina are different than the
23 facts of Beverly and Marlin?

24 A. Well, there obviously are different facts.
25 The question is whether the differences are material or

1 not. The names of the plaintiffs are different. They
2 are different plaintiffs. Those are different facts but
3 I don't believe those to be material differences. As to
4 the material facts, I don't think that there are any
5 significant distinctions.

6 Q. Either way, did any of the wrongful conduct in
7 the Beverly and Marlin matters occur outside the State
8 of Florida?

9 A. Nothing in particular is coming to mind right
10 now, so there is nothing I can identify as I am sitting
11 here right now. I don't remember. I don't recall
12 having focused on the issue of the geographic location
13 of facts that I thought would make a difference.

14 Q. Is a Florida jury permitted to award punitive
15 damages for conduct that occurred outside of the State
16 of Florida?

17 A. There is United States Supreme Court opinion
18 language that places geographic limitations on the
19 ability of a jury to punish for wrongdoing. I don't
20 believe that those limitations would have any material
21 bearing upon the punitive damages claims in this case.

22 Q. And why is that?

23 A. Because I believe that those facts upon which
24 I base my opinion with regard to punitive damages are
25 facts that involve Florida conduct.

1 Q. Is the second paragraph on Exhibit 5
2 describing your opinions, is that set forth in your
3 opinions with respect to the availability of punitive
4 damages in the Beverly and Marlin matters?

5 A. Those statements, as I have previously
6 testified, are accurate.

7 Q. Is there a statute that controls what a
8 plaintiff has to prove to receive punitive damages
9 against an employer for an employees conduct?

10 A. There is.

11 Q. And is that Florida Statute 768.72?

12 A. It is.

13 Q. And in formulating your opinions in this
14 matter, did you conclude that each plaintiff would
15 present clear and convincing evidence that would satisfy
16 that statute?

17 A. Yes.

18 Q. Let me mark the statute as an exhibit. It
19 will be Exhibit 8.

20 (Exhibit No. 8, Statute 768.72, was marked for
21 identification.)

22 BY MR. HUTCHINSON:

23 Q. Is Exhibit 8 a copy of the correct statute
24 which we are referring to?

25 A. It is.

1 Q. Would you walk me through the statute and
2 explain to me how a plaintiff in the underlying Beverly
3 and Marlin matters such as Mr. Beverly can recover
4 punitive damages against TD Bank for his claims under
5 this statute?

6 A. I am not sure what you mean when you request
7 that I walk you through the statute.

8 Q. Well, am I not correct that for an employer to
9 be liable for an employee -- excuse me, for an employer
10 to be liable for punitive damages for an employee's
11 conduct, the plaintiff must make a two-step showing
12 under the statute.

13 First, the plaintiff must show specific
14 conduct by an individual employee and after that must
15 show specific conduct by the employer. Correct?

16 A. That is correct.

17 Q. Subsection 2 of 768.72 specifies a conduct
18 that a plaintiff must prove with respect to an
19 individual employee first. Correct?

20 A. You are thus far accurately walking me through
21 the statute.

22 Q. Okay. Since you wouldn't walk me, I will walk
23 you.

24 A. Good.

25 Q. Okay. Subsection 2, so, with respect to the

1 individual employee, the plaintiff has to show by clear
2 and convincing evidence that the employee was personally
3 guilty of intentional misconduct or gross negligence.

4 Correct?

5 A. That is what the statute says.

6 Q. And you believe this statute to be applicable
7 to the claims in this matter. Correct?

8 A. I do.

9 Q. And do you believe that a plaintiff -- and in
10 the statute under Subsection 2 it then describes or
11 defines intentional misconduct and gross negligence.

12 Correct?

13 A. Yes.

14 Q. Is it your belief that a plaintiff such as
15 Mr. Beverly would make his showing with respect to an
16 individual TD Bank employee under either intentional
17 misconduct or gross negligence?

18 A. Both.

19 Q. Both. Okay. Well, let's focus on intentional
20 misconduct first.

21 First, which employee of TD Bank do you
22 believe a plaintiff could, Mr. Beverly could present
23 evidence with respect to satisfy intentional misconduct?

24 A. At least Frank Spinosa.

25 Q. Let's take Mr. Spinosa and, again, we will

1 just use Mr. Beverly as an example because he is named
2 plaintiff in the first filed suit.

3 So, please describe to me how you think
4 Mr. Beverly can prove that Frank Spinosa committed
5 intentional misconduct as it is defined in 768.72, 2(a).

6 A. By proving the fact alleged in the complaint.

7 Q. Are there any facts alleged in the complaint
8 that Mr. Spinosa knew that injury or damage would result
9 to Mr. Beverly?

10 A. If the intent of the question is to identify
11 factual allegations in the complaint that indicate
12 personal knowledge on Mr. Spinosa's part of the
13 particular circumstances of Mr. Beverly's individual
14 Ponzi scheme victimization, the answer to that question
15 is, I don't remember. However, that is not what would
16 be required to be proved in order to demonstrate
17 TD Bank's liability to Mr. Spinosa for Mr. Spinosa's
18 loss arising out of TD Bank's participation in either
19 the conspiracy to defraud or in aiding and abetting the
20 fraud.

21 Q. In response to the first part of your answer,
22 I just want it to be clear on the record, I am not
23 asking you about allegations in the complaint. I am
24 asking you about evidence. You were the one that
25 referred to the allegations in the complaint and your

1 knowledge and your assumption that everything in the
2 complaint is true. So, when I am asking you the
3 question, I am asking you about evidence.

4 A. Well then let me make sure that you understand
5 what my role in this case is and it may help to focus
6 your questions more specifically upon what it is that I
7 am doing and what it is that I am not doing.

8 I have not undertaken an assessment of the
9 plaintiff's ability to prove the allegations in the
10 complaint. I have assumed the plaintiff's ability to
11 prove the allegations in the complaint. I have taken
12 those allegations as a given, and if the plaintiffs are
13 unable to prove specific allegations, that may or may
14 not have an impact upon the ultimate opinions that I
15 will be expressing. If you identify a specific factual
16 allegation and ask me to assume that it cannot be
17 established, I will be happy to tell you whether that
18 would or would not have an impact upon the ultimate
19 opinions that I am expressing.

20 Q. Let's go back to 2(a), intentional misconduct.

21 Do you dispute that a claimant such as
22 Mr. Beverly in order to satisfy Subsection 2(a) would
23 have to show -- and, again, we are referring to
24 Mr. Spinosa because that's who you chose had actual
25 knowledge ---

1 A. No, I think you chose Mr. -- oh, I'm sorry, I
2 didn't choose ---

3 Q. You identified Mr. Spinosa?

4 A. I identified Mr. Spinosa.

5 Q. You identified Mr. Spinosa?

6 A. You chose him, that is, your client chose him.

7 Q. Would you not agree that under the scenario
8 that we are discussing that Mr. Beverly would have to
9 show that Mr. Spinosa, according to the statute, had
10 actual knowledge of the wrongfulness of the conduct and
11 that high probability that injury or damage to the
12 claimant, Mr. Beverly, would result? Do you agree with
13 that?

14 A. I agree that it would be Mr. Beverly's burden
15 to prove the elements described under 768.72, 2(a).

16 Q. And do you have any understanding of whether
17 Mr. Beverly can show or any of the other plaintiffs can
18 show that Mr. Spinosa had actual knowledge of the high
19 probability that injury or damage would occur to each
20 individual claimant?

21 A. The statute and the law on conspiracy and
22 aiding and abetting does not require that Mr. Spinosa
23 ever know of the existence of Mr. Beverly or any other
24 individual plaintiff.

25 Q. Sir, we have talked about aiding and abetting

1 and conspiracy before. We are now talking about
2 punitive damages, which is controlled by the language in
3 this statute. Correct?

4 A. Yes, that's correct.

5 Q. So, while we are talking, let's stay on
6 subject here and stick with punitive damages.

7 Do you have any understanding of whether the
8 plaintiffs in the Beverly and Marlin matters can show
9 that Mr. Spinoso had actual knowledge of the high
10 probability that injury or damage to each of the
11 claimant's would result?

12 A. Yes.

13 Q. And what is your understanding of the evidence
14 that would show that?

15 A. The evidence are the facts that are alleged in
16 the complaint which demonstrate that Mr. Spinoso was a
17 knowing participant in a Ponzi scheme that was intended
18 to cast the broadest possible net over victims who would
19 be willing to invest in what was a fraud.

20 Q. Can you point to me any evidence that Spinoso
21 had any knowledge of the high probability that injury or
22 damage would result to each individual plaintiff?

23 A. No, nor do I believe that to be relevant or
24 material or statutorily required. I believe that this
25 is a statute that was passed in derogation of the common

1 law. It must be construed as narrowly as possible in
2 terms of the restrictions that it imposes upon the
3 common law. I do not believe it was intended to, nor do
4 I believe that it does impose a requirement that the
5 specific identity of victims be known to someone who is
6 conspiring to defraud or aiding and abetting a fraud.

7 I think it is enough if the conspirator and
8 aider and abettor knows that the individual with whom he
9 is conspiring or to whom he is providing aid in the
10 commission of a fraud is out there trying to get as many
11 people involved in this scheme as he possibly can and
12 the conspirator and aider and abettor becomes
13 responsible for the injury suffered by everyone who gets
14 caught in that web of deception.

15 Q. Do you have any case law that supports your
16 interpretation of Subsection 2(a)?

17 A. The long history of common law of the State of
18 Florida.

19 Q. By the way, you talked about Mr. Rothstein.

20 A. Also, I should clearly extend that as well,
21 Coquina and Razorback addressed those issues. Those
22 issues were addressed in argument before the Court in
23 this case and, it is my understanding of the rulings in
24 each of those cases that the same distinctions that you
25 are attempting to draw, the same statutory

1 interpretations that you are by implication advancing
2 through your questions have been rejected by the courts
3 previously.

4 Punitive damages have already been awarded
5 under these circumstances and I don't -- I don't think
6 there is any question about the fact that they were
7 awarded under appropriate circumstances.

8 Q. Name me a case?

9 A. The rejection of those arguments was what was
10 required by the law of this state.

11 Q. Name me a case where punitive damages have
12 been awarded against TD Bank for its involvement in the
13 Rothstein Ponzi scheme where the plaintiffs had no
14 contact or communications with TD Bank?

15 A. I don't remember a name, nor do I think that
16 that's relevant or material. Once you join the
17 conspiracy, you become responsible for all of the
18 subsequent conduct as well as all of the proceeding
19 conduct of the co-conspirators. You are ratifying their
20 actions. You joined them at your own peril, responsible
21 exhibit all of the injury done in the course and scope
22 of that conspiracy, whether the injury proceeded your
23 joining the conspiracy or whether it followed your
24 joining the conspiracy. That's a very basic principle
25 of conspiracy law.

1 Q. Sir, we previously discussed -- we discussed
2 conspiracy and aiding and abetting previously. We are
3 focusing on the punitive damages statute. I ask that
4 you focus your attention on that.

5 A. I am focusing on that. I don't believe the
6 statute changes the common law in that regard. As I
7 said, this is a statute that is in derogation of common
8 law, and it only changes the common law to the extent
9 that it explicitly addresses those common law principles
10 and constitutionally limits them. This statute does not
11 change those basic principles of common law
12 conspiracies.

13 Q. Doesn't Subsection 2(a) also require that the
14 intentional course of conduct also resulted in the
15 injury of the claimant?

16 A. Yes, and in the case of a conspiracy, that
17 means that if you conspire to defraud that the injury
18 result from the fraud.

19 Q. We have already discussed proximate causation
20 versus but for causation. Correct?

21 A. That's a subject matter that was dealt with
22 earlier, yes.

23 Q. Subsection 2(b) you said is also applicable.
24 Is that correct?

25 A. Yes.

1 Q. And that's for gross negligence?

2 A. That's correct.

3 Q. It's clear to have a negligence claim there
4 has to be a duty. Isn't that correct?

5 A. In order for their to be a negligence claim,
6 there has to be a duty, but this statute is not defining
7 an independent negligence claim. It is defining the
8 predicate for the recovery of punitive damages.

9 Q. So, is it your legal opinion here today that
10 Subsection 2(b) is applicable regardless of whether any
11 duty is owed to the claimant?

12 A. It is my opinion that punitive damages may be
13 recovered against a defendant where the defendant's
14 conduct was so reckless or wanton in care that it
15 constituted a conscious disregard of the rights of
16 persons exposed to such conduct so that in the context
17 of a conspiracy, if TD Bank's conduct was so reckless or
18 wanting in care that it demonstrated a disregard of the
19 rights of victim's of the conspiracy to defraud TD Bank
20 would be subject to punitive damages.

21 Q. So, let's take Mr. Beverly and Mr. Spinosa as
22 the example which we are using because we are not
23 talking about the bank in this subsection. We are
24 talking about an individual.

25 Did Spinosa or is there a requirement under

1 2(b) that Mr. Spinosa owed Mr. Beverly any duty?

2 A. There is not a requirement under 2(b) that a
3 personal duty be owed to Mr. Beverly.

4 Q. A claimant can recover punitive damages under
5 a gross negligence prong regardless of whether there is
6 any duty owed?

7 MR. MOSKOWITZ: Objection. Asked and answered
8 a couple of times.

9 A. A claimant may recover punitive damages under
10 2(b) if the claimant suffered an injury as a result of
11 conduct that included an intentional or reckless
12 disregard of the rights of persons exposed to such
13 conduct.

14 BY MR. HUTCHINSON:

15 Q. Isn't intentional misconduct described in
16 2(a)?

17 A. Intentional misconduct is described in 2(a)
18 but gross negligence can arise from either an
19 intentional or a reckless disregard of the rights of
20 persons exposed to such conduct. And Mr. Beverly and
21 the other victims of the fraud had a right not to be
22 defrauded.

23 Q. Have you ever had an experience in your
24 practice of law where someone can be negligent or
25 reckless where they owed no duty to the other person?

1 A. That question really doesn't make much sense
2 to me. You will have to please try to ask it in a
3 different way.

4 Q. Do you have any cases to support any
5 contention that someone can be negligent or reckless
6 with respect to another person without a duty?

7 A. Negligence, if we are talking about a
8 negligence claim, requires as an element, whether it is
9 simple negligence or gross negligence the existence of a
10 duty.

11 Q. Would you agree that recklessness requires a
12 duty?

13 A. Recklessness as I understand it to be used in
14 this context is in effect a degree of negligence.

15 Q. Okay. So once a plaintiff makes the required
16 showing under 2(a) or 2(b), the plaintiff then has to
17 make an additional showing under Subsection 3 in order
18 to recover from punitive damages. Correct?

19 A. Yes.

20 Q. And which subsection of -- Subsection 3, I'm
21 sorry, is it 3(a), 3(b) or 3(c) that you claim are
22 applicable to the claims in the Beverly and Marlin
23 matters?

24 A. My understanding is that Mr. Spinoso was a
25 senior regional vice president of TD Bank. I believe

1 that Mr. Spinosa's conduct as a senior managerial level
2 employee rises to the level of being the conduct of
3 TD Bank so that the criteria of 3(a) are met.

4 I also believe that the criteria of 3(b) are
5 met, both through Mr. Spinosa's conduct and through the
6 ratification of that misconduct through the subsequent
7 actions of TD Bank as a corporate entity rising to the
8 highest corporate levels, that is, into the board of
9 directors.

10 I also believe that the criteria of 3(c) are
11 met in that the corporation, both through Mr. Spinosa
12 and others at levels above him engaged in conduct that
13 constituted gross negligence and contributed to the
14 losses suffered by these claimants. So, the answer to
15 your question is, all three.

16 Q. So, just so I understand what you're saying is
17 you are using Mr. Spinosa to meet the requirements of
18 Subsection 2 as the employee and you are using
19 Mr. Spinosa to satisfy the subsection, the requirements
20 of Subsection 3 as the employer?

21 A. In some respects the answer to that question
22 is yes. Yeah -- I mean, I'm not relying exclusively
23 upon Mr. Spinosa's conduct as the conduct of TD Bank,
24 but because Mr. Spinosa occupies the level within the
25 corporate structure that he does, it is in my opinion

1 sufficient to satisfy that criteria.

2 There are other factors as well but I think
3 that is one and I don't think that the statute changes
4 the common law in that regard. Again, the statute is in
5 derogation of the common law and as you, yourself, have
6 acknowledged earlier, a corporation cannot act except
7 through its agents, servants and employees and the
8 common law is clear that managerial level employees are
9 the corporate entity.

10 Q. And what's your understanding of Mr. Spinosa's
11 place in the hierarchy of TD Bank management?

12 A. He is senior regional vice president.

13 Q. And what's your understanding of where that
14 puts him in the corporate hierarchy?

15 A. I don't know how to answer that question.

16 Q. You don't know the answer?

17 A. It puts him at senior regional vice president.
18 You want to know how many levels there are above and
19 below him?

20 Q. Sure.

21 A. I don't know.

22 Q. Do you have any idea how many levels there are
23 above him?

24 A. No.

25 Q. Do you know whether he was making corporate

1 policy decisions?

2 A. He was certainly making some corporate policy
3 decisions, yes.

4 Q. What was Mr. Spinosa doing that you understand
5 to put him sufficiently high on the corporate ladder
6 to -- so that his acts would be deemed acts of the
7 corporation?

8 A. He was holding the title of senior regional
9 vice president and exercising the responsibilities
10 imposed upon him or vested in him by the corporation of
11 senior regional vice president.

12 Q. What were those responsibilities?

13 A. He was pretty much in charge of the entire
14 relationship with Mr. Rothstein. He seemed to have the
15 ability to do whatever he wanted on behalf of the
16 corporation and his relationship with Mr. Rothstein.

17 Q. So, you are saying because he was allegedly in
18 charge of the relationship with Mr. Rothstein that he
19 was high enough in the hierarchy for his acts to be
20 attributable to the corporation? Is that your
21 reasoning?

22 A. In light of the magnitude of the relationship
23 with Mr. Rothstein, the answer to that question is, yes.
24 There may be some bank teller who is in charge of the
25 relationship with me when I walk up to the window and I

1 deposit my check and I would not consider that bank
2 teller to be establishing corporate policy. But when
3 someone is conducting the level of business with TD Bank
4 that Mr. Rothstein was conducting and is interfacing
5 with TD Bank through Mr. Spinosa and Mr. Spinosa was
6 empowered to make decisions on behalf of TD Bank with
7 regard to a relationship of that magnitude, significance
8 and duration, all of the circumstantial evidence would
9 indicate that Mr. Spinosa has adequate corporate
10 authority to bind the corporation.

11 Q. Have you researched the case law interpreting
12 Subsection 3?

13 A. I don't think there is very much case law at
14 all that interprets Subsection 3, but it is not
15 something that I have researched with regard to this
16 case.

17 Q. You didn't take the time to do that before
18 rendering your opinions?

19 A. I did not, no. But, again, it is common law
20 with which I am familiar and I don't believe that the
21 statute has altered the common law in that regard.

22 Q. Okay. With respect to Subsection 3, you have
23 named Mr. Spinosa. Are there any other individuals at
24 TD Bank who you say would meet the requirements of the
25 subsections in Subsection 3 or that would meet the

1 requirements of Subsection 3?

2 A. The members of the board of directors.

3 Q. Any other individuals?

4 A. There were others in the corporate hierarchy
5 above Mr. Spinosa and I don't recall their names but it
6 is my recollection from information provided to me that
7 it was involvement on the part of the General Counsel's
8 office. There were other corporate executives above
9 Mr. Spinosa who were involved in relevant transactions
10 and conducted themselves in ways that clearly indicated
11 at least gross negligence on their part.

12 Q. You are referring to gross negligence with
13 respect to the Ponzi scheme operations?

14 A. Yes.

15 Q. Okay. Let's take the statute section by
16 section and make sure I understand what you are
17 referring to in each subsection.

18 Subsection 3(a), who meets the requirements
19 for TD Bank to satisfy Subsection 3(a), participation in
20 such conduct which I assume means -- do you agree that
21 would mean that the alleged Ponzi scheme conduct?

22 A. That is not accurate.

23 Q. Okay.

24 A. It is conspiracy and aiding and abetting the
25 Ponzi scheme.

1 Q. Okay. So that would be the intentional
2 misconduct under Section 2(a)?

3 A. Active and knowing participation in the
4 conspiracy and/or the aiding and abetting of the
5 conspiracy to defraud.

6 Q. Okay. So, which individual with TD Bank
7 satisfies Section 3(a) for the employer?

8 A. At least Mr. Spinosa, but my recollection is
9 that there are others above him who at least by virtue
10 of circumstantial evidence had knowing participation in
11 the fraud and conspiracy in the aiding and abetting of
12 the fraud.

13 Q. Can you explain the facts and circumstances
14 surrounding these other individuals and their
15 participation in the fraud?

16 A. Those are detailed in paragraph 13 and 86
17 through 153 of the complaint.

18 Q. Sir, I am asking for your understanding as we
19 sit here today --

20 A. That is my -- sorry, I didn't mean to
21 interrupt you.

22 Q. -- that you're basing your opinion on.
23 What is your understanding as to the facts and
24 circumstances surrounding these other individuals
25 participating in the fraud?

1 MR. MOSKOWITZ: Objection. Asked and
2 answered. He stated the specific paragraphs in the
3 complaint, which he has pointed you to a couple of
4 times already.

5 A. Yeah. I mean, I have assumed those facts to
6 be true. As I said, if you want me to assume they are
7 not true, tell me which ones you want me to assume they
8 are not true. If you want me to assume they are all not
9 true, I have no basis for my opinion.

10 BY MR. HUTCHINSON:

11 Q. As you sit here today, you cannot describe how
12 any other individuals other than Mr. Spinosa satisfies
13 Section 3(a)?

14 A. No, that's not true. I am pointing you to
15 paragraphs 13 and 86 through 153. I am also aware that
16 there has been subsequent discovery that has been taken
17 in this case, including depositions of corporate
18 representatives where there have been facts developed
19 with regard to reports made to the board of directors
20 with TD Bank with regard to this conduct. So, I have
21 that and clearly it is of significance that these same
22 circumstances have been presented to a jury and there
23 have been legal rulings made with regard to the
24 sufficiency of the evidence to get to a jury and then
25 there have been factual findings by that jury imposing

1 punitive liability. That's very significant to me in
2 terms of my ability to express an opinion with regard to
3 these matters. The fact that it already has happened
4 makes a big difference.

5 Q. Mr. Scarola, you previously testified that the
6 reports of board of directors dealt with the subsequent
7 litigation, did not deal with the underlying Ponzi
8 scheme. Isn't that correct?

9 A. No, I don't think I said that. I think that
10 what I said was I am aware that reports were made to the
11 board of directors with regard to the litigation
12 misconduct. I never said that there were no reports to
13 the board of directors regarding the underlying
14 liability, and it would astound me if reports were not
15 made to the board of directors regarding the underlying
16 liability and if that were to have been true, that, in
17 and of itself, would indicate an astounding level of
18 gross negligence.

19 For the board of directors to turn a blind eye
20 to the underlying liability concerns that have been so
21 widely publicly reported would all by itself warrant the
22 imposition of very significant punitive liability.

23 Q. Mr. Scarola, what evidence can you point me to
24 that any -- the board of directors was involved in any
25 way with the Rothstein Ponzi scheme prior to its

1 implosion?

2 A. I haven't stated that the Rothstein -- that
3 the board of directors was involved in the Rothstein
4 Ponzi scheme prior to its implosion. That isn't the
5 question that you asked, and that's not what I just
6 said. You asked me whether there was any indication
7 that the board of directors did not have knowledge of
8 the underlying liability as opposed to the subsequent
9 litigation misconduct. That's what I was responding to
10 because that's what you asked me.

11 Q. So how does the board of directors satisfy
12 Section, Subsection 3? Do they knowingly condone or
13 ratify Mr. Spinoso's conduct, alleged aiding and
14 abetting conduct in the underlying Ponzi scheme?

15 A. They are ratifying it, as we sit here today.

16 THE VIDEOGRAPHER: Pardon me, I need to go off
17 the record for one second.

18 MR. MOSKOWITZ: Can we take like a
19 five-minute, no more than five minutes?

20 (A recess was taken from 3:08 p.m. to
21 3:18 p.m.)

22 THE VIDEOGRAPHER: This is the beginning of
23 tape number three. The time is 3:18 p.m.

24 We are back on the video record.

25 BY MR. HUTCHINSON:

1 Q. Mr. Scarola, is it your opinion that any of
2 the alleged conduct with respect -- any of the alleged
3 litigation misconduct in the Coquina and Razorback
4 matter can be used to satisfy Subsection 3 of the, of
5 768.72?

6 A. Are you talking about the litigation
7 misconduct?

8 Q. Yes.

9 A. Yes.

10 Q. What is your opinion with respect to that?

11 A. That that litigation misconduct is
12 circumstantial evidence of knowledge of the wrongdoing
13 that extended beyond and above Mr. Spinosa's level and
14 that it is indicative of the ratification of that
15 misconduct, although there is also direct evidence of
16 the ratification of the misconduct.

17 Q. And what's your understanding of the direct
18 evidence of the ratification of misconduct?

19 A. There has been testimony -- I'm trying to
20 remember the names of the individuals, Mr. Torili **SP**
21 and Mr. Guillen maybe, were asked directly about whether
22 Mr. Spinosa did anything wrong and there has been a
23 consistent denial of any wrongdoing on the part of
24 Mr. Spinosa.

25 This is not a circumstance where TD Bank has

1 taken the position that there was a rouge employee who
2 was on a venture of his own. There has been an
3 admission that Mr. Spinosa was acting within the course
4 and scope of his employment and a consistent defense of
5 what he did.

6 The mere persistent denial of any wrongdoing
7 on his part and any need for any change within TD Bank
8 constitutes a ratification of all of that misconduct.

9 Q. And is your understanding -- did you receive
10 your understanding of those facts during the break that
11 we just took from counsel?

12 A. No, sir, I have -- that's from the materials
13 that we have provided to you. It's tabbed in the
14 materials as a result of the review that I did long
15 before this deposition began.

16 Q. Did you discuss those matters with counsel
17 during the break?

18 A. No, sir, that was not a topic of our
19 discussion.

20 Q. And what's your understanding of how Florida's
21 litigation privilege impacts the allegation of
22 litigation misconduct?

23 A. The litigation privilege would preclude a
24 separate cause of action for conduct occurring during
25 the course of and in direct relation to the conduct of

1 the litigation itself, although the Fourth DCA has
2 recently carved out an exception to the litigation
3 privilege. But I don't think that that's particularly
4 applicable here nor are we talking about a separate
5 cause of action for the litigation misconduct.

6 Q. So is it your opinion that while it would
7 prevent a separate cause of action that the evidence can
8 still be presented and considered by the jury in
9 assessing punitive damages?

10 A. Absolutely.

11 Q. Do you have any case law that supports that
12 opinion?

13 A. Johns-Manville.

14 Q. Does Johns-Manville address the litigation
15 privilege?

16 A. Johns-Manville addresses the attitude of the
17 wrongdoer upon discovery of the wrongdoing and efforts
18 to coverup the wrongdoing. It does not address the
19 litigation privilege because it was irrelevant in the
20 context of the Johns-Manville case as it is irrelevant
21 here. We are not talking about the prosecution of a
22 separate cause of action arising out of the litigation
23 misconduct. We are talking about the admissibility of
24 the litigation misconduct in evidence in this case.

25 (Exhibit No. 9, Statute 768.73, was marked for

1 identification.)

2 BY MR. HUTCHINSON:

3 Q. Mr. Scarola, I have marked as Exhibit 9
4 Florida Statute 768.73. Are you familiar with this
5 statute?

6 A. I am.

7 Q. This is the statute that we discussed briefly
8 earlier today that sets certain limits on the award of
9 punitive damages. Correct?

10 A. Yes.

11 Q. What are your opinions with respect to the
12 application of 768.73 to any future awarded punitive
13 damages against TD Bank for its alleged role in the
14 Rothstein Ponzi scheme?

15 A. That it imposes no practical limitation under
16 the circumstances of this case.

17 Q. Why does it impose no practical limitation on
18 the imposition of punitive damages?

19 A. Because, in my opinion, to the extent that it
20 recognizes exceptions to the limitations it imposes, the
21 circumstances of this case meet those exceptions. And
22 because this is a statute in derogation of common law I
23 think that it is unlikely that it would by its expressed
24 terms apply at all.

25 Q. Okay. Will you please point us to the

1 language that includes an exception to the statutes
2 application that leads you to believe it would not apply
3 in this matter?

4 A. Yes. Let's take them section by section, if
5 we could. Section -- I guess what I am volunteering to
6 do is walk you through the statute.

7 Q. I appreciate that.

8 MR SCHERER: How about running?

9 A. Section 1(a) imposes a three times limitation
10 of the compensatory damage award. Under circumstances
11 where the fact-finder determines that the wrongful
12 conduct was motivated solely by unreasonable financial
13 gain, that limitation does not apply.

14 Q. And what limitation does apply in that
15 circumstance?

16 A. In that circumstance, there is a four times
17 the amount of compensatory damage amount that applies.
18 However, that is not applicable where the fact-finder
19 determines that at the time of injury the defendant had
20 a specific intent to harm the claimant and determines
21 that the defendant's conduct did in fact harm the
22 claimant.

23 Under that circumstance, there is no cap on
24 punitive damages. Both the conspirator and the aider
25 and abettor are charged with sharing the specific intent

1 of co-conspirators or the offender who engaged in the
2 direct wrongdoing so that if it can be demonstrated that
3 Scott Rothstein had the specific intent to harm the
4 claimants and that Scott Rothstein's conduct did, in
5 fact, harm the claimants, those who conspired with Scott
6 Rothstein shared his specific intent.

7 Those who aided and abetted Scott Rothstein,
8 aided and abetted that specific intent and this statute,
9 which is in derogation of the common law, must be
10 construed to render those co-conspirators and aiders and
11 abettors liable for punitive damages with no cap.

12 Q. Which cases support your opinion on that?

13 A. All cases which talk about construing statutes
14 in derogation of the common law as narrowly as they may
15 reasonably be construed so as to impose the least
16 restrictive derogation of the common law.

17 Q. Which cases support your opinion that under
18 this statute TD Bank would be charged with any specific
19 intent on Mr. Rothstein?

20 A. The fact that all of those involved in a
21 conspiracy share the specific intent of their
22 co-conspirators. It is no different than one who
23 conspires with a first degree murderer or one who aids
24 and abets a first degree murder. A first degree murder
25 requires a specific intent. The conspirators, aiders

1 and abettors share the same criminal liability, the same
2 punitive liability that the direct actor shares.

3 Q. Sir, can you point me to any cases that
4 support your opinion that TD Bank would be charged with
5 Mr. Rothstein's specific intent under this statute?

6 A. Only the common law of conspiracy and aiding
7 and abetting and the fact that this statute must be
8 construed in accordance with the common law unless the
9 statute specifically clearly and unambiguously requires
10 a departure from the common law and it does not. And
11 there has been no case that I am aware of that would
12 indicate otherwise.

13 Q. Let me ask you, sir, how many of these
14 plaintiffs in Beverly and Marlin even met Mr. Rothstein?

15 A. I can't answer that question for you nor do I
16 think it's a material fact.

17 Q. Do you know of any plaintiffs in these cases
18 that actually met Mr. Rothstein?

19 A. When you talk about these cases, are you
20 talking about Beverly and Marlin?

21 Q. Yes.

22 A. I don't know, nor do I think it's a matter of
23 significance. They may have met agents of
24 Mr. Rothstein. I mean, their agents may have met
25 Mr. Rothstein and that would certainly be adequate, but

1 Mr. Rothstein obviously had a specific intent to defraud
2 all investors. He didn't need to meet them in order to
3 form that specific intent.

4 Q. That was my question. So, you are saying
5 Mr. Rothstein can have a specific intent to harm someone
6 he doesn't know and has never met and under the claims
7 asserted in this matter, assuming they are all true and
8 they prevail on them, which is your assumption in this
9 matter that that specific intent is then imputed upon
10 TD Bank for the statute?

11 A. Absolutely, and I think that that
12 understanding of the law is confirmed by the fact that
13 punitive liability has been imposed against TD Bank
14 under exactly those circumstances.

15 Q. In addition, they would have to prove the
16 proximate cause element that we discussed before, would
17 it not, under Subsection C, the defendant's conduct did,
18 in fact, harm the claimant?

19 A. As I have told you on multiple occasions
20 before, if you can show me any of the plaintiffs who
21 really didn't invest in this Ponzi scheme and lost no
22 money, they don't have a claim for either compensatory
23 damages or punitive damages. An essential element would
24 be that they invested in this Ponzi scheme and they lost
25 money as a consequence of that investment.

1 Q. Sir, if you can answer my question.

2 A. That is ---

3 Q. Isn't it true?

4 A. I'm sorry but that is a direct answer to your
5 question.

6 Q. Is it not true that they would have to share
7 proximate causation in addition to specific intent for
8 Subsection C to be applicable?

9 A. Yes, and all that would be necessary to show
10 proximate causation is that they were Ponzi scheme
11 investors who lost money in the Ponzi scheme. That
12 satisfies the proximate cause element both from a common
13 law perspective and from a statutory perspective as
14 well.

15 Q. When I asked you earlier, you couldn't
16 identify any cases that said that, could you.

17 MR. MOSKOWITZ: Objection misstates his
18 testimony.

19 A. I could not identify a case that includes that
20 language as I sit here right now --

21 Q. And then subsection B above --

22 A. -- except for Coquina, which obviously is a
23 case that stands for that proposition, Razorback -- and,
24 you know, it is not irrelevant to my opinion that
25 TD Bank has been settling hundreds of millions of

1 dollars worth of these claims. So, somebody at TD Bank
2 thinks these arguments make sense too.

3 Q. For Subsection C to be applicable which limits
4 the punitives to four times the compensatories isn't it
5 true that the wrongful conduct actually had to be known
6 by the managing agent, director, officer, other person
7 responsible for making policy decisions on behalf of the
8 defendant?

9 A. Yes, sir, that is true.

10 Q. And who at TD Bank do you claim would satisfy
11 that element at subsection B?

12 A. You don't need to go anywhere past
13 Mr. Spinosa, but once others above him gain knowledge
14 and fail to take action or affirmatively ratify his
15 conduct, they are certainly implicated as well.

16 Q. Are you offering any opinions in this matter
17 with respect to how the different sections of this
18 statute would be implemented if plaintiff's compensatory
19 damages are reduced through a payout under the plan?

20 A. I am offering no bankruptcy related opinions
21 at all. What I am saying is that the punitive damages
22 to the extent this statute would apply at all would be
23 based upon the amount of the compensatory loss arising
24 out of the misconduct, and if the question is would
25 collateral sources of any kind have an impact upon the

1 statutory limitation, my answer to that question would
2 be, no, they would not. And it would seem to me without
3 offering any bankruptcy opinions because that is clearly
4 outside my area of expertise that at best some
5 bankruptcy related pay out would be nothing more than
6 another collateral source.

7 Q. Do you have any law or cases that support your
8 opinion on that?

9 A. About the bankruptcy aspect of my opinion --

10 Q. Yes.

11 A. -- absolutely not.

12 Q. Or how any collateral source recovery would
13 affect the computation of compensatory damages under the
14 statute?

15 A. I don't have any specific cases but, once
16 again, this statute is in derogation of the common law
17 unless there were a clearly and unequivocally stated
18 legislative intent to tie the multiplier into a
19 collaterally, a collaterally sourced reduced amount. It
20 could not properly be applied to the collateral sourced
21 reduced amount.

22 Q. But you have nothing to, no case law to
23 support that?

24 A. All of those cases that talk about
25 interpreting statutes in derogation of the common law.

1 Q. What's your opinion with respect to the
2 application of Subsection 2 to any punitive damages
3 request in the Beverly or Marlin matter?

4 A. Well, I have already been addressing 2(c),
5 which -- are you talking about ---

6 Q. No, I think you are talking about two, on
7 Subsection 2. I think you were looking at 1(b) ---

8 A. Subsection parens, 2, close parens?

9 Q. Correct.

10 A. That one? On top of page two of this
11 document?

12 Q. Correct.

13 A. It is my opinion that this section would not
14 impose any limitation upon the award of punitive damages
15 in this case because of the way in which the same act or
16 single course of conduct is statutorily defined.

17 Q. Can you further explain that for me, please?

18 A. Yes. This subsection precludes the award of
19 punitive damages against a defendant in a civil action
20 where that defendant establishes that there has been a
21 prior award of punitive damages arising out of the same
22 act or single course of conduct. The phrase, "the same
23 act or single course of conduct" is defined in the
24 second sentence of that subsection. It is defined as
25 including acts resulting in the same manufacturing

1 defect. This case does not involve manufacturing
2 defects. It is defined as including acts resulting in
3 the same defects in design. This case does not involve
4 design defects. It talks about failure to warn of the
5 same hazards. This is not a failure to warn case with
6 respect to similar units of a product.

7 This entire subsection relates to product
8 liability cases. It was, and I acknowledge this to be a
9 pure assumption on my part, the consequence of
10 successful lobbying experts on the part of product
11 manufacturers to limit their liability in punitive
12 damages in cases where the same product defect has
13 resulted in multiple injuries to consumers. It's the
14 got nothing to do whatsoever with the circumstances of
15 this case.

16 That section could not possibly be construed
17 in light of the requirement that it be construed as a
18 provision in derogation of the common law as least
19 restrictively as possible as applying to the
20 circumstances of this non-product liability claim.

21 Q. Do you have any personal knowledge of the
22 legislative intent behind this section?

23 A. Only to the extent that it's very obvious from
24 the language that's employed but legislative intent has
25 no relevance unless we are attempting to construe some

1 ambiguity and there is nothing ambiguous about the fact
2 that it is intended to apply to products liability case.

3 Q. Well, it's not -- it doesn't say exclusively
4 to product liability case. Isn't the term includes? It
5 doesn't say only includes?

6 A. You are absolutely correct. The word "only"
7 does not precede the word includes, and some imaginative
8 defense lawyer might try to read into this statute an
9 only word but that effort would be unsuccessful because
10 this is a statute in derogation of the common law and so
11 only would not be read into this statute.

12 Q. Is there another provision in this same
13 statute that talks about what it applies to?

14 A. Are you talking about Section 2(a).

15 Q. No, I am talking about Section 5 that says,
16 "The provision of this section shall be applied to all
17 causes of action arising after the effective date of
18 this act."

19 A. Yes, that's true. It does, and that raises an
20 issue both with regard to this statute and 768.72 as
21 well because our discussions have assumed the
22 applicability of this statute, but I suggest to you that
23 it may not be applicable at all because these causes of
24 action may very well have accrued prior to the effective
25 date of the statute. But nonetheless, for purposes of

1 this discussion, I have assumed its applicability to
2 these causes of action.

3 Q. Sir, are you offering an opinion in this
4 matter that Beverly and Marlin causes of action accrued
5 before 1999?

6 A. No, I am not.

7 Q. That would cause major statute of limitations
8 problems, sir?

9 A. Oh, I think if they accrued before 1999 and
10 the fraud discovered within the statute of limitations
11 period, it would cause major statute of limitations
12 problems but that's not my opinion.

13 Q. You are not offering an opinion that this is
14 not applicable because these causes of action accrued
15 before 1999, are you?

16 A. No, I have told you that I have assumed
17 throughout the discussions that I had with you about
18 768.72 and 768.73 that these statutes applied but
19 pursuant to their expressed terms don't impose a
20 limitation on punitive damages under the circumstances
21 of these cases.

22 Q. Have you seen any case law supporting your
23 opinion that Subsection 2 only applies to product
24 liability matters?

25 A. I have not seen any cases that say that

1 Subsection 2(a) applies only to product liability cases.
2 I have never seen anybody attempt to argue otherwise.

3 Q. What is your opinion with respect to the
4 application of the last sentence in Subsection 2(b) to
5 this matter?

6 A. Give me just one moment, if you would, please.

7 My opinion is that 2(b) does not apply for the
8 same reasons that 2(a) does not apply. 2(b) speaks also
9 in terms of the act and course of conduct which is
10 defined in 2(a), so 2(b) also relates to product
11 liability claims.

12 Q. Is it your understanding that the groups that
13 were lobbying for this tort reform only involved product
14 manufacturers?

15 A. No. I am -- I would imagine that the, that
16 the health care industry was lobbying for these changes,
17 that the insurance industry was lobbying for these
18 changes, that there were a lot of vested interests whose
19 economic concerns favor the imposition of restrictions
20 on the tort system of a variety of kinds of limitations
21 of punitive damages being only one and they frequently
22 join together to lobby the legislature for changes like
23 this.

24 Q. Assuming Subsection 2 does not, is not limited
25 to product liability actions, would you agree with me

1 that TD Bank there has been a punitive damages award
2 against TD Bank for the same course of conduct for which
3 the Beverly and Marlin plaintiff seeks to restore
4 damages?

5 A. You want me to assume that the same act or
6 single course of conduct language is omitted from the
7 statute and that the statute instead reads that the
8 limitations of 2(a) apply to all cases regardless of
9 the, of whether they arise out of the same act or single
10 course of conduct. So, if there is a punitive damages
11 award against a defendant under any circumstances
12 anywhere then no punitive damage award may ever be
13 awarded against that defendant again under any
14 circumstances? Is that the assumption you want me to
15 make?

16 Q. No, sir. I want you to put the statute down.
17 Assume for me -- no assumptions.

18 Has TD Bank -- has there been an award of
19 punitive damages for TD Bank for its alleged role in the
20 Rothstein Ponzi scheme?

21 A. Yes, although TD Bank continues to challenge
22 that award and hasn't paid it yet.

23 Q. Is it your understanding that the Beverly and
24 Marlin plaintiffs are seeking an award of punitive
25 damages based on the same alleged course of conduct?

1 A. Well, that would depend on how you define the
2 same course of conduct, but if we want to define it as I
3 think it appropriately is defined, that being the
4 conspiracy to participate in the Rothstein Ponzi scheme
5 and aiding and abetting the Rothstein Ponzi scheme, then
6 I would believe that the answer to that question would
7 be yes.

8 Q. And how would it work, sir -- I guess you --
9 never mind. I will mark for you Exhibit 10.

10 Do you recognize Exhibit 10?

11 A. Nice handwriting.

12 (Exhibit No. 10, Handwritten Notes, was marked
13 for identification.)

14 A. I do, yes.

15 BY MR. HUTCHINSON:

16 Q. What is Exhibit 10?

17 A. Those are handwritten notes that I have made.

18 Q. What were these notes of?

19 A. Observations that I made of the contents of
20 documents that I reviewed and/or conversations with
21 plaintiff's counsel.

22 Q. Do you know which are your observations and
23 which are notes from conversations with plaintiff's
24 counsel?

25 A. I didn't attempt to make that distinction.

1 Q. You see the second entry states Coquina had a
2 lot of direct contact with the bank. Is that correct?
3 Is that a correct reading of your handwriting?

4 A. That is a correct reading of that line except
5 for the last word that without the T crossed. It is an
6 incomplete sentence.

7 Q. Then a couple of entries down it says that
8 some had direct calls with Spinosa?

9 A. Yes.

10 Q. What is that referring to?

11 A. That refers to the fact that there were Marlin
12 and Beverly plaintiffs who had direct calls with
13 Spinosa.

14 Q. And who were those plaintiffs, sir?

15 A. I can't give you their names.

16 Q. Are you aware that that contradicts the sworn
17 discovery provided by the plaintiffs in this case?

18 A. No, I am not aware that it contradicts the
19 sworn discovery provided by the plaintiffs. If you
20 would like me to assume that that is not true, I would
21 be happy to do that and tell you what, if any, impact it
22 has on my opinion.

23 Q. Have you taken the time to review any of the
24 bankruptcy discovery that we have been conducting over
25 the last several weeks?

1 A. I have received copies of transcripts,
2 depositions that were taken of Leo Doyle and Craig
3 Baldauf. I have not read those yet. I have been in
4 trial myself the last week and a half.

5 Q. So you have not taken time to review any of
6 the discovery, the sworn discovery that's been taken in
7 this case?

8 A. I don't really believe that that accurately
9 characterizes the circumstances. I had a meeting, a
10 fairly lengthy meeting last weekend during which recent
11 discovery was discussed and so to that extent I have had
12 the time to review some of what has been going on
13 recently as far as discovery is concerned. I have not
14 had the time to review those transcripts.

15 Q. Did anyone tell you that your entry here with
16 regard to direct cause with Spinosa was incorrect?

17 A. No, no one has told me that that entry is
18 incorrect. To the contrary, I have been told that there
19 were some direct calls with Spinosa. I have also been
20 told that some of the Marlin and Beverly plaintiffs did
21 receive lock letters.

22 Q. And which plaintiffs were those?

23 A. I was not given names. I don't know the
24 names. Nor do I think.

25 Q. Would it surprise you that the record reflects

1 that none of the Beverly and Marlin plaintiffs received
2 lock letters executed by TD Bank?

3 A. It would surprise me that that statement is
4 inaccurate but it wouldn't alter my opinion.

5 Q. Where did you get -- did the next statement,
6 the conspiracy and aiding and abetting requires no
7 direct contact, did that come from plaintiffs' counsel?

8 A. That comes from me. That's an observation
9 that I was recording of my own understanding.

10 Q. What about the next entry? It says all
11 evidence of Coquina comes in to prove knowledge.

12 A. That's me.

13 Q. Which statements in these notes came from
14 counsel?

15 MR. MOSKOWITZ: Objection. Asked and
16 answered.

17 A. Do you want me to go through each of the
18 statements and tell you whether they reflect something
19 that was told to me by counsel if I can recall that?

20 BY MR. HUTCHINSON:

21 Q. If you can, just briefly skim through it and
22 let me know whether any of these statements were
23 provided to you by counsel.

24 A. The statement that there was significant
25 direct contact with the bank that was proven in the

1 Coquina case was a statement from counsel. The
2 statement that there was -- that there were plaintiffs
3 who had direct calls with Spinoso was from counsel. The
4 statement that some Marlin and Beverly plaintiffs
5 received lock letters was from counsel. The statement
6 that TD Bank never paid anything in the -- never paid
7 the punitive damage award in Coquina, that was from
8 counsel.

9 The description of the Emess settlement was
10 from counsel. The notes regarding the Craig Baldouf
11 deposition, which I misspelled in these notes because I
12 was spelling it phonetically, that's information
13 provided by counsel because I had not yesterday had an
14 opportunity to review the deposition transcript.

15 No regret, no remorse, that's me. The
16 notation admit only that Frank Spinoso may have had bad
17 judgment but did not cause injury to anyone else, that
18 was counsel's summary of the position that has been
19 taken in the discovery of this case.

20 Q. In which case are you referring to?

21 A. The Marlin and Beverly proceedings, the
22 discovery that has recently been taken.

23 The 450 to 500 million in losses as a result
24 of 6 plus billion in transactions, that's counsel.

25 Guillen has been promoted, counsel.

1 Ratification is my note. The notation at the
2 bottom of that page, the first two lines are counsel and
3 the second two lines are me. The notations about the
4 pecuniary circumstances of TD Bank that appear on the
5 next page are my notes on conversation with counsel.

6 Q. Okay. Let me show you what I am marking as
7 Exhibit 11. Do you recognize Exhibit 11, sir?

8 A. Yes, sir.

9 Q. What is Exhibit 11?

10 A. Those are my notes.

11 (Exhibit No. 11, Handwritten Notes, was marked
12 for identification.)

13 BY MR. HUTCHINSON:

14 Q. What are these notes of, sir?

15 A. These are notes that I made as I went through
16 discovery materials provided to me relating to my
17 assignment.

18 MR SCHERER: Do you have an extra copy over
19 there?

20 THE WITNESS: I have an extra copy. If you
21 take these, I can look at the originals.

22 BY MR. HUTCHINSON:

23 Q. So these do not reflect notes of calls with
24 counsel. Correct?

25 A. No, these are my own notes.

1 Q. In the middle of the page you discuss TD Bank
2 misconduct, do you see that or there are notes regarding
3 TD misconduct?

4 A. Yes.

5 Q. Do either of the first two entries, providing
6 investors with false TD account statements or fraudulent
7 written assurances or lock letters, do either of those
8 alleged conduct apply to the Marlin or Beverly
9 investors?

10 A. Yes.

11 Q. Do you believe that -- is it your
12 understanding that those investors received false
13 account statements?

14 A. I don't remember whether they personally
15 received false account statements nor do I consider it
16 of particular significance whether they received false
17 account statements personally or not. The fact that
18 TD Bank aided and abetted this fraud by providing false
19 account statements is what is significant, not which
20 particular investors received them.

21 Q. On your expert disclosure, Exhibit 5, it
22 appears that you were just opining on the aiding and
23 abetting claims and the punitive damages that might
24 result from those claims. Correct?

25 A. I'm sorry, but I am not seeing the language

1 from which you draw that conclusion.

2 Q. Let me ask it another way.

3 Are you offering opinions on the Razorback
4 matter on the current pending motion for sanctions in
5 the Razorback matter?

6 A. No, no, but you said aiding and abetting and I
7 thought the intent of that question was to carve out
8 conspiracy.

9 Q. No, I'm sorry, I was attempting to limit it to
10 Beverly and Marlin, but it's clear you are not offering
11 opinions on the Razorback sanctions proceedings.

12 A. No.

13 Q. Wouldn't you agree with me, sir, that
14 reasonable juries can reach different results on the
15 same evidence?

16 A. Absolutely.

17 Q. Wouldn't you also agree with me that there is
18 no way to reliably predict exactly what a jury will do
19 with a specified fact pattern?

20 A. I agree with that statement as you have state
21 it had.

22 Q. And would you agree with me that there is no
23 way to reliably predict the amount of punitive damages
24 that a jury would award in any specific matter?

25 A. If you are talking about an exact prediction,

1 I would agree with you.

2 Q. And, sir, you have done jury research projects
3 during your time as an attorney. Correct?

4 A. I have.

5 Q. And you have done jury research projects where
6 there are several different pools of juries within those
7 research projects. Correct?

8 A. I have.

9 Q. And those juries have come back with vastly
10 different results at times during those research
11 projects?

12 A. There indeed have been times where different
13 juries have come back with different results, that is
14 correct. Part of that process is an effort to try to
15 assess the consequences of taking different approaches
16 to the presentation of evidence in order to see the
17 extent to which it impacts upon the results obtained
18 from a jury. So, you -- you change the input. You
19 anticipate that there is going to be a change in the
20 output.

21 Q. Have you ever taken a case to verdict where
22 you thought you had a good punitive damages claim but
23 the jury did not return a punitive damages verdict?

24 A. I am sure that that has happened to me.

25 Q. How many times?

1 A. I do my best to forget the losses. I can't
2 tell you how many times and I don't keep -- I don't keep
3 a track record like that so it would be impossible for
4 me to tell you but there is no question about the fact
5 that there have been times in the past. And it has been
6 more than once when I have prosecuted a punitive damage
7 claim and have not gotten punitive damages.

8 Q. And isn't it true, sir, that that's just part
9 of being a trial attorney? In our profession, we really
10 don't know what's going to happen when a jury goes back
11 in that room?

12 A. It is true that there are significant
13 uncertainties involved in our profession and if that
14 were not the case no lawsuits would go to trial. They
15 would all be settled. It is as a consequence of
16 differences in opinion with regard to the value of
17 claims that cases get tried and so the mere fact that
18 there are trials is empirical evidence of the fact that
19 different lawyers and sometimes very experienced lawyers
20 have different views of the likely outcome of contested
21 litigation, yes.

22 Q. I think that's all I have right now, sir.
23 Thank you.

24 A. What a relief that is.

25 MR. GENOVESE: You are not done yet. I don't

1 have a lot.

2 CROSS-EXAMINATION

3 BY MR. GENOVESE:

4 Q. John Genovese. I said hello this morning,
5 Mr. Scarola.

6 Have you ever represented a client in
7 connection either the defense or the plaintiff's side in
8 a tort claim arising out of a Ponzi scheme?

9 A. Yes, and I am trying -- it would not have been
10 the defense side. It would have been the plaintiff
11 side. I have never defended a Ponzi schemer, and I know
12 that it has happened in the past but as I am sitting
13 here right now, I can't remember the particular
14 circumstances or even whether it was more than one time.
15 But I am sure that it's been at least once.

16 Q. So the -- all the testimony you gave regarding
17 your general understanding of conspiracy and aiding and
18 abetting under Florida law would be broadly construed
19 and not -- you weren't talking about personal experience
20 and knowledge about how those principle have been
21 applied in Ponzi schemes?

22 A. That is correct, although I -- I have
23 prosecuted cases involving conspiracy and aiding and
24 abetting frauds in general, although I don't remember
25 specifically a conspiracy or aiding and abetting Ponzi

1 scheme case. But those are issues that I have
2 researched in the context of fraud claims in the past
3 and prosecuted in the context of fraud claims.

4 Q. And I understand that you believe there is
5 nothing different about the general application to that
6 law to a Ponzi scheme?

7 A. Yeah, a Ponzi scheme is just a kind of fraud.
8 I don't think that there is anything that would
9 distinguish that from other fraud claims.

10 Q. It's frequently bigger?

11 A. That is correct and involves more victims.

12 Q. Agreed.

13 I am looking at the TD Bank victims' notice of
14 filing expert disclosures that was referred to by
15 Mr. Hutchinson before and the description I think you
16 said that you probably spoke about it, you didn't draft
17 it but it was prepared by counsel or filed by counsel
18 who you are appearing in connection with this deposition
19 with.

20 It says that you will testify that the TD Bank
21 victim's claims for aiding and abetting fraud and
22 conspiracy to commit fraud against TD Bank are viable,
23 nonspeculative and valuable claims with a high
24 probability of success if tried to a jury.

25 I am not finishing. I will come back to the

1 last clause a little bit later but as to that statement,
2 let me ask you a question by way of clarification. I
3 understand that you have accumulated a vast amount of
4 knowledge, per your testimony, about TD Bank's
5 misconduct in the course of the Ponzi scheme. Correct?

6 A. I don't -- I don't know that -- I don't know
7 what you mean by vast. I have reviewed a lot of
8 materials. I have become familiar with TD Bank's
9 misconduct, yes.

10 Q. And I understand your testimony to be that
11 with respect to the plaintiff's ability to establish his
12 viable nonspeculative and valuable claims as to each
13 individual plaintiff to establish liability, you have
14 suggested to Mr. Hutchinson that you are making that
15 assumption and you have asked him to show you or suggest
16 to you facts as to a particular plaintiff that would
17 cause you to recede from that statement. Do I
18 understand that's been your testimony?

19 A. I think in general that's true. What I have
20 said is I have assumed the accuracy of the facts as
21 alleged in the complaint. There are other materials
22 that have corroborated the accuracy of those allegations
23 and I am absolutely open to consider any hypothetical
24 that would ask me to alter those assumptions and I will
25 tell you whether that alters my opinion.

1 Q. Okay. But this statement really is a result
2 of significantly more knowledge that you have about TD's
3 conduct than you have about the bona fides of multiple
4 plaintiffs' claims. Is that a fair statement?

5 A. I am not sure what the distinction is that you
6 are trying to draw. The plaintiffs' claims are based
7 upon TD's misconduct.

8 Q. No, the plaintiffs' claims have to be based
9 upon their individual establishment of elements of a
10 cause of action including their damages, their -- those
11 individual damages were caused by a specific conduct.
12 Those are elements of proof that require a case by case
13 plaintiff evaluation by a jury to meet each of the
14 elements of the cause of action. That's a fair
15 statement, isn't it?

16 A. Only to a very limited extent in this context.
17 There was a Ponzi scheme that was operated in a uniform
18 manner. Scott Rothstein solicited investments in
19 nonexistent or fraudulent settlements and he sold those
20 investments to a variety of individuals and
21 institutional investors, and there was a uniform sales
22 pitch that was used as I understand the facts in order
23 to induce those investments. The facts that are
24 different in each case are the amount that was invested
25 and the amount that was lost so that's where I have

1 repeatedly gone back to my statement that if you want me
2 to assume that somebody really wasn't an investor in the
3 Ponzi scheme and really didn't lose money, I can make
4 that assumption and I will then tell you they don't have
5 a claim.

6 Q. Let me. Since you talked about the Coquina
7 case, let me read you a particular instruction of the
8 Coquina case and ask you if in your view it would be an
9 agreed instruction or an instruction that a judge in
10 state court were likely to give the jury in connection
11 with this. I am reading from page 22 to 27 of document
12 filed 4599 filed in the Coquina case on its docket.

13 TD Bank has asserted a waiver defense. Waiver
14 is a defense to a charge of fraud where the party
15 claiming to have been defrauded discovered or reasonably
16 should have discovered the nature of the deception
17 through ordinary diligence. The intent to weigh the
18 claim of fraud may be inferred from a party's conduct
19 and the surrounding circumstances. In order for you to
20 find that the plaintiffs waived their rights to recover
21 damages from the alleged fraud you must find that
22 Coquina had actual or constructive knowledge of
23 Rothstein's fraudulent activity yet continued to invest.

24 You understood what I read to you. Right?

25 A. I did understand what you read.

1 Q. I take it from your testimony that you are
2 assuming that for each of the plaintiffs that their
3 diligence was reasonable and they had no reason to
4 suspect that there was a Ponzi and that they didn't
5 continue to invest after either having indications of
6 things that should have led them to conduct diligence or
7 actual knowledge that there was something wrong with the
8 Rothstein investment?

9 MR. MOSKOWITZ: If I could just get an
10 objection on the record. It's a hypothetical jury
11 instruction from another case with different claims
12 and different -- it's not talking about the Beverly
13 and Marlin jury instructions.

14 A. I heard a whole lot of questions there. I am
15 having a little bit of difficulty because there seemed
16 to be a lot of questions that you have asked. You first
17 started off by asking me whether I would think that the
18 instruction you were about to read was one that would be
19 an agreed to instruction. Is that ---

20 Q. Let me -- I was trying. There is a limited
21 amount of time and I don't want to impose on your time
22 as unnecessary but isn't it the case in your experience
23 that counsel submit -- each side submits proposed jury
24 instructions?

25 A. Yes.

1 Q. And rarely do both counsel say absolutely,
2 Judge, we agree to those proposed instructions?

3 A. Well, agreement to proposed instructions is
4 very common. Agreement to all proposed instructions is
5 uncommon.

6 Q. It would be rare. Correct? Unusual?

7 A. I don't know that it would be rare but more
8 often than not there is something about the proposed
9 instructions that lawyers wind up disagreeing about and
10 require the court's intervention to dissolve that
11 disagreement.

12 Q. Do you think in Beverly and Marlin cases that
13 an instruction to the jury suggesting that they may have
14 waived their claims by not adequately diligently
15 investigating or having actual knowledge of
16 circumstances to put them on notice, don't you think it
17 a possibility that that defense will be asserted in the
18 Beverly and Marlin case?

19 MR. MOSKOWITZ: Objection. Improper
20 hypothetical.

21 A. Again, there seemed to be multiple questions
22 there so let me try to break it down and respond as best
23 I can based upon the various issues raised.

24 Do I think that the defense may attempt to
25 raise a waiver defense? The answer to that question is

1 it's pretty likely that if in the context of Coquina the
2 defense was successful in having a waiver defense raised
3 and having the jury instructed with regard to waiver,
4 the defense will probably try to do the same thing in
5 these cases.

6 Now, I haven't looked at which claims actually
7 went to the jury in Coquina and I don't know whether any
8 difference in the nature of the claims that went to the
9 jury in Coquina may have an impact upon the ability to
10 raise a waiver defense but that instruction talks about
11 two different things, a lack of adequate due diligence,
12 an actual knowledge of the fraud. It is my
13 understanding of Florida law that negligence is not a
14 defense to an intentional fraud so that to the extent
15 that there is some suggestion that a lack of due
16 diligence, a negligent investigation could bar a
17 victim's claim based upon intentional fraud, I have a
18 very strong opinion that that instruction is erroneous
19 in the context of a conspiracy and aiding, abetting and
20 intentional fraud claim.

21 To the extent that the instruction talks about
22 intentionally investing in a known fraud as opposed to
23 negligence in having failed to detect the fraud, I
24 wouldn't have any problem with that instruction at all,
25 if, in fact, there were evidence to support it, evidence

1 from which a jury could conclude that somebody actually
2 knew this was a Ponzi scheme and they figured I'm
3 getting in early enough so that I can be one of those
4 folks who manages to get paid before this all unravels.
5 Anybody in that position doesn't have a valid claim and
6 has waived any ability to prosecute a claim.

7 Q. Okay. So you dispute the concept of an
8 appropriate statement of the law that a party that could
9 have, reasonably should have discovered through ordinary
10 diligence the nature of the deception. Is that your
11 dispute?

12 A. Yes.

13 Q. To that instruction?

14 A. Yes.

15 Q. Let's talk about the variables that could
16 affect a jury verdict. Let me hit on some of them.
17 Obviously, the facts, the facts are critical to jury
18 verdict for both liability and punitive damages?

19 A. Clearly.

20 Q. And the judge has an ability to affect,
21 certainly, punitive damages because in Florida the judge
22 makes the initial determination as to whether you get to
23 have punitive damages in your case?

24 A. I agree, leave must be granted to assert a
25 claim for punitive damages.

1 Q. And while we know Judge Streitfeld is familiar
2 with this case, has these cases, the Beverly and Marlin
3 cases, and he appears to be in good health, judges get
4 ill like the rest of us. While I wouldn't expect it of
5 Judge Streitfeld, judges have problems with JQC
6 periodically or judges change their mind and decide
7 they're going to retire?

8 A. We can agree without impugning anyone's
9 integrity that there are a whole variety of reasons why
10 the judge you have today may not be the judge you have
11 tomorrow.

12 Q. And appellate courts also come into play as to
13 whether, as you have testified, you have won them, lost
14 them and gone up and had different results on appeal,
15 good and bad, that has all happened?

16 A. It has.

17 Q. That is a variable that would affect the
18 ability to get punitives or the amount of punitives.
19 Correct?

20 A. Indeed it is.

21 Q. And the quality of the experts on both sides
22 affects the ability to get an amount of punitive
23 damages. Correct?

24 A. In the context of the prosecution of the
25 underlying claim, expert testimony may impact upon the

1 compensatory recovery but experts are generally not
2 testifying as to the amount of punitive damages.

3 Q. Well, we will get to that in a moment but they
4 frequently testify in punitive damages as to the
5 defendant's ability to pay so that you don't put them
6 out of business. That's a frequent source of expert
7 testimony on punitive damages?

8 A. It is a source of testimony relating to
9 punitive damages but it's -- the pecuniary circumstances
10 of the defendant very frequently are not a significantly
11 contested matter, particularly when you are talking
12 about publicly traded entities, entities that are
13 required to file 10Ks and 10Qs. The numbers are there
14 and the numbers are what the numbers are, and often
15 there are stipulations with regard to the relevant
16 issues concerning pecuniary circumstances.

17 Q. Let me revert for a question that's been
18 handed to me, so if you think it's out order, it's not
19 my fault.

20 A. Objection, out of order.

21 Q. I don't mean out of order in the sense as
22 impolite. I mean out of chronological order.

23 MR. MOSKOWITZ: Bill does it all the time to
24 me.

25 BY MR. GENOVESE:

1 Q. Nobody is passing me stickies.

2 An investor who used the usurious rate of
3 return or was intended to receive for the investment
4 what appeared to be an usurious rate of return on
5 investment, would you consider that to be something that
6 a jury should consider in measuring whether the
7 plaintiff had knowledge of a fraudulent scheme?

8 A. We are taking this out of the context of these
9 investments.

10 Q. I am just asking you this hypothetical.

11 A. If it were to be a different kind of fraud
12 where there were an obvious violation of the usury
13 rates, that might have some relevance to the issue of
14 whether there was actual knowledge that this was a Ponzi
15 scheme, a fraudulent investment, but there would need to
16 be some evidence of actual knowledge.

17 Q. Correct. But were there evidence or any other
18 illegalities that the plaintiff was aware of surrounding
19 the scheme that would go to a jury and a jury would
20 evaluate whether that would create a defense?

21 A. I have difficulty with a question that is as
22 vaguely worded as that one is or any other knowledge of
23 illegality. You know, give me a specific example and I
24 will try to assess that -- excuse me, I'm sorry for
25 moving -- I will try to give you a response to that

1 specific example.

2 Q. In a hypothetical I gave you that you don't
3 think exists, if it is the investor who would be getting
4 the usurious rates who is conflicting Florida law as
5 well. Correct?

6 A. An investor who is charging an usurious rate
7 of interest for a loan is violating the usury laws by
8 definition.

9 Q. Getting back to the -- getting back to the
10 variables, the quality of the lawyering on both sides of
11 the case affects whether there will be punitive damages
12 and the amount of punitive damages?

13 A. That is true.

14 Q. And when you are dealing with a large
15 plaintiff group, is it possible that certain of the
16 plaintiff group would be delighted with compensatory
17 damages or something less and others want to roll the
18 dice and go the distance for maximum punitive damages is
19 that fairly the usually the case in a large plaintiff
20 group?

21 A. There could be differences of opinion as to
22 the degree of risk that plaintiffs are willing to take
23 in a litigation process, yes.

24 Q. So it's not uncommon for some plaintiffs to
25 peel off from the plaintiffs' group and settle?

1 A. It really depends upon the circumstances.
2 There are frequently joint prosecution agreements that
3 impose limitations on the ability of parties to do that
4 when an agreement has been made that the case will be
5 prosecuted jointly.

6 Q. You are not aware one way or another in
7 connection with the Beverly and Marlin case if that is
8 present here?

9 A. Don't know.

10 Q. I'll get to probably the most important
11 question suggesting that your partner Chris Searcy at
12 every JNC interview says, how would you treat lawyer
13 voir dire to judge applicants. I suspect you know the
14 answer to what he wants to hear.

15 A. Oh, I absolutely know the answer to what the
16 Chris wants to hear, yes.

17 Q. Because you want to have the jury 90 percent
18 in your corner by the time you're done with voir dire.
19 Correct?

20 A. No, sir. No, my desire is to have the jury
21 100 percent in my corner by the time I'm finished with
22 voir dire, although we all know that that's an
23 impractical and unachievable objective. Every trial
24 lawyer would like to know that every juror is
25 100 percent behind him before opening statements. It

1 doesn't happen.

2 Q. Certainly it's more difficult in federal court
3 because the judges generally are the ones that ask the
4 questions, correct, as opposed to state court?

5 A. My most recent experience in federal court has
6 been that you get at least some voir dire. There seems
7 to be some erosion of the most restrictive approaches to
8 voir dire in federal court.

9 Q. And you were asked about studies of jury
10 verdicts by Mr. Hutchinson a few moments ago. Are you
11 aware of any current or did you rely on any current
12 studies in Broward County for awards in cases involving
13 Ponzi schemes?

14 A. No, I did not rely upon any historical results
15 regarding Ponzi scheme.

16 Q. The only historical report that you have
17 relied upon has been the Coquina case?

18 A. That is correct. Well, that's not entirely
19 correct. The only historical results I have relied upon
20 are the historical results that relate particularly to
21 claims against TD Bank, not only the jury verdicts but
22 the settlements as well, which I think are relevant and
23 material.

24 Q. We will get to that in a moment. Let me ask
25 you, turning back to the use of financial information in

1 the punitive phase, I assume you have been involved in
2 offering examining or cross-examining witnesses that are
3 testifying about the financial ability of the defendant
4 to withstand a punitive award. Correct?

5 A. Yes.

6 Q. Almost every case against a major corporate
7 defendant, a bank, a corporation, an automobile
8 manufacturer, I assume has that kind of evidence that
9 goes to the jury. Correct?

10 A. Yes.

11 Q. Have you ever seen in a financial statement,
12 in any of those cases, a valuation done by a defendant
13 or its auditors of a contingency recovery, not in that
14 case but relating to an asset that they have that is a
15 contingency claim?

16 A. You are talking about a circumstance where
17 what appears in the audited financial statement is an
18 evaluation of a claim as an asset as opposed to an
19 evaluation of a claim as a liability.

20 Q. Value of an asset or a liability of an
21 unrelated case, meaning when you look at the defendants
22 financial condition have you ever seen a financial
23 statement, which lists as an asset or a liability a
24 projected punitive award?

25 A. I have seen in corporate financial statements

1 evaluations of claims as liabilities. I don't have a
2 recollection of seeing in corporate financial statements
3 an assessment or an evaluation of a claim as an asset.

4 Q. You may have seen reserves, correct, for
5 litigation?

6 A. I have seen litigation reserves and
7 expressions of the value of potential liabilities in
8 financial statements.

9 Q. But not a specific amount for punitive
10 damages?

11 A. I don't recall seeing a separate amount
12 designated as punitive damages. The overall liability
13 is assessed and where there is a punitive damages claim,
14 that's noted as part of the assessment of the overall
15 liability.

16 Q. That's the claim but not the entities' opinion
17 as to what the punitive award would be?

18 A. It's not separate and apart from the
19 compensatory award. It is an overall assessment of the
20 exposure.

21 Q. One last variable was change in the law
22 regarding the ability to get punitive damages. That's
23 always a variability that's out there?

24 A. Yes, it is.

25 Q. And, in fact, the statutes you were asked

1 about whereas I understand it changes to the common law
2 or limitations on the amount of the punitives that could
3 be recovered. Correct?

4 A. That is correct.

5 Q. Are you aware of Florida cases which suggest
6 in the context of the enactment of the statutes we
7 referred to that the right to punitive damages is not a
8 present property right?

9 A. I am.

10 Q. You agree with that statement?

11 A. I must accept it to be true. It is the
12 prevailing law of the State of Florida at the present
13 time.

14 Q. You believe the testimony you are giving today
15 is relevant?

16 A. I really think that that's a bankruptcy law
17 question, and I haven't been asked to form an opinion
18 about that. But my general understanding is that it is
19 relevant but that's not something that I am opining as
20 an expert on.

21 Q. Okay. From what I understood from your prior
22 testimony that you have never testified in this capacity
23 to opine on the likely range of punitive damage award?

24 A. Correct.

25 Q. You have never called a witness in a punitive

1 damage case for that purpose?

2 A. Well, the one circumstance that I told you
3 about.

4 Q. The Farish case?

5 A. The Farish case, right, was a case in which an
6 opinion was expressed regarding the value of the
7 punitive damage claim for purposes of assessing the
8 compensatory loss.

9 Q. Was that your case? Were you involved in
10 that?

11 A. Yes.

12 Q. Other than that case do you have a belief,
13 generally, about if you tried to offer someone just like
14 yourself in the Beverly and Marlin case to express an
15 opinion on the amount of punitive damages to be awarded
16 to each plaintiff in that case, would that be allowed by
17 the trial judge?

18 A. No.

19 Q. Why is that?

20 A. Because that would be an effort to invade the
21 province of the jury in the context of assessing the
22 amount of punitive damages that would be appropriate in
23 that case. However, I can think of circumstances where
24 that kind of testimony with regard to the Beverly and
25 Marlin cases would be appropriate and Farish is a good

1 example. If someone were to steal Mr. Moskowitz's and
2 Mr. Scherer's cases from them, if they were to
3 tortiously interfere with their contracts with their
4 clients by lying to their clients about something that
5 caused their clients to leave them, then it very well
6 may be appropriate to offer expert witness testimony
7 about the value of those claims in the hands of
8 Mr. Moskowitz and Mr. Scherer in order to assess their
9 compensatory damages for having lost cases that were
10 stolen from them that included viable punitive damages
11 claims.

12 That's the contention in which this arose from
13 Farish. While it is a highly unusual circumstance, it
14 is not one that is outside of what would be easily
15 conceivable as appropriate.

16 Q. And is the only one you could think of in
17 41 years may have occurred at the time in which you had
18 two children and no grandchildren?

19 A. What's the date on the opinion?

20 Q. I thought it was old.

21 A. It's old. It's pretty old but so are my kids.
22 My oldest grandchild is 18, so it was probably before my
23 first grandchild but we were well into kids by then.

24 MR. MOSKOWITZ: John, do you know about how
25 much time have you left?

1 MR. GENOVESE: I would say not more than half
2 hour.

3 MR. MOSKOWITZ: Do you want a break?

4 THE WITNESS: No, I am fine. Press on.

5 BY MR. GENOVESE:

6 Q. Explain to me what you believe to be the
7 concept of mitigation as it relates to a jury
8 instruction.

9 A. Mitigation is the obligation on the part of an
10 injured party to take reasonable measures to limit or
11 avoid damages which may be limited or avoided through
12 reasonable measures, and it is generally a jury question
13 as to what is reasonable under the particular
14 circumstances of both the case and the injured party.

15 Q. The example of one of the cases, if you can
16 recall, is I get terminated from my job. I then just
17 can't sit home for a year. I have to go find another
18 job. I have to try to minimize the damages to the
19 plaintiff. Right?

20 A. That would be a good example and part of what
21 I am suggesting to you is that doesn't mean you are
22 obliged to leave your family and move to Alaska to work
23 the pipeline.

24 Q. Right, because the case law talks about
25 reasonable measures without exposing oneself to

1 humiliation and undue hardship. Correct?

2 A. Without incurring financial obligations that
3 are beyond your means, yeah. I mean, there are ---

4 Q. You have seen bankruptcy restitution claims?

5 A. I have.

6 Q. You have seen that they are always relatively
7 simple documents. Correct?

8 A. Yes.

9 Q. Have you ever seen a criminal restitution
10 claim?

11 A. I have.

12 Q. A little more complicated?

13 A. Yes.

14 Q. A little?

15 A. It's been a while since I've seen a criminal
16 restitution claim and I have never compared them for
17 purposes of judging complexity.

18 Q. Do you think that a jury might conclude that a
19 victim of the Rothstein Ponzi might believe that the
20 filing of a criminal restitution claim or bankruptcy
21 claim is a step towards mitigation of the damages?

22 A. Maybe.

23 Q. You said it would be a jury question?

24 A. The reasonableness of mitigation is most
25 frequently a jury question, that's correct.

1 Q. Are you familiar with the plan of
2 reorganization that's before the Court now that this
3 deposition is taken in connection with?

4 A. Fortunately, no.

5 Q. Not all of us can say that.

6 Do you believe that a jury could consider the
7 efforts of TD Bank to support and contribute to
8 substantial recovery by the Beverly and Marlin
9 plaintiffs as an effort to cause mitigation of their
10 damages?

11 A. I think that that might be a relevant factor
12 in mitigation of punitive damages, yes. It might be.

13 Q. You previously talked about the corrective
14 behavior that's required of, that you would like to see
15 TD Bank engage in so as to limit their punitive damages.
16 Do you recall that testimony?

17 A. There was some reference to it, yes, to that.

18 Q. And you talked about corrective action
19 internally, meaning you streamlined or focused your
20 policies and procedures to prevent this kind of thing
21 that happened. That would be some remedial action that
22 they could take?

23 A. It would be.

24 Q. Are you aware that both the Banyon trustee and
25 the RRA trustee have basically mirror image settlements

1 with TD Bank? Are you aware of that?

2 A. I have read press accounts in that regard.

3 Q. And are you aware that in those settlements
4 and in the plan parties that have never made demand on
5 TD Bank, never filed lawsuits against TD Bank are to be
6 paid? Are you aware of that?

7 MR. MOSKOWITZ: Objection. Mischaracterizes
8 the evidence in the record.

9 A. I don't have knowledge of any of those
10 details, no.

11 BY MR. GENOVESE:

12 Q. But if, in fact, we assume that that's the
13 case, that there are settlements and a plan which
14 proposes to pay victims of the Rothstein Ponzi that have
15 not sued TD or made demand on TD and TD otherwise has no
16 present obligation to pay, do you believe that to be
17 using your words efforts that a jury could consider to
18 be corrective or remedial in the context of a punitive
19 damages award?

20 A. They may consider them as remedial. They
21 might also consider them as an effort to avoid a
22 significantly greater liability.

23 Q. A jury would evaluate whether that was a
24 positive thing to do or whether it is a self-serving or
25 self-interested thing to do?

1 A. It may very well be a factor that could
2 appropriately be presented to a jury in a second stage
3 proceeding, yes.

4 Q. But I can tell from the tone of your answers
5 that the opinions you formulated didn't consider what
6 I'm asking you now.

7 A. I was not in a position to consider facts that
8 I didn't know and I am telling you that I was not
9 specifically aware of those facts, that's correct.

10 Q. If there is a mechanism in place for the
11 Beverly and the Marlin plaintiffs to be paid claims from
12 the bankruptcy estates and potentially still pursue
13 their state court cases and punitive damage awards,
14 would that evidence be something the jury would consider
15 in connection with evaluating the amount of the punitive
16 award against TD Bank?

17 A. I would need to know more about that mechanism
18 and TD Bank's role and motivation in involving itself in
19 that mechanism.

20 Q. Obviously, you don't have the plan so you
21 can't -- probably if you saw it I guess it would be
22 mystery to you because to some of us we forget what's in
23 it because it's like a phone book.

24 You talk generally about the nature of
25 conspiracy and aiding and abetting.

1 Would every investor -- under your analysis,
2 would every investor who lost money in the Rothstein
3 Ponzi scheme have the same kind of claims that the
4 Beverly Marlin Group have?

5 A. You have pointed out at least one exception
6 and that one exception would be those who invested with
7 actual knowledge in advance of the fraud.

8 Q. Thank you for pointing that out.

9 A. You did.

10 Q. I didn't mean one that would have a -- they
11 would have a claim but not a very successful claim, that
12 party. That party would get an involuntary dismissal at
13 the end of the case?

14 A. Assuming that evidence were uncontested, yes.

15 Q. So, putting those people aside, every investor
16 in the Rothstein Ponzi scheme, be it directly giving
17 money to the Rothstein firm or to the Banyon entities,
18 every one of them could pursue exactly the claims that
19 Beverly and Marlin were pursuing unless they were
20 complicit or co-conspirators. Correct?

21 A. I can't think of an exception right now.

22 Q. Do you understand that the damages being
23 sought by Beverly and Marlin are reflected in the proof
24 of claims filed in the bankruptcy estate?

25 MR. MOSKOWITZ: Objection. Mischaracterizes

1 the evidence.

2 A. I have not undertaken to make any assessment
3 of what's going on in the bankruptcy case.

4 My understanding of my role has been to assess
5 the value of the Beverly and Marlin plaintiffs' claims,
6 primarily from a punitive damage perspective, assuming
7 those claims were prosecuted in circuit court.

8 BY MR. GENOVESE:

9 Q. Are you aware of any attributes of their
10 claims that would be any different than someone who
11 isn't here who just invested money through Banyon, for
12 instance, in the Rothstein Ponzi? Are you aware of
13 anything separating them from investors generally?

14 A. I am not aware of anything separating them
15 from investors generally that would have an impact upon
16 those matters about which I am opining.

17 Q. And putting affirmative defenses aside, you do
18 understand that Mr. Stettin, as trustee for the RRA
19 case, is settling a litigation subsumed by the plan
20 which asserts that the firm was harmed through
21 Rothstein's misuse of the firm and the facilitation of
22 that misuse by TD Bank, you understand Mr. Stettin has a
23 pending complaint ---

24 A. On behalf of RRA, yes.

25 Q. And while there is not yet and hopefully not a

1 Banyon case but that the trustee of Banyon has asserted
2 that it has similar claims against TD Bank for aiding
3 and abetting and conspiring with Rothstein and others in
4 perpetuating the Ponzi scheme?

5 A. Okay.

6 Q. Do you see any difference between those
7 claims, other than the affirmative defenses that could
8 be asserted against those plaintiffs, Mr. Stettin and
9 Mr. Furr on behalf of Banyon? Do you see any difference
10 fundamentally between those claims and the claims
11 asserted in the Beverly and Marlin case?

12 MR. MOSKOWITZ: Objection. Outside the scope
13 of his expertise.

14 A. Are you asking me whether there is any
15 difference between the claims by Rothstein, Rosenfeldt
16 and Adler and the claims of Ponzi scheme investors.

17 BY MR. GENOVESE:

18 Q. If you assume that Mr. Furr for Banyon and
19 Mr. Stettin for RRA are seeking to recover for the
20 benefit of Ponzi investors, do you see anything
21 different with regard to their claims?

22 A. I'm sorry, but I am confused by that question.
23 Whatever losses were sustained by RRA I assume were not
24 sustained as a consequence of RRA investing in the Ponzi
25 scheme? Is that an incorrect assumption?

1 Q. I will withdraw and rephrase the question.

2 If RRA -- if Stettin, as the Trustee of RRA,
3 were seeking to recover from damages from the Ponzi
4 scheme measured by the victim's out-of-pocket losses,
5 would the claims be essentially the same or you don't
6 have enough information to evaluate that?

7 A. I really don't.

8 Q. Do you understand the compensatory damages
9 sought in the Beverly and Marlin actions, putting aside
10 prejudgment interest, the compensatory damage portion,
11 do you understand those damages to be the out-of-pocket
12 losses that each of those investor victim's suffered?

13 A. Yes.

14 Q. Would you assume that to be a net amount? I
15 put in a hundred dollars, I got repaid \$50 and my
16 remaining claim is \$50?

17 A. I have not sought to assess the manner in
18 which the compensatory loss has been calculated. I have
19 expressed my opinion in terms of a multiple of the
20 compensatory loss, whatever it is determined to be.

21 Q. Wouldn't you assume in a Ponzi scheme --
22 because you have analogized it to fraud generally,
23 wouldn't you assume that damages in fraud generally for
24 a Ponzi scheme would consist of a party's actual
25 out-of-pocket losses?

1 A. No, not necessarily. There are two ways in
2 which to measure damages for fraud. One is the
3 out-of-pocket methodology. The other is the method of
4 the bargain methodology. Florida law recognizes both
5 and permits recovery under that theory which best makes
6 the victim of the fraud whole.

7 Q. My assumption here is that the plaintiffs
8 would not argue that they deserve the benefit of an
9 illegal bargain. Wouldn't that be your assumption?

10 A. I would assume that the plaintiffs would not
11 make an argument that they are entitled to the benefit
12 of an illegal bargain, yes.

13 Q. So, what's remaining is their actual losses,
14 their actual net losses. Is that a fair statement?

15 A. If, in fact, the bargain was illegal, what
16 remains is the out-of-pocket measure of damages.

17 Q. You have indicated or your counsel has
18 indicated in the statement you adopted, the last half of
19 the nature and substance of opinion, the first part you
20 said nonspeculative, valuable with a high probability of
21 success. The last part are, or are likely to be
22 resolved through pretrial settlement with TD based on
23 the outcome of similar cases in which investors damaged
24 by the Rothstein fraud sued TD Bank. You have that in
25 front of you apparently. Do you see the last half of

1 the first paragraph?

2 A. Yes, I see that language.

3 Q. We have only had one jury award in connection
4 -- on appeal in connection with the Coquina case.
5 Correct?

6 A. Yes.

7 Q. And you do know that that was a group but
8 essentially one plaintiff. It was an entity that was an
9 investment entity. You understand that?

10 A. Yes, I was aware of that generally.

11 Q. And the instructions in that case -- did you
12 ever look at the jury instructions?

13 A. I did not.

14 Q. Would it surprise you that as plead in
15 Mr. Scherer's motion for punitives in front of Judge
16 Streitfeld, in Coquina there were direct meetings with
17 TD Bank officers, the providing of lock letters by
18 Spinoso, these shows at the bank with the involvement of
19 the bank, you understand that the extent of those
20 instructions and the extent of privity between TD and
21 the plaintiffs are significantly different than those
22 which exist in the Beverly and Marlin case. Correct?

23 A. I have assumed that the degree of direct
24 contact in Coquina was greater than the degree of direct
25 contact in Beverly and Marlin, yes.

1 Q. And in the Coquina case that you're using as
2 precedent, the punitives to compensatory damages, what
3 was the ratio?

4 A. A little bit greater than one-to-one if recall
5 correctly.

6 Q. Okay. So it's one-to-one. The only
7 settlements that would -- let me withdraw that question.

8 Fairly early after the Coquina trial -- let me
9 withdraw that question.

10 There were multiple motions about discovery
11 issues and the failure of TD to comply with discovery
12 request appropriately during the Coquina trial. Are you
13 aware of that?

14 A. Yes.

15 Q. And after the Coquina trial in the subsequent
16 case documents that we referred to here today -- is it
17 the CDD?

18 A. CDD.

19 Q. In the Emess case you are aware that an un --
20 I wouldn't say unredacted but an actual color copy of a
21 document that had been produced in black and white in
22 the Coquina case came out in the Emess case?

23 A. Yes.

24 Q. You understand the lawyer that was to try the
25 Emess case was the same lawyer who tried the Coquina

1 case?

2 A. I don't know that I remembered that.

3 Q. Would that be a fact that would be material to
4 you if it's true?

5 A. Well, it depends on what question you are
6 going to ask me.

7 Q. Okay. Well, post Coquina verdict and post at
8 least sanction and discovery issues being raised, the
9 only settlement which has occurred in excess of
10 out-of-pocket losses that we talked about is the Emess
11 case. Are you aware of that?

12 A. I wasn't aware that that was the only
13 settlement that has occurred. I was aware that there
14 was a settlement in Emess that was in excess of the
15 out-of-pocket losses.

16 Q. Are you aware of any other settlement that is
17 in excess of the out-of-pocket losses since the Coquina
18 verdict?

19 A. What are you referring to as out-of-pocket
20 losses.

21 Q. Well, what we discussed, compensatory damages
22 consists of the plaintiffs' group's actual monetary
23 loss?

24 A. With or without prejudgment interest, with or
25 without fees and costs.

1 Q. Exclude fees and cost. Exclude prejudgment
2 interest, any settlements other than Emess, which
3 exceeded the amount of out-of-pocket losses?

4 A. I had the impression that there were other
5 matters that were resolved that compensated victims
6 beyond the straight out-of-pocket loss number and
7 included interest and expenses incurred by the
8 plaintiffs.

9 Q. Can you point to those?

10 A. I don't have a recollection.

11 Q. Razorback settlement occurred shortly before
12 its scheduled trial and shortly after the Coquina
13 verdict and the damages sought out of pocket in the
14 Razorback case exclusive of prejudgment interest and
15 attorneys' fees, did you understand to be \$186 million?

16 A. That number sounds familiar.

17 Q. So, on the heels of Coquina, Razorback settles
18 for 170 million and doesn't go to trial for punitive
19 damages. So, I am trying to understand the statement
20 here or likely to be resolved through a pretrial
21 settlement with TD Bank based on the outcome of similar
22 cases in which the investor was damaged by the Rothstein
23 fraud sued TD Bank.

24 I am trying to understand -- are you
25 suggesting that there be settlements in excess of

1 compensatory damages?

2 A. That's not what it says. It only says --

3 MR. MOSKOWITZ: Have you read it twice, John.
4 You keep reading in some other words that says in
5 excess. That's not in there at all. You said
6 based on in excess.

7 BY MR. GENOVESE:

8 Q. Or likely to be resolved through a pretrial
9 settlement with TD Bank based on the outcome of similar
10 cases in which investors damaged by the Rothstein fraud
11 sued TD Bank?

12 MR. MOSKOWITZ: Yeah.

13 A. All this says is that these are viable claims.
14 They have been successfully prosecuted already and
15 others have been resolved through pretrial settlement
16 with TD Bank.

17 BY MR. GENOVESE:

18 Q. But you said or are likely to be resolved?

19 A. Yeah.

20 Q. So you are suggesting that the Beverly and
21 Marlin plaintiffs may settle this case, do I understand
22 that statement?

23 A. What that statement is intended to convey is
24 that these are viable claims and if they are prosecuted
25 in front of a jury they are likely to be successfully

1 prosecuted and if they are not successfully prosecuted
2 in front of a jury, it will be because they will settle
3 favorably.

4 MR. MOSKOWITZ: Could we maybe take a break?
5 We have been going two hours and 40 minutes. I
6 know you said you were going to be 20 more minutes.

7 THE WITNESS: How close are we.

8 MR. MOSKOWITZ: It's been 15 minutes.

9 MR. GENOVESE: Give me ten minutes, I'll
10 finish.

11 MR. SCHERER: You've got minutes.

12 MR. MOSKOWITZ: It's seven hours time. We can
13 get technical on tape time but it's been seven
14 hours of depositions. We started at 10:00.

15 MR. GENOVESE: We started at 10 after 10:00
16 but you can penalize me for the ten minutes.

17 BY MR. GENOVESE:

18 Q. Or likely to be resolved through pretrial
19 settlement with TD Bank.

20 What I am trying to understand is, are you
21 suggesting that in the face of potential punitive
22 damages that there will be a settlement -- there may be
23 a settlement by the Beverly and Marlin Group?

24 A. I think that the potential punitive damage
25 exposure is a factor that is likely to be taken into

1 consideration whether the cases are tried or whether
2 they are settled, but this portion of the opinion is
3 only intended to convey that if the cases are prosecuted
4 through trial they are likely to be prosecuted
5 successfully and the only reason that I see for their
6 not being successfully prosecuted through trial is that
7 there is a settlement agreement.

8 Q. What I am trying to get at and these are --
9 these are not your words but you adopted these words, I
10 am trying to understand if you are suggesting that the
11 existence of potential punitive damages claims would up
12 the likely settlement amount?

13 A. That's not addressed in this paragraph. I
14 don't think this paragraph says anything at all about
15 punitive damages. That's simply not addressed in that
16 paragraph, but if you are asking me whether I have an
17 opinion as to whether a viable punitive damage claim has
18 an influence on the likelihood of settlement, the answer
19 to that question is absolutely, yes, I believe that a
20 viable punitive damages claim does have an impact on
21 settlement negotiations.

22 Q. So, Razorback had a viable punitive damages
23 claim. It was about to go to the jury. Are you
24 familiar with the FEP settlement?

25 A. No.

1 Q. You are familiar with the Emess settlement?

2 A. Yes.

3 Q. And you mentioned other settlements which you
4 believed had components beyond compensatory damages but
5 you don't recall?

6 A. That is correct, yes.

7 Q. So the existence of punitive damages claim
8 today other than the unnamed ones that you can't respond
9 to have not increased settlements beyond compensatory
10 damage claims?

11 MR. MOSKOWITZ: Misstates again the witness.
12 It's not in here, increasing the amount of the
13 settlement.

14 MR. GENOVESE: I am asking him a question. I
15 am not asking him what he has read.

16 MR. MOSKOWITZ: You keep telling him. He
17 keeps saying he is going to increase the amount of
18 settlement.

19 BY MR. GENOVESE:

20 Q. He has conceded that the punitive damages are
21 likely in a negotiation, as I understand his testimony,
22 going to increase the amount of the settlement. Isn't
23 that what you said?

24 A. Yes, that is what I said.

25 What I have not said is that the pendency of a

1 punitive damage claim will necessarily increase the
2 value of the settlement beyond the total compensatory
3 losses. It is -- it is often the case where it is the
4 presence of a viable punitive damage claim that enables
5 a plaintiff who has sustained a loss to get 100 percent
6 of their compensatory damages in a settlement context.
7 You usually don't get a hundred percent of your
8 compensatory damages when a case settles because a
9 settlement is a compromise.

10 Q. I understand.

11 A. It is a compromise of the total value of all
12 of your claims.

13 Q. So, was I -- I mean, I was just inferring that
14 this is what you were suggesting by this statement. Am
15 I wrong in making that?

16 A. You are wrong. That paragraph says nothing
17 about punitive damages.

18 Q. All right. So, with the existence of punitive
19 damages claim, put your statement aside, John Mullin is
20 here somewhere representing Morse. Morse settled for
21 less than compensatory damages, correct? Do you know?

22 A. I have a general recollection of that, yes.

23 Q. And FEP, you are familiar that they settled
24 for less than punitive damages?

25 A. Okay.

1 Q. And Emess got 122 percent or some number of
2 punitives. Razorback got slightly less than
3 compensatory damages?

4 A. Okay.

5 Q. Is the only thing that makes your projection
6 of potential punitive damage here so much larger -- let
7 me rephrase the question.

8 If we have no settlements for more than
9 122 percent of out-of-pocket losses and you are
10 testifying that the presence of punitive damages claims
11 will likely cause parties to settle for their
12 compensatory losses, what relevance is -- what is
13 your -- is it one to nine times? I forget what your
14 projected is.

15 A. Four to nine.

16 Q. Four to nine times. What relevance is that
17 range in this calculus?

18 A. Let me answer your question by focusing on
19 what it is that I am opining about. I have not been
20 asked to express an opinion as to the likely figure at
21 which the Marlin and Beverly cases will settle. That's
22 a different question than what I consider to be the
23 likely range of punitive damages if this case were to be
24 tried to a jury.

25 Cases settle if they settle at all for less

1 than the full value of the claim because settlements are
2 compromises. So, what I have perceived my role to be is
3 not to project the settlement value of the claims but to
4 express an opinion regarding the value of punitive
5 damages in terms of a multiple of compensatory damages
6 if this case were ultimately to be tried.

7 As you, yourself, have pointed out, there are
8 a wide variety of factors that influence whether a case
9 will be tried or will be settled and the risk tolerance
10 of the plaintiffs is a major factor in making that
11 determination.

12 The pecuniary circumstances of the plaintiffs
13 is a major factor in making that determination. I have
14 had -- I have had clients with very, very strong and
15 valuable claims who have decided to settle those claims
16 for significantly less than I thought they ought to
17 settle them for because they have been under financial
18 duress and I understand that and that's an appropriate
19 consideration to assess in deciding whether the case is
20 going to be settled.

21 I have had other clients who have had what I
22 considered to be extremely strong and valuable claims
23 who simply were very risk adverse and preferred to seize
24 the opportunity to get a hundred percent of their
25 compensatory losses rather than take the risks that

1 might be involved in continuing to prosecute the
2 punitive damage claim. And one of the reasons why
3 plaintiffs get rewarded for going to trial and getting
4 punitive damages and having the staying power to
5 withstand the risks of an appeal and ultimately getting
6 those punitive damages to put in their pockets is
7 because they have undertaken and faced all of those
8 risks.

9 MR. GENOVESE: I think I am done. If we can
10 just take a few minutes and consult.

11 MR. MOSKOWITZ: I may have a few questions as
12 well.

13 MR. GENOVESE: If we can confer quickly, we
14 can probably avoid any of Mike's questions.

15 (Discussion held off the record.)

16 (A recess was taken from 5:15 p.m. to
17 5:21 p.m.)

18 THE VIDEOGRAPHER: The time is 5:21. We are
19 back on the video record.

20 BY MR. GENOVESE:

21 Q. Mr. Scarola, I think I have two questions.

22 A. I have heard that before.

23 Q. Other than what you have discussed here today,
24 in terms of the materials you reviewed and relied on,
25 you have told us all of everything that you can recall

1 that you have relied on that you expect to rely on in
2 your testimony at the confirmation hearing?

3 A. I have described everything that I have relied
4 upon and the case specific materials have been provided
5 to you in their entirety.

6 Q. Do you presently or do you anticipate
7 expressing an opinion at the confirmation hearing on
8 matters other than the opinions expressed today?

9 A. I intend to answer whatever questions are
10 asked of me and I think that you have been collectively
11 fairly comprehensive in covering relevant matters, but I
12 don't know.

13 Q. But you haven't been asked to express opinions
14 other than what we have discussed today. Correct?

15 A. I haven't been asked to express opinions
16 except those that I have described at least in general
17 terms today.

18 Q. I lied. That's three questions. I asked you
19 three questions. Thank you for your courtesy,
20 Mr. Scarola.

21 A. Thank you for your courtesy and lunch. Thank
22 you for lunch, also, whoever bought lunch.

23 MR. GENOVESE: Berger Singerman bought lunch.

24 MR. RIGOLI: I have no questions.

25 MR. GOLDBERG: No question.

CROSS-EXAMINATION

1
2 BY MR. MOSKOWITZ:

3 Q. Mr. Scarola, I have one question.

4 How do you compare the conduct regarding
5 specifically for punitive damages from TD Bank in this
6 case as to all other cases that you have dealt with in
7 your career.

8 A. It is one of the most aggravated and valuable
9 punitive liability claims that I have seen in my
10 experience.

11 MR. MOSKOWITZ: Okay. No further questions.

12 Thank you.

13 THE VIDEOGRAPHER: We are off the record.

14 It's 5:23.

15 (The deposition was concluded at 5:25 p.m.)
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CERTIFICATE OF OATH

STATE OF FLORIDA
COUNTY OF MIAMI-DADE

I, the undersigned authority, certify that
JOHN JACK SCAROLA personally appeared before me and was
duly sworn.

WITNESS my hand and official seal this 3rd day
of July, 2013.

Patricia Diaz, RPR, FPR
Notary Public - State of Florida
My Commission No. DD 973059
My Commission Expires 04/17/2014

REPORTER'S CERTIFICATE

STATE OF FLORIDA
COUNTY OF MIAMI-DADE

I, Patricia Diaz, Registered Professional Reporter, Florida Professional Reporter and Notary Public in and for the State of Florida at large, do hereby certify that JOHN JACK SCAROLA was by me first duly sworn to testify the whole truth; that I was authorized to and did report said deposition in stenotype; and that the foregoing pages, numbered from 1 to 219, inclusive, are a true and correct transcription of my shorthand notes of said deposition.

I further certify that said deposition was taken at the time and place hereinabove set forth and that the taking of said deposition was commenced and completed as hereinabove set out.

I further certify that I am not an attorney or counsel of any of the parties, nor am I a relative or employee of any attorney or counsel of party connected with the action, nor am I financially interested in the action.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

IN WITNESS WHEREOF, I have hereunto set my hand this 3rd day of July, 2013.

Patricia Diaz, RPR, FPR

OUELLETTE & MAULDIN COURT REPORTERS
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Miami, Florida 33130

July 3, 2013
John Jack Scarola
c/o Adam Moskowitz, Esquire
Kozyak, Tropin & Throckmorton, P.A.
2525 Ponce de Leon Boulevard
Ninth Floor
Miami, Florida 33131-2335

IN RE: Rothstein Rosenfeldt Adler, Banyon 1030-32
CASE NOS: 09-34791-RBR and 10-33691-RBR

Please take notice that on Tuesday, July 2, 2013, you gave your videotaped deposition in the above-referenced matter. At that time, you did not waive signature. It is now necessary that you sign your videotaped deposition.

Please call our office at the number listed below to schedule an appointment between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday. You can also have your counsel send you a copy of the transcript and avoid coming into our office.

At the end of the transcript, you will find an errata sheet. As you read your videotaped deposition, any changes or corrections that you wish to make should be noted on the errata sheet, citing page and line number of said change. DO NOT write on the transcript itself. Once you have read the transcript and noted any changes, be sure to sign and date the errata sheet and return these pages.

If you do not read and sign the videotaped deposition within a reasonable time, the original, which has already been forwarded to the ordering attorney, may be filed with the clerk of the court. If you wish to waive your signature, sign your name in the blank at the bottom of this letter and return it to us.

Sincerely,

Patricia Diaz, RPR, FPR

I do hereby waive my signature:

John Jack Scarola