No. _____

In the
Supreme Court of the United States

THE WALL GUY, INC.;
JEFFREY FRYE; JR CONTRACTORS,
Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as receiver for The First State Bank,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR CERTIORARI

Steven T. Cook
Counsel of Record
COOK LAW OFFICES, PLLC
P. O. Box 549
Barboursville, WV 25504
(304) 521-1304
cooklaw31@gmail.com

Counsel for Petitioners

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

TABLE OF CONTENTS
Appendix

Page:

[FILED MARCH 18, 2024]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1414

THE WALL GUY, INC.; JEFFREY FRYE; JR CONTRACTORS,

Plaintiffs - Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for The First State Bank,

Defendant - Appellee.

No. 21-1387

THE WALL GUY, INC.; JEFFREY FRYE; JR CONTRACTORS,

Plaintiffs - Appellees,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for The First State Bank,

Defendant - Appellant.

No. 23-1380

THEW ALL GUY, INC.; JEFFREY FRYE; JR CONTRACTORS,

Plaintiffs - Appellees,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for The First State Bank,

Defendant - Appellant.

Appeals from the United States District Court for the Southern District of West Virginia, at Huntington. Robert C. Chambers, District Judge. (3:20-cv-00304)

Argued: January 23, 2024 Decided: March 18, 2024

Before AGEE, WYNN, and THACKER, Circuit Judges.

Dismissed by published opinion. Judge Wynn wrote the opinion, in which Judge Agee and Judge Thacker joined.

ARGUED: Steven Todd Cook, COOK LAW OFFICES, PLLC, Barboursville, West Virginia, for Appellants/Cross-Appellees. John William Guarisco, FEDERAL DEPOSIT INSURANCE

CORPORATION, Arlington, Virginia, for Appellee/Cross-Appellant. **ON BRIEF:** B. Amon James, Assistant General Counsel, J. Scott Watson, Senior Counsel, FEDERAL DEPOSIT INSURANCE CORPORATION, Arlington, Virginia, for Appellee/Cross-Appellant.

WYNN, Circuit Judge:

This case originates from a lending relationship between Plaintiffs-Jeffrey Frye and his companies The Wall Guy, Inc., and JR Contractors- and First State Bank ("the Bank"). When that relationship soured, the parties sued each other. What followed was nearly a decade of litigation, including two state-court lawsuits, a jury trial, post-trial motions, removal to federal district court, and motions practice in that court.

As it comes to us on appeal, however, this case turns on the threshold question of whether Plaintiffs have properly invoked our appellate jurisdiction. Because we conclude that they have not, we dismiss the appeal for lack of jurisdiction.

I.

We begin with the relevant factual history.

In January 2016, Plaintiffs sued the Bank in West Virginia state court for, in relevant part, breach of contract ("First Case"). A few months later, the Bank sued Plaintiffs-also in state court- alleging that they had defaulted on various loans ("Second Case"). The court in the Second Case found Plaintiffs had no equity in certain collateral and directed it be surrendered to the Bank. Plaintiffs did not seek timely reconsideration of or appeal that order, and

there were no further entries on the docket in the Second Case until 2019.

Meanwhile, in August 2018, the First Case proceeded to a jury trial. The jury awarded Plaintiffs $1,500,000. Following the verdict, the parties entered into an agreement to secure the judgment ("the Pledge Agreement"), with specific real estate identified as collateral.

In March 2019, the state court granted the Bank's request for remittitur of the jury verdict. The court concluded that the jury's award must have included some inappropriate items, namely, attorneys' fees and costs and the value of the repossessed collateral in the Second Case. Accordingly, the court reduced the verdict to $524,023. The court then entered final judgment in that amount and notified Plaintiffs that they could accept the judgment, request a new trial, or appeal. Plaintiffs elected to appeal to the Supreme Court of Appeals of West Virginia. [1] The Bank filed a cross-appeal. *Wall Guy, Inc. v. FDIC,* No. CV 3:20-0304, 2021 WL 838889, at *2 (S.D.W. Va. Mar. 5, 2021). In June 2019, the state trial court stayed any further action in the Second Case pending resolution of the appeal in the First Case. *Id.*

Before the appeal in the First Case could be resolved, however, the Bank was found to be insolvent, resulting in the Federal Deposit Insurance Corporation being appointed as receiver ("FDIC-R")

---

[1] At the time, West Virginia did not have an intermediate appellate court. That has since changed: in 2021, the West Virginia Legislature created an Intermediate Court of Appeals and mandated that it was to "be established and operable on or before July 1, 2022." 2021 W. Va. Acts 875 (codified at W. Va. Code § 51-l 1-3(b)).

on April 3, 2020. Pursuant to its authority under 12 U.S.C. § 1819(b)(2)(B), the FDIC-R removed both cases-the First and Second-to federal district court on April 30, 2020. The court consolidated both cases and then stayed them while Plaintiffs completed the mandatory administrative-claims process.

After the stay was lifted, the district court issued an order dated March 5, 2021, concluding that, under this Court's decision in *Resolution Trust Corp. v. Allen,* 16 F.3d 568 (4th Cir. 1994), upon removal, it had to adopt the state-court judgment as its own. *Wall Guy,* 2021 WL 838889, at *3. The court noted that, once it did so, the ordinary post-judgment remedies would be available; for example, the parties could file motions pursuant to the Federal Rules of Civil Procedure or could appeal. *Id.* Accordingly, the district court adopted the state-court remittitur award of $524,023 and gave Plaintiffs the option of either accepting the remittitur or electing a new trial. *Id.* at *3-4. Three days later, Plaintiffs filed a response accepting the remittitur. In light of that response, on March 15, 2021, the district court entered judgment in favor of Plaintiffs in the amount of $524,023 ("2021 Judgment").

On April 7, 2021, the FDIC-R timely filed a Rule 59(e) motion to amend the 2021 Judgment and a notice of appeal. Four days later, Plaintiffs also filed a Rule 59(e) motion and notice of appeal. Plaintiffs' notice of appeal stated that they thereby appealed to this Court "from Judgement Order [ECF No. 38] entered in this action on March 15th, 2021 and all orders and ruling submitted therein, including but not limited to, the Memorandum Opinion Order [ECF No. 34] entered on March 5th, 2021, and/or any rulings

on pending Rule 59(e) post-judgment motions etc." J.A. 1384 (bracketed text in original). [2]

This Court consolidated the cross-appeals and suspended proceedings on appeal pending resolution of the Rule 59(e) motions. In the notice regarding suspension of the proceedings, this Court "directed [the parties] to immediately inform [the Clerk's] [O]ffice in writing of the district court's ruling on the motion [for reconsideration] and whether they intend to appeal the ruling." Jurisdictional Notice at 1, *Wall Guy, Inc. v. FDIC,* No. 21-1414 (4th Cir. Apr. 15, 2021), ECF No. 4. Later, this Court also remanded the case for the limited purpose of allowing the district court to rule on those motions. In our remand order, we directed the parties to submit regular reports on the status of the motions.

In October 2022, the FDIC-R filed an emergency motion in the district court to enforce a provision of the Pledge Agreement requiring the parties to "negotiate" a new Pledge Agreement "without delay and in good faith" if there was a remittitur. J.A. 1344. The FDIC-R contended that, "[b]ecause Plaintiffs accepted a remittitur reducing the judgment from $1.5 million to $524,023, and in order to clear recent cloud-on-title issues on the existing collateral, the [FDIC-R] attempted to exercise its rights under" that provision, but was rebuffed. J.A. 1429. Plaintiffs opposed the FDIC-R's emergency motion and filed their own motion to enforce the Pledge Agreement, arguing that the FDIC-R had breached the "deed of trust" attached to the Pledge Agreement by selling "at least two pieces of property" secured by that

---

[2] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

agreement. Plaintiffs' Motion to Enforce the Parties' Pledge Agreement at 4, *Wall Guy, Inc. v. FDIC,* No. 3:20-cv-00304 (S.D.W. Va. Nov. 1, 2022), ECF No. 76; *see* J.A. 1346.

On November 17, 2022, the district court resolved the motions pertaining to the Pledge Agreement, granting the FDIC-R's motion and denying Plaintiffs' ("Pledge Agreement Order"). The court ordered the FDIC-R "to provide substitute collateral in the form of a letter of credit for $524,023" and Plaintiffs "to release their judgment liens on the properties listed in the Pledge Agreement" within seven days of receipt of that letter of credit. J.A. 1451.

Plaintiffs did not file a notice of appeal in response to the district court's entry of the Pledge Agreement Order. Instead, the next filing on the district court docket was entered on February 7, 2023, when the district court entered an order resolving the pending Rule 59(e) motions, denying Plaintiffs' motion and granting the FDIC-R's motion in part ("Rule 59 Order").

As to the First Case, the court concluded that, while the jury's verdict was excessive, remittitur was improper because there was no way for the state court to fairly reduce the verdict without engaging in improper speculation about the jury's calculations. But the court noted that, while this scenario would normally require a new trial, no new trial was warranted because the breach-of-contract claim was statutorily unenforceable against the FDIC-R.

As to the Second Case, because the court concluded it was unclear whether the FDIC-R sought further relief in that matter, the court requested clarification from the FDIC-R. That resulted in the

FDIC-R moving to dismiss the Second Case without prejudice.

The district court then entered judgment on February 15, 2023, granting final judgment in favor of the FDIC-R on the First Case while dismissing the Second Case without prejudice ("2023 Judgment") (together with the Rule 59 Order, the "2023 Orders"). Plaintiffs again did not file a notice of appeal on the district court docket.

Instead, on February 28, 2023, Plaintiffs fi led a status report before this Court, noting that the district court "rendered an Order on February 15th, 2023 resolving the pending motions [for reconsideration]." Status Report at 1, *Wall Guy, Inc. v. FDIC,* No. 21-1414 (4th Cir. Feb. 28, 2023), ECF No. 30. They stated that "[t]he matter appears ripe for cross-appeal." *Id.* And on March 6, 2023, Plaintiffs filed the standard docketing-statement form this Court requires of counseled appellants. *See* 4th Cir. R. 3(b); Docketing Statement, *Wall Guy, Inc. v. FDIC,* No. 21-1414 (4th Cir. Mar. 6, 2023), ECF No. 33 [hereinafter "Docketing Statement"].

On April 7, 2023, the FDIC-R filed a timely "notice of conditional cross-appeal," seeking a new trial in the event this Court "reverses or vacates in whole or in part any order or judgment that [P]laintiffs have appealed or may appeal from." J.A. 1477. We consolidated that appeal with the earlier appeals.

On January 4, 2024, a few weeks before oral argument in this case, we ordered supplemental briefing on three questions:

1. What specific authority under Federal Rules of Appellate Procedure 3 and 4

> establishes the Court's subject matter jurisdiction (or lack thereof) to review the [Pledge Agreement Order]?
>
> 2. (a) What specific authority under Federal Rules of Appellate Procedure 3 and 4 establishes the Court's subject matter jurisdiction (or lack thereof) to review the [2023 Judgment]?
>
> (b) Are any potential references to the [2023 Judgment] in [Plaintiffs'] March 6, 2023 docketing statement, including in the "Issues" and "Nature of Case" sections, sufficient to render that docketing statement the "functional equivalent" of a notice of appeal under *Torres v. Oakland Scavenger Co.,* 487 U.S. 312, 317 (1988), and its progeny, for purposes of appealing the [2023 Judgment]?

Supplemental Briefing Order at 2- 3, *Wall Guy, Inc. v. FDIC,* No. 21-1414 (4th Cir. Jan. 4, 2024), ECF No. 61. The parties filed supplemental briefs addressing our questions.

II.

In their Opening Brief, Plaintiffs take issue with four separate orders: the 2021 Judgment, the Pledge Agreement Order, and the 2023 Orders (the Rule 59 Order and the 2023 Judgment). But upon being faced with Plaintiffs' presentation of the issues, "[o]ur first obligation is to ascertain whether we possess jurisdiction [over] an appeal, an issue we assess *de nova." In re Grand Jury 2021 Subpoenas,* 87 F.4th 229, 244 (4th Cir. 2023) (quoting *Dickens v. Aetna Life Ins. Co.,* 677 F.3d 228, 231 (4th Cir. 2012)). Most

instructive here, "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell,* 551 U.S. 205, 214 (2007); *see* 28 U.S.C. § 2107; Fed. R. App. P. 3(a)(l).

We typically enforce Federal Rule of Appellate Procedure 3 's notice-of-appeal requirement with some leniency, including for counseled parties. *E.g., Jackson v. Lightsey,* 775 F.3d 170, 176 n.2 (4th Cir. 2014). That's because the Supreme Court has instructed that "courts should construe Rule 3 liberally when determining whether it has been complied with." *Smith v. Barry,* 502 U.S. 244, 248 (1992). Still, "noncompliance" remains "fatal to an appeal," even for pro se litigants. *Id.* These "twin commands from the Supreme Court- that Rule 3 is jurisdictional, but that it should be construed liberally- inherently give courts some flexibility about when to apply Rule 3 's jurisdictional bar and when to use liberal construction to rescue a facially deficient notice of appeal." *Diaz Aviation Corp. v. Airport Aviation Servs., Inc.,* 716 F.3d 256, 262 (1st Cir. 2013).

Further, despite any leniency or flexibility that might apply, the ultimate "burden of establishing" that we have appellate jurisdiction "rests upon the party asserting jurisdiction." *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.,* 683 F.3d 577, 584 (4th Cir. 2012). And it is well stated that "[w]here an appellant fails to lead, we have no duty to follow. It is the appellant's burden, not ours, to conjure up possible theories to invoke our legal authority to hear her appeal." *Raley v. Hyundai Motor Co.,* 642 F.3d 1271, 1275 (10th Cir. 2011) (Gorsuch, J.). Thus, while in some cases we may "use liberal construction to rescue a facially deficient notice of appeal," *Diaz Aviation Corp.,* 716 F.3d at 262, in

others we may choose to hold an appellant to the burden of proving "that necessary preconditions to the exercise of appellate jurisdiction-including the timely filing of a notice of appeal- have been fulfilled," *Porchia v. Norris,* 251 F.3d 1196, 1198 (8th Cir. 2001).

In this case, Plaintiffs have not met their burden to establish appellate jurisdiction.

Despite being notified of a possible jurisdictional defect multiple times, they have not offered any valid explanation of why we can exercise jurisdiction over the 2023 Orders-even though, as explained below, that question is dispositive of our jurisdiction over all aspects of this appeal. Moreover, we decline to "rescue" Plaintiffs because even if we were to reach the merits, it appears Plaintiffs' arguments would fail. So we dismiss these appeals for lack of jurisdiction.

A.

We start with the 2023 Orders, which are the most recent and the most important orders for this appeal. Throughout their briefing on appeal, Plaintiffs' primary argument for appellate jurisdiction over the 2023 Orders has rested on their April 2021 notice of appeal. But for the reasons we give below, that notice was insufficient to give us appellate jurisdiction over the 2023 Orders.

On April 11, 2021, Plaintiffs filed a motion to reconsider the 2021 Judgment, followed by a notice of appeal pertaining to that judgment. Under Rule 4, that meant that the notice became effective upon entry of the Rule 59 Order in 2023. Fed. R. App. P. 4(a)(4)(B)(i) ("If a party files a notice of appeal after the court announces or enters a judgment- but before

it disposes of [any motions to reconsider]- the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered."). But it became effective *only for the judgment or order it designated* (and any orders that merged into that judgment or order). Fed. R. App. P. 3(c)(1)(B), (4). The 2021 notice of appeal designated the 2021 Judgment as a judgment being appealed, so it was effective as to that judgment. But the question at hand is whether it could also effectively designate the later-filed 2023 Orders by designating for appeal, in April 2021, "any rulings on pending Rule 59(e) post-judgment motions etc." J.A. 1384. It could not.

On that point, the Federal Rules of Appellate Procedure provide clear instruction. Under Rule 4(a)(4)(B)(ii), " [a] party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), [such as a Rule 59 motion to reconsider,] or a judgment's alteration or amendment upon such a motion, *must file a notice of appeal, or an amended notice of appeal-in* compliance with Rule *3(c)-within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."* Fed. R. App. P. 4(a)(4)(B)(ii) (emphases added); *accord* 20 James Wm. Moore et al., Moore's Federal Practice – Civil § 303.21[3][c][vii] (2023) ("The designation in the notice of appeal of the final judgment does not usually include any orders that are entered after the judgment. An amended notice of appeal or a second notice of appeal is required to raise these later rulings."). As the Supreme Court has noted, Rule 4 "contemplate[s] that the [appellant] will file the notice of appeal *after* the district court has decided the issue sought to be appealed," *Manrique v.*

United States, 581 U.S. 116, 120 (2017) (discussing Rule 4(b)(l)), because it sets the deadlines as running *"after* entry of the judgment or order appealed from," Fed. R. App. P. 4(a)(l)(A), (B) (emphasis added).

The Rules do allow for an earlier-filed notice of appeal to encompass a later-filed entry of the order in particular circumstances. Notably, " [a] notice of appeal fi led *after the court announces a decision or order- but* before the entry of the judgment or order- is treated as filed on the date of and after the entry." Fed. R. App. P. 4(a)(2) (emphasis added); *accord* Fed. R. App. P. 4(b)(2) (same in the criminal context). "By its own terms," however, this Rule "applies only to a notice of appeal filed after a [decision] has been 'announce[d]' and before the judgment ... is entered on the docket." *Manrique,* 581 U.S. at 123 (second alteration in original) (discussing Rule 4(b)(2)). And at the time Plaintiffs filed the April 202 l notice of appeal, the district court had not yet announced its decision related to the Rule 59 motions. So, the April 2021 notice of appeal could not provide the basis for an appeal from the 2023 Orders.

As one leading treatise puts it, "[g]iven that Rule 4(a)(2) refers to '[a] notice of appeal filed after the court announces a decision or order,' it is unsurprising that courts find that the Rule does not afford relation forward for a notice of appeal that is filed *before* the court announces the decision that the would-be appellant later seeks to challenge." 16A Charles Alan Wright et al., Federal Practice and Procedure§ 3950.5 (5th ed. 2019 & Supp. 2023) (alteration in original); *e.g., Marshall v. Comm'r Pa. Dep 't of Corr.,* 840 F.3d 92, 95 (3d Cir. 2016) ("Rule 4(a)(2) does not apply here because Marshall filed his notice of appeal before the District Court announced

its decision."); *United States v. Hansen,* 795 F.2d 35, 37 (7th Cir. 1986) ("A notice of appeal filed (as in this case) before the announcement of judgment does not satisfy the condition in Rule 4(a)(2) for postponing the notice's effective date."). This rule makes good sense: before a decision is made, neither party knows whether that decision will be favorable or adverse to their interests.

Circuits confronted with similar situations, where a notice of appeal referred to a *pending or imminent* motion for which no decision had yet been announced, have agreed with our conclusion that such a notice is insufficient to confer appellate jurisdiction. [3] In the Third Circuit case *Carrascosa v. McGuire,* the district court entered a final order, after which the appellant filed a motion for reconsideration and then a timely notice of appeal. *Carrascosa v. McGuire,* 520 F.3d 249, 251 (3d Cir. 2008). The notice stated that the appellant was appealing the final order and that, because of the pending motion for reconsideration, she would "withdraw [the] Notice of Appeal, or file an amended notice of appeal, as may become necessary." *Id.* More than five months after the district court

---

[3] *Moore's Federal Practice* notes an exception not at issue here: that " [a] circuit court may hear the appeal from a postjudgment order if it finds that the postjudgment order is inextricably entwined with issues that have been properly raised in the notice of appeal." Moore et al., *supra,* § 303.21[3][c][vii]. "For example, an order fixing costs entered in the district court during the pendency of an appeal has been found to be an inseparable part of that pending appeal and was therefore available for review in the circuit court, even though the notice of appeal had not (indeed could not have) mentioned the order." *Id.* Because the issue is not before us, we do not evaluate whether such an exception applies, or should apply, in this Circuit.

denied the motion for reconsideration, the appellant filed an amended notice of appeal. *Id.* at 252. The appellant conceded that this amended notice was untimely. *Id.* But she contended that the *original* notice was sufficient to appeal not only the final order, but also the later denial of reconsideration, because it "'specifically referenced the pending reconsideration motion,' thereby signaling her intention 'to seek an appeal of the denial of the Motion for Reconsideration.'" *Id.*

The Third Circuit rejected the appellant's argument. It held that, under the Rules, the appellant's original notice of appeal "became effective on ... the date that the District Court entered its order denying her Motion for Reconsideration." *Id.* at 253. But if the appellant "wanted her appeal 'to encompass any challenge to' the District Court's denial of *that* motion, she was required to file a new or amended notice of appeal within the ... time limit imposed by the Federal Rules." *Id.* (emphasis added) (quoting *United States v. McGlory,* 202 F.3d 664, 668 (3d Cir. 2000) (en banc)); *accord United States* v. *Brown,* No. 21-5045, 2021 WL 3027858, at *2 (6th Cir. June 2, 2021) (per curiam) (concluding that the court lacked jurisdiction over an appeal of the district court's denial of a motion for reconsideration where the notice of appeal was filed at the same time as the motion, noting that "[a] notice of appeal filed before a ruling is made is premature").

Similarly, in *Bogle v. Orange County Board of County Commissioners,* the Eleventh Circuit considered a situation where the district court entered judgment as a matter of law against the plaintiff on April 7, 1997. *Bogle* v. *Orange Cnty. Bd. of Cnty. Comm'rs,* 162 F.3d 653, 656 (11th Cir. 1998).

Shortly thereafter, the defendant filed notice of its intent to seek Rule 11 sanctions, and the plaintiff subsequently filed a timely notice of appeal. *Id.* The notice of appeal stated that the plaintiff was appealing "all Orders of th[e district] Court, including the Final Judgment rendered on April 7, 1997." *Id.* at 660.

Then, a few days after the plaintiff filed his notice of appeal, the defendant filed its Rule 11 motion, which the district court ultimately granted. *Id.* at 656. On appeal, the plaintiff sought to challenge not only the entry of judgment as a matter of law, but also the imposition of sanctions. *Id.*

The Eleventh Circuit concluded that the earlier-filed notice of appeal was insufficient to confer appellate jurisdiction over the imposition of sanctions. *Id.* at 661. It held that the fact "[t)hat an order imposing sanctions may have been contemplated" at the time the plaintiff noticed his appeal did not "change the fact that," at that time, "a decision regarding sanctions had not yet been announced and sanctions had not yet been imposed." *Id.* The court further noted that, "[a]lthough notices of appeal are to be given expansive rather than hypertechnical construction, Rule 3(c) requires that a notice of appeal designate an existent judgment or order, not one that is merely expected or that is, or should be, within the appellant's contemplation when the notice of appeal is filed." *Id.*

We agree with these other circuits: a notice of appeal filed *before* the district court has even announced a decision on a future or pending motion cannot confer appellate jurisdiction over an appeal from a later order related to that motion. The April

2021 notice of appeal therefore cannot create appellate jurisdiction over the February 2023 Rule 59 Order or 2023 Judgment.

Instead, for Plaintiffs to appeal the 2023 Orders, they needed to "file a notice of appeal, or an amended notice of appeal-in compliance with Rule 3(c)-within the time prescribed by [Rule 4] measured from the entry of the" Rule 59 Order. Fed. R. App. P. 4(a)(4)(B)(ii); *see Hatton v. Thomasville Furniture Indus., Inc.,* 2 F. App'x 302, 304 n.2 (4th Cir. 2001) (per curiam) ("Because [the appellant] did not amend his notice of appeal after the district court's denial of his motion for reconsideration, the issues raised in his motion for reconsideration are not before the Court." (citing *McGlory,* 202 F.3d at 668)); *Carrascosa,* 520 F.3d at 253 (same); *Bracey v. Lancaster Foods LLC,* 838 F. App'x 745, 748 (4th Cir. 2020) (unpublished but orally argued) (concluding that the new-or-amended-notice requirement is jurisdictional). This they did not do.

B.

In many cases, the appellant's failure to fi le a formal notice of appeal from a particular judgment would nevertheless not end the inquiry because another, timely filed document would be able to serve as the functional equivalent of that notice. Here, however, we cannot discern from the briefs that such a document exists, and under the circumstances of this case, we decline to independently seek out justifications for exercising jurisdiction.

Under Rule 3(a)(l), "[a]n appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4." Fed.

R. App. P. 3(a)(l). And under Rule 3(c)(l), "[t]he notice of appeal must: (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice ... ; (B) designate the judgment-Dr the appealable order-from which the appeal is taken; and (C) name the court to which the appeal is taken." Fed. R. App. P. 3(c)(1). The Supreme Court has held that these are jurisdictional requirements.[4] *Torres,* 487

---

[4] Other circuits have recently evaluated whether the requirements of Rule 3(c) should still be considered jurisdictional. The Eighth and Eleventh Circuits have "acknowledge[d] that recent decisions of the Supreme Court call into question its earlier decisions that the content requirements for notices of appeal are jurisdictional," but have concluded that they are nevertheless "bound to follow" the Supreme Court's earlier "precedents on this issue until the Supreme Court overrules them." *Auto. Alignment & Body Serv., Inc. v. State Farm Mut. Auto. Ins. Co.,* 953 F.3d 707. 722-23 (11th Cir. 2020) (citations omitted); *see Kohlbeckv. Wyndham Vacation Resorts, Inc.,* 7 F.4th 729, 734 (8th Cir. 2021) (same). Additional circuit courts have nearly uniformly continued to treat compliance with Rule 3(c) as jurisdictional without addressing more recent Supreme Court decisions. *E.g., O'Brien v. Town of Bellingham,* 943 F.3d 514, 526 (1st Cir. 2019); *Cho v. Blackberry Ltd.,* 991 F.3d 155, 162-63 (2d Cir. 2021); *Karlo v. Pittsburgh Glass Works, LLC,* 849 F.3d 61, 67-68 (3d Cir. 2017); *Hauck-Adamson v. Communist Party of Ky.,* No. 20-5758, 2020 WL 5914615, at *l (6th Cir. Aug. 5, 2020) (per curiam); *Al-Qarqani v. Chevron Corp.,* 8 F.4th 1018, 1023 (9th Cir. 2021); *HCG Platinum, LLC v. Preferred Prod. Placement Corp.,* 873 F.3d 1191, 1199 n.8 (10th Cir. 2017); *Artrip v. Ball Corp.,* 735 F. App'x 708, 712 (Fed. Cir. 2018); *cf United States v. Bonk,* 967 F.3d 643, 648 & n.28 (7th Cir. 2020) (appearing to conclude that the requirements of Rule 3(c) are still jurisdictional, even considering more recent Supreme Court case law). *But see Wiener, Weiss & Madison v. Fox,* 971 F.3d 511, 514 & n.5 (5th Cir. 2020)(appearing to treat Rule 3(c)'s requirements as mandatory, not jurisdictional).

But we do not resolve this question at this time because Plaintiffs have not argued that the content requirements of Rule 3 are nonjurisdictional. In any event, at minimum, "the timely

U.S. at 317; *cf Gonzalez v. Thaler,* 565 U.S. 134, 147-48 (2012).

That said, "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal." Fed. R. App. P. 3(c)(7). Instead, the operative question is whether a document filed within the time prescribed for a notice to appeal "was the ' functional equivalent' of the formal notice of appeal demanded by Rule 3." *Smith,* 502 U.S. at 248. That is, "[i]f a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." *Id.* at 248-49.

So, for example, in *Smith v. Barry,* the Supreme Court concluded that a pro se appellant's informal opening brief could constitute the functional equivalent of a notice of appeal, conferring appellate jurisdiction over the case. *Id.* at 250. The fact that the brief had been filed in the Court of Appeals- not the district court, as a formal notice of appeal would be- was of no moment because the Rules "set[] out a transmittal procedure to be followed when the notice of appeal is mistakenly filed with an appellate court, and provides that a misfiled notice 'shall be deemed filed in the district court' on the day it was received by the court of appeals." *Id.* at 249 (quoting Fed. R. App. P. 4(a)(l) (1992)); *accord* Fed. R. App. P. 4(d) (current equivalent version of this Rule).

Following *Smith,* we have allowed a number of different types of documents, filed in either our Court or the district court, to serve as the functional

---

filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles,* 551 U.S. at 2 14. And, as we conclude, Plaintiffs have not satisfied the initial step of pointing to a timely notice of appeal.

equivalent of a notice of appeal.[5] We have emphasized, however, that "[i]n order for us to find that a [document] is the functional equivalent of a notice of appeal, the [document] *must* be timely under Rule 4 and *must* satisfy the notice requirements of Rule 3." *Clark v. Cartledge,* 829 F.3d 303, 307-08 (4th Cir. 2016). To be "timely under Rule 4" here, *id.,* the document in question needed to be filed within "60 days after entry of the judgment or order appealed from,"[6] Fed. R. App. P. 4(a)(l)(B). And to "satisfy the notice requirements of Rule 3," *Clark,* 829 F.3d at 308, the document also needed to "specify the party or parties taking the appeal," "designate the judgment- or the appealable order- from which the appeal is

---

[5] *E.g., Clark v. Cartledge,* 829 F.3d 303, 304 (4th Cir. 2016) (pro se request for extension of time to seek a certificate of appealability); *United States v. Coleman,* 319 F. App'x 228, 229 n.l (4th Cir. 2009) (per curiam) (docketing statement); *Mitchell v. Virginia,* No. 23-6077, 2023 WL 2583688, at *1 (4th Cir. Mar. 21, 2023) (per curiam) (pro se informal brief); *United States v. Nelson,* 859 F. App'x 675, 675 n.* (4th Cir. 2021) (per curiam) (prose supplemental brief); *United States v. Goforth,* 245 F. App'x 260, 261 (4th Cir. 2007) (per curiam) (request for reconsideration and certificate of appealability filed in district court); *United States v. Hatala,* 191 F.3d 449, 1999 WL 734737, at *1 n.* (4th Cir. 1999) (unpublished, per curiam table decision) (request for certificate of appealability filed in district court); *cf United States v. Hill,* 706 F. App'x 120, 121 (4th Cir. 2017) (per curiam) (suggesting that a "motion to amend [the] notice of appeal" might have been able to serve as the functional equivalent of a notice of appeal had it been timely).

[6] The sixty-day deadline applies when, as here, "one of the parties is ... a United States agency." Fed. R. App. P. 4(a)(l)(B)(ii); *see Waldron v. FDIC,* 935 F.3d 844, 847 (9th Cir. 2019) (collecting cases concluding that the FDIC is a United States agency, even "when acting solely as a receiver"); 12 U.S.C. § 1819(b)(l) ("The [FDIC], in any capacity, shall be an agency of the United States for purposes of [28 U.S.C. § 1345] without regard to whether the [FDIC] commenced the action.").

taken," and "name the court to which the appeal is taken," Fed. R. App. P. 3(c)(l).

In the case at bar, the only document filed within the appropriate timeframe that could potentially serve as the functional equivalent of a notice of appeal from the 2023 Orders is the docketing statement that Plaintiffs filed in this Court on March 6, 2023.[7] The docketing statement specified the parties taking the appeal and named this Court as the court to which the appeal was taken. Fed. R. App. P. 3(c)(1)(A), (C); *see* Docketing Statement at 1, 4. So the dispositive question is whether the docketing statement sufficiently "designate[d]" the 2023 Orders as being ones "from which the appeal [was] taken." Fed. R. App. P. 3(c)(1)(B).

The problem for Plaintiffs is that the docketing statement provided mixed signals as to whether Plaintiffs intended to appeal the 2023 Orders. And yet, when repeatedly, directly prompted to clarify whether their docketing statement could be read to designate the 2023 Orders, Plaintiffs did not provide a valid explanation. *Cf Becker v. Montgomery,* 532 U.S. 757, 767 (2001) ("[I]mperfections in noticing an

---

[7] We acknowledge that, in a prior case, we allowed an opening brief to demonstrate the intent to appeal a particular order without evaluating whether that brief was timely as a notice of appeal. *Bogart v. Chapell,* 396 F.3d 548, 555 (4th Cir. 2005). However, the Supreme Court has since clarified that "the *timely* filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles,* 551 U.S. at 214 (emphasis added). Consistent with that admonition, we have emphasized that for a document to serve as "the functional equivalent of a notice of appeal," it *"must* be timely under Rule 4." *Clark,* 829 F.3d at 307-08. Here, Plaintiffs' Opening Brief was not filed within sixty days of the 2023 Orders, so it cannot serve as the functional equivalent of the notice of appeal.

appeal should not be fatal *where no genuine doubt exists* about who is appealing, from what judgment, to which appellate court." (emphasis added)).

We begin with the mixed signals. In the docketing statement's "Jurisdiction" section, under "Date of entry of order or judgment appealed," Plaintiffs indicated "March 8th, 2021 "-not the date of either of the 2023 Orders.[8] Docketing Statement at 1. The "Jurisdiction" section's only reference to the 2023 Orders was in the box for "Date order entered disposing of any post-judgment motion." *Id.* We have held in unpublished authority that such a reference, alone, is insufficient to confer appellate jurisdiction over a postjudgment order. *Bracey,* 838 F. App'x at 748. After all, merely noting that a post-judgment order was *filed* is not enough to indicate that the order is *the subject of the appeal.* To the contrary, the fact that when the docketing statement specifically required them to state the date the appealed order or judgment was entered, Plaintiffs *did not* refer to the 2023 Orders, suggests that those orders were *not* the subject of the appeal.[9] *Cf Jackson,* 775 F.3d at 176

---

[8] In fact, there was no order entered on March 8th, 2021. We assume this "was simply a 'scrivener's error'" and that Plaintiffs intended to refer to the 2021 Judgment, which was filed on March 15, 2021. *Bogart,* 396 F.3d at 554 n.4.

[9] We note that 2021 amendments to Rule 3 clarified that, in some circumstances, courts should not interpret silence in a notice of appeal to deprive them of jurisdiction. *See*

Fed. R. App. P. 3(c)(4) ("The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal."); Fed. R. App. P. 3(c)(6) ("An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."); Fed. R. App. P. 3(c)

(concluding that, where the notice of appeal "express[ly] designat[ed] . . . one particular order" and made no reference to another order, "the fairest inference is that (the appellant] did not intend to appeal the other" order).

The docketing statement also included a "Nature of Case" section, which directed Plaintiffs to explain the "[n]ature of [the] case and [the] disposition below." Docketing Statement at 2. In that section, Plaintiffs described the 2023 Orders. *Id.* at 6. But that description does not obviously designate those orders as being the matters appealed because it is perhaps most naturally read as merely providing a description of the proceedings below, without necessarily designating all those proceedings as the subject of the appeal.

By contrast, later in the docketing statement, Plaintiffs were asked to list the "Issues," that is, to provide a "[n]on-binding statement of issues on appeal." Docketing Statement at 3. Among other issues, Plaintiffs stated that the district court "erred by entering a final order which found judgment in favor of FDIC, essentially granting a JNOV, and reducing Plaintiff[s'] award to zero and or a negative amount." *Id.* That would seem to suggest that Plaintiffs *did* intend to appeal the 2023 Orders, which are the only orders that could be described in that way. *See United States v. Garcia,* 65 F.3d 17, 19 (4th

---

advisory committee's note to 2021 amendment (describing these amendments). Those provisions do not apply to our review of whether the 2023 Orders were properly designated in the docketing statement. The 2023 Orders cannot have "merged into" the earlier (designated) 2021 Judgment, and there is no suggestion that Plaintiffs designated "only part" of any single order.

Cir. 1995) (noting that, although "orders can be and commonly are identified by their dates of entry, nothing in Rule 3(c) requires an appellant to 'designate' an order by date"). This apparent conflict between the Jurisdiction and Issues sections of the docketing statement creates at least some genuine doubt about the basis for their appeal.

It is possible that Plaintiffs' single reference in the "Issues" section of the docketing statement--or that reference in combination with the description in the "Nature of Case" section-could be enough to designate the 2023 Orders as the orders appealed, particularly given the " liberal[] constru[ction]" we afford to "pleadings under Rule 3." *Id.* But we decline to reach that novel question because Plaintiffs have insufficiently made such an argument in support of jurisdiction in this case. While we will liberally construe *the contents* of a filing that might serve as a notice of appeal, nothing obligates us to liberally construe the *briefs* of a counseled party who makes only conclusory arguments about why a given filing satisfies the requirements of Rule 3.

In their Opening Brief, Plaintiffs rested their assertion of jurisdiction entirely on the April 2021 notice of appeal- an argument that fails for the reasons explained above. It was the FDIC-R who first noted (and disputed) the docketing statement as a possible source of appellate jurisdiction, when it raised the jurisdictional matter in its Opening-Response Brief and pointed out that a new or amended notice of appeal was required by Rule 4(a)(4)(B)(ii). Yet, in response, Plaintiffs' only reference to the docketing statement was to state summarily that "[a]ll the matters are set forth in the docketing statement filed on 6 March, 2023, so the

FDIC had notice." Plaintiffs' Response-Reply Br. at 5-6.

In light of the ambiguous nature of the docketing statement explained above, we ordered supplemental briefing on the jurisdictional question. In addition to asking generally "[w]hat specific authority under Federal Rules of Appellate Procedure 3 and 4 establishes the Court's subject matter jurisdiction (or lack thereof) to review the [2023 Judgment]," we queried whether "any potential references to the [2023 Judgment] in [Plaintiffs'] March 6, 2023 docketing statement, including in the 'Issues' and 'Nature of Case' sections," were "sufficient to render that docketing statement the 'functional equivalent' of a notice of appeal." Supplemental Briefing Order at 2-3, *Wall Guy, Inc. v. FDIC,* No. 21-1414 (4th Cir. Jan. 4, 2024), ECF No. 61. But in their supplemental brief and at oral argument, Plaintiffs never explained *how* the statements in the "Issues" and "Nature of Case" sections were sufficient to provide the notice Rule 3 requires.

Additionally, in their supplemental brief, Plaintiffs argued that the *combination* of the docketing statement with other previous filings made clear their intent to appeal. The Eighth Circuit appears to have embraced such a theory. *See Hawkins v. City of Farmington,* 189 F.3d 695, 704 (8th Cir. 1999). But, even assuming we would adopt the Eighth Circuit's reasoning, a consideration of the various filings here does not dispel the ambiguity inherent in the docketing statement alone.

To review, Plaintiffs filed a notice of appeal in April 2021 , designating (appropriately) the 2021 Judgment and (inappropriately) any judgment from

the pending motions for reconsideration. They thus signaled, albeit ineffectively, that they intended to appeal what they apparently assumed would be an adverse decision on the motions for reconsideration. Yet, as discussed, Rule 4(a)(4)(B)(ii) explicitly required them to file a new or amended notice of appeal once the 2023 Orders issued.

Consistent with that Rule, this Court issued a jurisdictional notice in April 2021 directing the parties to immediately inform our Clerk's Office "in writing of the district court's ruling on the motion [for reconsideration] *and whether they intend to appeal the ruling."* Jurisdictional Notice at 1, *Wall Guy, Inc. v. FDIC,* No. 21-1414 (4th Cir. Apr. 15, 2021), ECF No. 4 (emphasis added). Despite the plain language of the Rule, and despite the jurisdictional notice we provided, Plaintiffs did not file a new or amended notice of appeal, suggesting they did *not* intend to appeal the 2023 Orders after all.

Instead, Plaintiffs filed a status report in February 2023 that stated, without further elaboration, that "[t]he matter appears ripe for cross-appeal." Status Report at 1, *Wall Guy, Inc. v. FDIC,* No. 21-1414 (4th Cir. Feb. 28, 2023), ECF No. 30. Shortly thereafter, they filed the docketing statement, which is ambiguous for the reasons described above. In sum, while the April 2021 notice of appeal suggested Plaintiffs *would* appeal from an adverse ruling on the motions for reconsideration, their *actual behavior* after that ruling was ambiguous.

Accordingly, neither in the original round of briefing nor in the supplemental briefs did Plaintiffs raise a clear argument for why we may exercise appellate jurisdiction over the 2023 Orders. And we

are not obligated to make such an argument on their behalf. [10] *E.g., Raley,* 642 F.3d at 1275; *Mayor & City Council of Bait. v. BP P.L.C.,* 31 F.4th 178, 202 (4th Cir. 2022), *cert. denied,* 143 S. Ct. 1795 (2023).

Nevertheless, in another case, issues of justice might compel us to exercise our discretion to evaluate the jurisdictional question of our own accord. *See Manning v. Caldwell,* 930 F.3d 264, 271 (4th Cir. 2019) (en banc) (collecting cases regarding our discretion to reach issues not presented by the parties); *United States v. Sineneng-Smith,* 140 S. Ct. 1575, 1579 (2020) ("The party presentation principle is supple, not ironclad. There are no doubt circumstances in which a modest initiating role for a court is appropriate."). If, for example, the case for vacatur or reversal was particularly compelling, we might have concluded that we should evaluate the docketing statement's validity as a notice of appeal regardless of the arguments Plaintiffs did or did not make in support of jurisdiction. And perhaps, in such a case, we would have concluded that the docketing statement *could* serve as a notice of appeal from the 2023 Orders. [11]

---

[10] We would, of course, be required to sua sponte consider arguments that we lacked jurisdiction before we could *assert* it. *Gonzalez,* 565 U.S. at 141.

[11] Indeed, in similar circumstances, other circuits have found a docketing statement's description of an order sufficient to confer jurisdiction, albeit often where there was some extra factor that made the designation particularly clear. *E.g., Denver & Rio Grande WR.R. Co. v. Union Pac. R.R. Co.,* 119 F.3d 847, 849 (10th Cir. 1997) (holding that a docketing statement was sufficient to confer appellate jurisdiction where "it failed to designate the dates of the orders" appealed but "clearly described the issues on appeal as those decided by the undesignated orders" *and attached copies of those orders to the*

But here, the case for vacatur or reversal is not particularly compelling. Of course, we do not resolve the issues at hand in this appeal, because we lack jurisdiction to do so. But in the process of reviewing the briefs and hearing oral argument, we have been faced with Plaintiffs' arguments on the merits related to the 2023 Orders, and our preliminary review suggests that an appeal of those Orders would not be fruitful. Put differently, we are not convinced that this is a case where "the equities require" us to sua sponte put forth reasoning in favor of our jurisdiction. *Curry v. Beatrice Pocahontas Coal Co.,* 67 F .3d 517, 522 n.8 (4th Cir. 1995).

For these reasons, we dismiss Plaintiffs' appeal as to the 2023 Orders for lack of jurisdiction.

C.

Our decision to dismiss the appeal of the 2023 Orders requires us to also dismiss Plaintiffs' appeal of the 2021 Judgment and Pledge Agreement Order, as well as the FDICR's cross-appeal of the 2023 Orders, for lack of jurisdiction.

First, Plaintiffs' appeal of the 2021 Judgment and the FDIC-R's cross-appeal of the 2023 Orders were timely. However, the 2021 Judgment has been replaced by the 2023 Orders, and the FDIC-R only conditionally cross-appealed those Orders in the

---

docketing statement); Trotter v. Regents of the Univ. of N.M., 219 F.3d 1179, 1184 (10th Cir. 2000) (same); *Emps. Mut. Cas. Co. v. Bartile Roofs, Inc.,* 618 F.3d 1153, 1165 n.9 (10th Cir. 2010) (finding docketing statement sufficient to serve as notice of appeal where it "unambiguously stated" the party's "intent to challenge" the order in question); *Partners & Friends Holding Corp. v. Cottonwood Mins., L.L.C*, No. 23-10192, 2023 WL 8649880, at *2 (5th Cir. Dec. 14, 2023) (per curiam) (similar).

event we reversed or vacated them. Accordingly, these two appeals are moot. *See Int'l Bhd. Of Teamsters, Loe. Union No. 639 v. Airgas, Inc.,* 885 F.3d 230, 235 (4th Cir. 2018) ("If an event occurs during the pendency of an appeal that makes it impossible for a court to grant effective relief to a prevailing party, then the appeal must be dismissed as moot.").

Second, Plaintiffs have not pointed to a timely notice of appeal from the Pledge Agreement Order. The only filings Plaintiffs made within sixty days of that order were status reports filed in this Court on December 1 and 30, 2022, neither of which were even arguably the functional equivalent of a notice of appeal. Instead, Plaintiffs contend that the Pledge Agreement Order merged with the 2023 Orders pursuant to Rule 3(c)(4), such that their purported appeal of the 2023 Orders encompassed the Pledge Agreement Order. *See* Fed. R. App. P. 3(c)(4) ("The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order."). Since the 2021 amendment to Rule 3 that added the relevant language, there has been little case law interpreting which orders "merge into" a later order, and we are aware of none evaluating whether a potentially collateral order like the Pledge Agreement Order would "merge" with the final judgment. We need not resolve that issue, however, because, even if the Pledge Agreement Order merged into the 2023 Orders, Plaintiffs have not established a timely notice of appeal regarding *those* orders for the reasons described above.

III.

The Federal Rules of Appellate Procedure are not meant to create a byzantine system that only the cleverest litigants can navigate. To the contrary, "the requirements of the rules of procedure should be liberally construed and ... 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres,* 487 U.S. at 316 *(quoting Foman v. Davis,* 371 U.S. 178, 181 (1962)). But neither may the Rules be ignored, particularly where, as here, they implicate our appellate jurisdiction over the case.

Nor may appellants rely on us to make jurisdictional arguments for them. In some cases, we may find it appropriate to "rescue" an appellant so as to avoid a circumstance where "a slip of the pen," the appellant's prose status, or a similar factor results in a notice of appeal that is deficient only in a technical sense, or where we are faced with compelling merits arguments that support such a "rescue" for reasons of justice. *Blockel v. JC. Penney Co.,* 337 F.3d 17, 24 (1st Cir. 2003) (quoting *Town of Norwood v. New Eng. Power Co.,* 202 F.3d 408 (1st Cir. 2000)); *e.g., Clark,* 829 F.3d at 306 (pro se appellant); *Torres v. Bella Vista Hosp., Inc.,* 914 F.3d 15, 19 (1st Cir. 2019) (opting to "exercise [the court's] discretion to review [a particular] ruling notwithstanding the lack of clarity in the notice of appeal"). But we are not obligated to do so. *See Raley,* 642 F.3d at 1275.

We decline to make arguments favoring jurisdiction on Plaintiffs' behalf under the circumstances of this case. Accordingly, we dismiss the cross-appeals for lack of jurisdiction.

DISMISSED

[FILED MARCH 18, 2024]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1414 (L)
(3 :20-cv-00304)

THE WALL GUY, INC.; JEFFREY FRYE; JR CONTRACTORS

Plaintiffs - Appellants

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for The First State Bank

Defendant - Appellee

No. 21-1387
(3:20-cv-00304)

THE WALL GUY, INC.; JEFFREY FRYE; JR CONTRACTORS

Plaintiffs - Appellees

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for The First State Bank

Defendant - Appellant

No. 23-1380
(3:20-cv-00304)

THE WALL GUY, INC.; JEFFREY FRYE; JR CONTRACTORS

Plaintiffs - Appellees

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for The First State Bank

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, these appeals are dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

[FILED FEBRUARY 7, 2023]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

CIVIL ACTION NO. 3:20-0304
(consolidated with 3 :20-0305)

THEW ALL GUY, INC.,
JEFFREY FRYE, and
JR CONTRACTORS,

Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC) as Receiver for The First State Bank,

Defendant.

MEMORANDUM OPINION AND ORDER

This action and the consolidated companion case, *FDIC v. Frye,* Civ. Act. No. 3 :20-305, pose complicated legal issues against a unique procedural backdrop. Plaintiffs The Wall Guy, Inc., Jeffrey Frye, and JR Contractors (collectively referred to as "Borrowers") and Defendant Federal Deposit Insurance Corporation, as Receiver (FDIC-Receiver) for The First State Bank, have filed competing motions pursuant to Rule 59 of the Federal Rules of Civil Procedure, challenging a judgment and remittitur entered by a state trial court that this Court adopted as its own following removal. *See Wall Guy, Inc. v. FDIC,* 3:20-304, 2021 WL 838889 (S.D. W. Va. 2021) (adopting and entering at its own the Cabell

County Circuit Court's Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law, Granting, in part, Defendant's Motion for Remittitur or New Trial, and Denying Plaintiffs' Motion to Award Interest on Judgment Pursuant to W. Va. Code 56-6-31). For the following reasons, the Court finds the remittitur was improper, the jury's verdict was excessive, Borrowers' claim against the FDIC-Receiver is barred, and judgment must be entered in favor of the FDIC-Receiver in case 3:20-0304.

I.
FACTUAL AND PROCEDURAL BACKROUND

Essential to the resolution of the current motions is the backdrop upon which these consolidated actions rest. Mr. Frye is a businessman who operates JR Contractors, a West Virginia sole proprietorship, and The Wall Guy, Inc., a West Virginia Corporation. Most of Mr. Frye and his companies' ventures involve building large-scale retaining walls. The First State Bank, Inc. (First State) also was a West Virginia corporation that had a long-standing banking relationship with Mr. Frye and his companies. However, when the relationship between Borrowers and First State fell apart, these actions ensued.

On January 15, 2016, The Wall Guy, Inc. filed an action against First State, alleging, inter alia, that Jackie Cantley, a bank executive, illegally added amounts to loan accounts that were never disbursed to it. *The Wall Guy, Inc. v. The First State Bank,* Civ. Act. No. 16-C-027, *sub nom. The Wall Guy, Inc. v. FDIC,* Civ. Act. No. 3:20-0304 (referred to hereinafter

as "Case One"), *Compl.* ¶¶l 6, 24, ECF No. 6, at 5-6.[1] After Mr. Cantley and First State parted ways, Plaintiff Frye asserts he met with P. Andrew Vallandingham, another bank officer, who "pressured [him] into signing over nearly $500,000 of construction equipment,, and pledging certain property referred to as "Booten Creek" to secure a Business Loan Agreement in the amount of $280,000, often referred to as the "Consolidation Loan." *Id.* ¶¶17-20; *see Business Loan Agreement* (Dec. 13, 2012), ECF No. 6-1, at 52-56; Errors and Admissions Agreement (Dec. 13, 2012), ECF No. 6-1, at 57-58; *Promissory Note* (Dec. 13, 2012), ECF No. 6-1, at 50-51; *Deed of Trust* (Dec. 13, 2012), ECF No. 6, at 11-17;[2] *Agricultural Security Agreement* (describing equipment used as collateral) (Dec. 13, 2012), ECF No. 6-1, at 59-63. The Deed of Trust for Booten Creek was made amongst Mr. Frye for The Wall Guy, Inc. and Mr. Frye as Guarantor and First State, as Lender, and P. Andrew Vallandingham and Samuel Vallandingham, as "Trustee," and recorded at that Cabell County courthouse on January 22, 2013. *Deed of Trust,* at 1. The Business Loan Agreement for $280,000, the Errors and Omissions Agreement, and the Promissory Note were all made between Mr. Frye

---

[1] Mr. Cantley's criminal banking activities are well-known. In 2014, he pied guilty before this Court to Misallocation of Bank Funds, in violation of 18 U.S.C. § 656. *See United States v. Cantley,* 3:13-cr-00245 (S.D. W. Va. 2013). Mr. Cantley was sentenced on September 15, 2014, to sixty months of incarceration. Since that time, there have been several actions filed alleging that Mr. Cantley's criminal conduct caused various plaintiffs personal and business losses. This Court also recognizes that his actions were a contributing factor to bank's ultimate failure.

[2] The Deed of Trust was attached as Exhibit 1 to the Complaint.

and First State. The Agricultural Security Agreement provides it was made between the Wall Guy, Inc. and First State. The $280,000 Business Loan Agreement, the Errors and Omissions Agreement, the Promissory Note, the Deed of Trust, and the Agricultural Security Agreement all bear Jeffrey Frye's name,[3] but none were signed by the bank.

At some point, it appears that Mr. Frye began having financial difficulty, which resulted in him filing Chapter 13 bankruptcy in 2014. *In Re: Jeffrey Allen Frye,* 3:14-bk-30113 (S.D. W. Va. 2014). Thereafter, in or about December of 2015, The Wall Guy, Inc., which was not in bankruptcy, received a Notice of Trustee Sale of the Booten Creek property scheduled for January 19, 2016. *Aff. of Jason D. Koontz* ¶¶2, 3,[4] ECF No. 6, at 18. To stop the sale, The Wall Guy, Inc. filed Case One against First State, seeking both a temporary restraining order and injunctive relief. Additionally, the Complaint alleged claims for Breach of Fiduciary Duty, Negligence, and Breach of Contract against First State. *Compl.* ¶¶23-38.[5] Neither Mr. Frye nor JR Contactors were named

---

[3] Mr. Frye reportedly told his banking expert that "[t]here were loan amounts and documents that [he] did not recall. Further, Mr. Frye questioned some of the signatures that were supposed to be his signature." *Affid. of Jason D. Koontz* ¶8, ECF No. 6, at 19.

[4] Mr. Koontz's affidavit was attached as Exhibit 2 to the Complaint

[5] The Wall Guy, Inc. moved to amend its Complaint in Civ. Act. No. 16-C-027 on December 11, 2017 to state claims for (I) Breach of Express Warranty and (2) Fraud and Breach of Fiduciary Duty. *Mot. to Amend* (Dec. 11, 2017), ECF No. 6, at 105-09. The state court denied the motion as untimely. *See*

as Plaintiffs in Case One when it was filed. It is not clear from the record whether the state court ever took up the injunction request, but First State proceeded with the foreclosure and obtained title to Booten Creek on March 24, 2016. *See Mem. of Law in Supp. Of Mot. of FDIC to Reconsider and Amend J,* at 3, ECF No. 20. Nevertheless, the remainder of The Wall Guy, Inc. 's action continued against First State.

In the meantime, the bankruptcy court dismissed Mr. Frye's bankruptcy case on April 15, 2016, on a motion by the bankruptcy court Trustee for "fail[ing] to respond to or otherwise cure the matters raised in the Trustee's motion to dismiss." *In re: Jeffrey Allen Frye,* 3:14-bk-30113, *Order Dismissing Pet.* (Apr. 15, 2016), ECF 6-1, 28. Soon thereafter, on May 13, 2016, First State filed its own action against Mr. Frye, The Wall Guy, Inc., and the Wall Guy, Inc. d/b/a JR Contractors to collect on $385,169.35 in loans that were included in the dismissed bankruptcy case. *See Compl., The First State Bank v. Frye,* Civ. Act. No. 16-C-341, *sub nom FDIC v. Flye,* 3:20-305, ECF No. 6-1, at 23-27 (referred to hereinafter as "Case Two"). First State alleged Mr. Frye and his companies were in default, but they refused to assist in the peaceful repossession of the collateral used to secure the loans. *Id.* Therefore, First State sought an injunction to execute the orderly repossession of the collateral. *Id.* ¶9.

Shortly thereafter, the state court entered an Order in Case Two finding Mr. Frye, The Wall Guy, Inc., and JR Contractors had defaulted on various

---

Order, Civ. Act. No. 16-C-27 (Jan. 23, 2018), ECF No. 6, at 122-23.

loans in the amount of $385,169.35. *Order,* Civ. Act. No. 16-C-341(May 27, 2016), ECF No. 6-1, at 41-44. The state court also found that Mr. Frye, The Wall Guy, Inc., and JR Contractors had no equity in the collateral securing those loans and that they had refused a peaceful repossession of the same. *Id.* Therefore, the state court directed that the collateral be peacefully surrendered to First State. *Id.*

There was no further substantive activity in Case Two. However, on August 4, 2018, The Wall Guy, Inc., Jeffrey Frye, and The Wall Guy, Inc. d/b/a/ JR Contractors as "Plaintiff/Counterclaim Defendants"[6] filed a motion in Case One to set aside the Order in Case Two under Rule 60(b) of the West Virginia Rules of Civil Procedure.[7] The state court in Case One denied the motion, finding (1) it was untimely because the May 2016 Order had remained unchallenged for over two years, (2) the allegation First State did not fund or credit loan proceeds in the amount of $151,718.96 was not "newly discovered evidence" but, rather, based on records admittedly produced over a year earlier, and (3) no exceptional circumstances existed warranting setting the Order aside. *Order,* Civ. Act. No. 16-C-27 (Aug. 22, 2018); 3:20-304, ECF No. 6-5, at 9-13. As a result, the state court also granted First State's Motion in Limine in Case One collaterally estopping any challenge to the earlier

---

[6] Although Mr. Frye and JR Contractors frequently appear in the style of Case One, the style was not officially changed to include them as "Plaintiffs" until August 20, 201 8. *See Agreed Order Substituting Plaintiffs* (Aug. 20, 2018), ECF No. 6-5, at 24-26.

[7] *Mot. to Set Aside the Order from May 27th, 2016 Pursuant to Rule 60(b) of the R. of Civ. Proc.,* Civ. Act. No. 16-C-027 (Aug. 6, 2018), ECF No. 6-3, at 1-6. It does not appear from the state court's docket sheet that this motion was ever filed in Case Two.

finding that the loans in Case Two were in default and/or suggesting that First State wrongfully repossessed the collateral at issue in Case Two. *Order,* Civ. Act. No. 16-C-27 (Aug. 21, 2018), ECF No. 6-4, at 101-05. Additionally, the state court excluded in Case One any evidence that the foreclosure and repossession in Case Two resulted in any damages. *Id.,* at 103.

Prior to the trial in Case One, the state court granted First State's Motion for Summary Judgment on the Breach of Fiduciary Duty and Negligence claims. *Order,* Civ. Act. No. 16-C-27 (Aug. 22, 2018), ECF No. 6-5 at 14-19. Thus, the only remaining claim for trial was the Breach of Contract claim. This claim focused on two separate loans: the Consolidation Loan for $280,000 and a separate SBA loan in the amount of $230,000. At trial, Borrowers offered a copy of the Note for the SBA loan, an Unconditional Guarantee for the loan, an Errors and Omissions Agreement, a Commercial Security Agreement, and an Equal Credit Opportunity Notice. However, as with the Consolidation Loan, First State did not sign any of these documents. ECF No. 42-6, at 20-37. Following a three-day trial, the jury returned a verdict finding First State had breached both loans and awarded The Wall Guy, Inc., Mr. Frye, and JR Contractors a lump-sum of$ 1,500,000. *Verdict Form,* at 1-3 (Aug. 23, 2018), ECF No. 6-5, at 31-33.

On September 14, 2018, First State filed a Renewed Motion for Judgment Notwithstanding the Verdict, Remittitur, or a New Trial. ECF No. 6-5, at 69-97. On March 14, 2019, the state court entered an Order rejecting First State's argument that, under *Jones v. Kessler,* 126 S.E. 344 (W. Va. 1925), Borrowers could not recover monetary damages on

either contract because they breached the contracts by not making their loan payments. *Order Den. Def 's Renewed Mot. for JNOV, Granting, in part, Def 's Mot. for Remittitur or New Trial, and Den. Pls.' Mot. to Award Interest on J pursuant to W Va. Code 56-6-31,* ECF No. 7, at 50-64. Upon consideration, the state court distinguished *Jones* by finding the plaintiff in *Jones* had breached first. To the contrary, the state court found the evidence in Case One established that First State breached first, causing Borrowers to suffer damages, resulting in Borrowers' default. *Id.* ¶¶7-10.

In its Order, the state court also rejected First State's argument that it fully funded the $280,000 Consolidation Loan and any breach of contract it committed "occurred under an earlier loan which was subject to the doctrine of novation." *Id.* ¶11. First State argued the Consolidation Loan was created to pay off and pay down earlier loans, pay a tax lien, and provide working capital. *Id.* ¶14. However, the state court found First State failed to establish the elements of novation. *Id.* ¶16.

On the other hand, First State effectively argued that the $1,500,000 verdict was excessive by including compensation for amounts that were not legally recoverable. First, Borrowers presented evidence to the jury that their attorney fees and costs totaled $102,500, and the state court found it erred in refusing to instruct the jury that attorney fees and costs were not recoverable as part of any award. *Id.* ¶¶32, 35, 36. Although the state court stated "[t]here is no data by which the amount of fees and costs awarded by the jury can be definitely ascertained," the state court deducted that amount from the $l,500,000 verdict. *Id.* ¶¶35, 38.

Second, the state court found that Borrowers presented evidence of the value of the repossessed collateral in violation of the court's pretrial ruling precluding such evidence. *Id.* ¶48. As Borrowers presented testimony that the value of the repossessed collateral was $873,477, the court also deducted that amount from the verdict, leaving a balance of $524,023. *Id.* ¶¶49-53.[8] The state court then rejected the remainder of First State's arguments and entered judgment in the remittitur amount of $524,023. *Id.* ¶61.[9] Thereafter, the state court gave Borrowers the option of accepting the remittitur, requesting a new trial, or filing an appeal. Borrowers elected to appeal.

To secure the judgment while Case One was on appeal, First State and Borrowers entered into a Pledge Agreement. *Pledge Agreement,* ECF No. 7, at 75-78. First State also filed a motion to stay enforcement of the judgment. ECF No. 7, at 65-66. The lower court granted the motion, staying the matter pending a ruling by the West Virginia Supreme Court. *Order Granting Def* 's *Mot. for Stay of Proceedings to Enforce.!* (June 3, 2019), ECF No. 7-2, at 81-83.

While the appeal was pending, however, the bank failed, and the FDIC was appointed as Receiver on April 3, 2020, succeeding to the bank's interests and liabilities. *See* 12 U.S.C. § 1821(d)(2)(A), in part ("The [FDIC] shall, as conservator or receiver, and by operation of law, succeed to-(i) all rights, titles, powers, and privileges of the insured depository

---

[8] In doing so, the state court repeated that "[t]here is no data by which the amount of fees and costs awarded by the jury can be definitely ascertained[.]" *Id.* ¶50.

[9] The state court also rejected Borrowers' motion for pre-judgment interest. *Id.* ¶67.

institution"). The FDIC-Receiver substituted itself for First State in both Cases One and Two and removed the actions to this Court on April 30, 2020. *See* 12 U.S.C. § 1819(b)(2) (providing for the removal to federal court by the FDIC).[10] The FDIC-Receiver then moved to consolidate the actions and stay all judicial proceedings to allow Borrowers to complete the mandatory administrative claims process set forth in 12 U.S.C. § 1821(d) of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). This Court granted the motions. *Order Granting Def FDIC-Receiver's Mot. for a Stay of all Judicial Proceedings* (May 27, 2020), ECF No. 10.

Ultimately, Borrowers' claims were administratively denied, and the Court lifted the stay. Borrowers then filed a Motion for Summary Judgment (ECF No. 15) and a Motion to Enforce Judgment in the amount of $1,500,000. ECF No. 23. The FDIC-Receiver also filed a Motion to Reconsider and Amend Judgment. ECF No. 19.

Before addressing the underlying merits of the parties' motions, the Court found it necessary to address the unique procedural posture of this case. Pursuant to the Fourth Circuit's decision in *Resolution Trust Corp. v. Allen,* 16 F.3d 568 (4th Cir. 1994), the Court was required first to '"adopt the state court judgment as its own"' and then treat the judgment "the same as other judgments entered by the district court, [with] ... the parties ... follow[ing] the ordinary rules regarding post-judgment

---

[10] Although Case One was pending before the West Virginia Supreme Court, Case Two remained stayed in the trial court pending the outcome of Case One on appeal. *See Order,* Civ. Act. No. 16-C-341(June 3, 2019), ECF No. 1-5, at 28-30.

remedies.'" *The Wall Guy, Inc.,* 2021 WL 838889, at *3 (quoting *Resolution Trust Corp.,* 16 F.3d at 573). Thus, after the Court adopted the state court's judgment, the parties may file post-trial motions or appeal to the Fourth Circuit. *Id.* If the parties elect to file post-trial motions, the district court should address the motions on the merits, which allows the district court to "'consider any new federal questions injected into the case by the addition of RTC [or in this case, the FDIC], and require whatever briefing, argument or hearings it deems necessary to resolve these questions and prepare an adequate record for review on appeal.'" *Id.* (quoting *Resolution Trust Corp.,* 16 F.3d at 573). This procedure prevents the Fourth Circuit "'from assuming the role of a state appellate court.'" *Id.* (quoting *Resolution Trust Corp.,* 16 F.3d at 573). Therefore, the Court adopted and entered as its own the state court's remittitur order in Case One. *Id.*

Although the Court recognized that ordinarily the parties would then be given the opportunity to fi le post-trial motions, this action presented yet another complication because the state court already had ruled on the post-trial motions and the district court must "'take[] the case as it finds it ... and treat[] everything that occurred in the state court as if it had taken place in federal court.'" *Id.* (quoting *Khouri v. Nat 'l Gen. Ins. Mktg., Inc. ,* No. 1 :20-cv-580, 2020 WL 6749713, at *2 (M.D. N.C. Nov. 17, 2020) (internal quotation marks and citations omitted)). In other words, by adopting the state court judgment, this Court also adopted the state court's rulings on the post-trial motions. *Id.*

By readopting the state court's remittitur, the parties agreed that Borrowers then "must be given

the option of either accepting the reduction in the verdict or electing a new trial.'" *Id.* at *4 (quoting Syl. Pt. 9, *Perrine v. E.I. du Pont de Nemours & Co.,* 694 S.E.2d 815 (W. Va. 2010); also citing *Cline v. Wal-Mart Stores, Inc.,* 144 F.3d 294, 305 (4th Cir. 1998)). Therefore, the Court directed Borrowers to make its choice, and it denied the remainder of the patties' pending motions. *Id.*

On March 8, 2021, Borrowers accepted the remittitur, and the Court entered a Judgment Order against the FDIC-Receiver in the amount of $524,023. ECF Nos. 37, 38. The FDIC-Receiver then filed a Motion to Amend this Court's Judgment Reflecting the State Court's Remittitur Order and Grant Judgment to the FDIC-Receiver or, Alternatively, to Order a New Trial. ECF No. 42. On the same day, the FDIC also filed a Notice of Appeal to the Fourth Circuit. Four days later, Borrowers filed their own Rule 59(e) motion, seeking an award of the entire $1 ,500,000 jury verdict or, in the alternative $1,396,501, which reflects the remittitur amount of $523,024 plus the value of the repossessed items in the amount of $873,477. ECF No. 47. On that same day, Borrowers also filed a Notice of Appeal. ECF No. 49. Thereafter, the Fourth Circuit entered a Jurisdictional Notice suspending any proceedings until this Court ruled on the pending Rule 59 motions. ECF No. 53.

Following extensive briefing on the pending motions, the FDIC-Receiver filed an Emergency Motion to Enforce the Parties' Pledge Agreement. ECF No. 71. When First State failed, three of the four properties used as collateral to secure the judgment were transferred to MVB Bank (MVB). *The Wall Guy, Inc. v. FDIC,* Civ. Act. No. 3:20-304, 2022 WL 17072028, *1 (S.D. W. Va. Nov. 17, 2022). MVB then

sold two of the properties. *Id.* As the Pledge Agreement created a cloud of title on the properties, the FDIC-Receiver sought to substitute the property used as collateral for a letter of credit in the amount of the remittitur. *Id.* Although Borrowers vehemently objected and asserted First State agreed to collateralize $2,300,000 worth of claims, the Court found the Pledge Agreement allowed for the property to be sold and for the FDIC-Receiver to offer substitute collateral in the amount of the remittitur. *Id.* at *2. Therefore, the Court granted the FDIC-Receiver's motion. *Id.* Now, the only remaining issues for the Court to address are the parties' post-trial cross motions under Rule 59.

II.
STANDARD OF REVIEW

The FDIC-Receiver and Borrowers both filed their motions to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure. Although Rule 59(e) does not contain its own standard, the Fourth Circuit has held there are three grounds upon which a Rule 59(e) motion may be granted. These are "(l) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.,* 148 F.3d 396, 403 (4th Cir. 1998) (citations omitted). Rule 59(e), however, "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co.* v. *Baker,* 554 U.S. 471, 486 n.5 (2008) (internal quotation marks and citation omitted). Additionally, a Rule 59(e) motion "is an extraordinary remedy that should be applied

sparingly." *Mayfield v. Nat 'l Ass 'n for Stock Car Auto Racing, Inc.,* 674 F.3d 369, 378 (4th Cir. 2012) (citation omitted).

Alternatively, the FDIC-Receiver also seeks a new trial under federal Rule 59(b). With respect to this argument, the Court looks to Rule 59(a)(l)(A), which provides the criteria for granting a new trial following a jury trial. Rule 59(a)(l)(A) provides " the court may, on motion, grant a new trial on all or some of the issues- and to any party- as follows: (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court[.]" Fed. R. Civ. P. 59(a)(l)(A). The Fourth Circuit has explained that, under the Rule, the district court must "set aside the verdict and grant a new trial, if he is of the opinion that [1] the verdict is against the clear weight of the evidence, or [2] is based upon evidence which is false, or [3] will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Atlas Food Sys. & Servs., Inc. v. Crane Nat 'l Vendors, Inc.,* 99 F.3d 587, 594 (4th Cir. 1996) (internal quotation marks and citations omitted). Additionally, when considering whether to grant a new trial under Rule 59, "a trial judge may weigh the evidence and consider the credibility of the witnesses[.]" *Poynter by Poynter v. Ratcliff,* 874 F.2d 219, 223 (4th Cir. 1989) (citations omitted). It is in light of these principles that the Court now considers the parties' arguments.

III.
DISCUSSION

A.
Authority of the Court to Rule on the Parties' Motions

Before addressing the merits of the Rule 59 motions, however, the Court first must determine its authority to do so under the circumstances of this case. On one hand, as this Court stated in its March 2021 Memorandum Opinion and Order, the Court already ostensibly has ruled on post-trial motions by adopting as its own the state court's remittitur order and treating everything that took place in state court as if it had occurred before this Court. *The Wall Guy, Inc.,* 2021 WL 838889, at *2-3. On the other hand, the Judgment Order entered by this Court is distinguishable from the Judgment Order entered by the state court in one important, critical way. The Judgment Order entered by this Court is no longer against First State. Rather, it is against the FDIC-Receiver. As such, the FDIC-Receiver has unique arguments and statutory defenses available to it under federal law that were not available to First State. Additionally, it is clear from the Fourth Circuit's decision in *Resolution Trust Corp.* that it is this Court's obligation to consider and address the merits of any new federal questions raised by the FDIC-Receiver so there is an adequate record for review. *See Resolution Trust Corp.,* 16 F.3d at 573. Therefore, the Court finds it has the authority and, indeed, the obligation to rule on the parties' motions.

B.
Challenges to the Remittitur and the Jury Verdict

In their motions, both parties argue that the Court should reconsider the remittitur to prevent a clear error of law and to prevent a manifest injustice under Rule 59(e). The FDIC-Receiver also asserts the jury's verdict was excessive, against the clear weight of the evidence, and based upon false evidence. Specifically, the FDIC-Receiver asserts the only evidence of damages at trial was Mr. Frye's testimony that: (1) First State failed to fund $125,000 in loan proceeds;[11] (2) he lost $43,000 annually when First State repossessed the equipment; (3) he spent $105,000 in legal fees and costs; and (4) the value of the collateral seized was $873,477.[12] Not only does the FDIC-Receiver contend much of this evidence is demonstrably false, it also argues the value of the collateral seized or foreclosed upon, together with any damages Borrowers suffered as a result of the seizure, was inadmissible under the state court's pretrial ruling collaterally estopping them from challenging the earlier ruling *in* Case Two. *See Order,* Civ. Act. No. 16-C-27, ECF No. 6-4 at 101-05. Moreover, the FDIC-Receiver agrees with the state court that the jury should have been instructed that it could not award attorney fees and costs. For their part,

---

[11] Of the $125,000 Borrowers claimed was missing, the FDIC-Receiver asserts the evidence at trial proved that all but $5, 125 actually was disbursed to Borrowers or used to payoff other loans.

[12] The FDIC-Receiver argues this figure is unsupported in the record. Borrowers claim it represents both the collateral listed in the bankruptcy proceedings and the collateral possessed by the Wall Guy, Inc., which was not part of the bankruptcy proceedings.

Borrowers generally insist the remittitur was unjustified and the jury's calculation of damages should be reinstated.[13]

Upon consideration, the Court has no difficulty finding, as did the state court, that the jury verdict was excessive. Borrowers submitted evidence that First State failed to fund $125,000 in loan proceeds. Thus, the $1,500,000 verdict almost certainly included damages that were presented to the jury, but that were not recoverable, i.e., the value of the repossessed collateral and attorney fees and costs.[14] Clearly, the state court believed these items were improperly considered and deducted them from the verdict, leaving a remittitur balance of $524,023. However, even if this Court assumes these deductions were appropriate, there remains a difference of $399,023 between the amount of the remittitur and the $125,000 claim of missing funds. Each side attempts to explain what they believe the jury considered in calculating the verdict, but both sides' assumptions encompass a hefty dose of speculation. Even the state court acknowledged twice in deciding the amount of the remittitur that "[t]here is no data by which the amount of fees and costs awarded by the jury can be definitely ascertained[.]" *Order Den. Def 's Renewed Mot. for JNOV, Granting, in part, Def 's Mot. for Remittitur or New Trial, and Den. Pls. ' Mot. to*

---

[13] Borrowers also claim the Court should award them an additional $2,300,000 to compensate them for the value of the collateral listed in the Pledge Agreement. However, this Court ruled in its November 2022 Memorandum Opinion and Order that the sale of the collateral was consistent with the terms of the Agreement. *The Wall Guy, Inc.,* 2022 WL 17072028, at *2.

[14] Mr. Frye also offered evidence of loss of income caused by the repossession.

Award Interest on J pursuant to W Va. Code 56-6-31 ¶¶36, 50, ECF No. 7, at 57, 59. Given the uncertainty of how to reduce the verdict, this Court finds that any recalculation would amount to mere guesswork. Quite simply, there is no way for this Court to justly reduce the excessive verdict in fairness to either party. Thus, in addition to finding the jury's original verdict was excessive and against the weight of the evidence, the Court also finds it must reverse the entry of the remittitur to prevent a manifest injustice. *See Miller v. WesBanco Bank, Inc.,* 859 S.E.2d 306, 336 (W. Va. 2021) (holding that, to the extent a lump-sum jury award may contain unrecoverable damages and apportionment of damages is subject to speculation, the award is found to be against the clear weight of the evidence and will be reversed and remanded for a new trial on damages).

C.
The FDIC-Receiver's Protection under FIRREA

Ordinarily, the next step would be for this Court to direct a retrial.[15] However, the FDIC-Receiver further argues that Borrowers cannot maintain an action against it because Congress has bestowed upon it special protections under FIRREA that extinguish Borrowers' breach of contract claim. Specifically, the FDIC-Receiver cites 12 U.S.C. §§ 1823(e) and 1821(d)(9)(A) as barring Borrowers' claim.[16] Section 1823(e)(1) provides:

---

[15] For the reasons stated *infra,* the Court need not decide whether a retrial would be on liability or just damages.

[16] The FDIC-Receiver also cites 12 U.S.C. § 1825(b), barring punitive damages against it. The FDIC-Receiver argues that the jury verdict likely contained punitive damages. However, as the

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement-
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1823(e)(l)(A)-(D). In *Resolution Trust Co1p.,* the Fourth Circuit held that "[a]ll four of these requirements must be satisfied for an agreement to be enforceable against [the FDIC-Receiver]." 16 F.3d at 574. Additionally, § 1821(d)(9)(A) states that, "[e]xcept as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the

---

Court already ruled the damages awarded by the jury cannot stand, the issue of whether the verdict contained punitive damages is moot.

basis of, or substantially comprise, a claim against the [FDIC-Receiver]." 12 U.S.C. § 1821(d)(9)(A).[17] Moreover, " [e]nforcement of agreements which must be inferred from written recorded agreements is forbidden ... ; explicit written documentation is required[.]" *Resolution Trust Corp.,* 16 F.3d at 575.

Here, the FDIC-Receiver points out that Borrowers never identified any agreement *executed* by First State that is enforceable against the FDIC-Receiver under§ 1823(e)(l). As to the $280,000 Business Loan Agreement and the related Errors and Omissions Agreement, Promissory Note, Deed of Trust, and Agricultural Security Agreement, none of the documents offered were signed by an official at the bank. Likewise, there is no signature by a First State representative on the $230,000 SBA Note or the related Unconditional Guarantee, Errors and Omissions Agreement, Commercial Security Agreement, and Equal Credit Opportunity Notice. Moreover, in any event, the FDIC-Receiver argues that Borrowers have not identified a single provision in any of these documents that creates an enforceable obligation by which First State was required to advance to Borrowers any sums impermissibly added to the loan balances.[18] If such sums were added to loans, but not actually disbursed to Borrowers, the FDIC-Receiver insists the remedy is for Borrowers not to repay the non-disbursed amount. If, as here,

---

[17] Subsection (B) involves an exception that is not relevant to this case.

[18] The FDIC-Receiver asserts the only document submitted into evidence at trial that addressed First State's duties was the Business Loan Agreement related but, in addition to being unsigned, it does not contain a provision obliging the bank to advance the loan in full.

the non-disbursed amount is awarded as damages without any obligation to repay, the FDIC-Receiver contends it results in an improper windfall to Borrowers. Additionally, to the extent it is even arguable there was an implied obligation under any of the loan agreements to advance the "missing" funds, the FDIC-Receiver maintains Congress prohibits consideration of it under FIRREA as all terms must be expressly reflected in a signed written agreement between the bank and the Borrowers and made part of the bank's records.

In Response, Borrowers argue they introduced a number of documents regarding the loans at trial, the parties stipulated at trial that the contracts existed, and the FDIC-Receiver is bound by that stipulation because it stepped into the shoes of First State when it was named Receiver. However, the FDIC-Receiver's arguments are more nuanced than simply whether the contracts exist. Rather, it is that, even if contracts existed between First State and Borrowers, those contracts are not enforceable against it because they do not comply with FIRREA's requirements. Specifically, the purported contracts were not signed by First State, as required by FIRREA, and, at best, any breach must be implied from the existing documents, which also is prohibited under FIRREA. Upon review, the Court agrees with the FDIC-Receiver that Congress has foreclosed Borrowers' breach of contract claim.

Although the Fourth Circuit has not extensively addressed § 1823(e) in many years, the Court finds the Eleventh Circuit's recent discussion in *Landcastle Acquisition Corp. v. Renasant Bank,* No. 20-13735, 2023 WL 174277 (11th Cir. 2023), and its predecessors, helpful. In *Landcastle Acquisition*

Corp., the Eleventh Circuit explained that § 1823(e) broadened the protections afforded the FDIC following the United States Supreme Court's decision in *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447 (1942). 2023 WL 174277, at *l, 6. Section 1823(e) and *D'Oench,* collectively referred to as the *"D'Oench* doctrine," allow the FDIC-Receiver to "rely upon the *failed bank's official records* when it quickly estimates and sells a failed bank's assets-loans and collaterals- to a successor bank that takes over the failed bank's deposit liabilities." *Id.* at * 1, 2 (italics original).[19] This process permits the successor bank to reopen immediately without interruption to customers. *Id.* at *2 (citing *Langley v. FDIC,* 484 U.S. 86, 91- 92 (1987); *Fed. Sav. & Loan Ins. Corp. v. Gordy,* 928 F.2d 1558, 1564 (11th Cir. 1991)). To accomplish its goals, *"D'Oench* affords the FDIC a super-charged, holder-in-due-course protection." *Id.* Additionally, any "agreement-that 'tends to diminish or defeat' the FDIC's interest in an asset- is only valid against the FDIC if it [satisfies all the requirements of § 1823(e)]." *Id.* at *6 (citation omitted). To be clear, "the equities that the *D'Oench* doctrine regards as predominant are those protecting the FDIC." *Id.* *19 (citing *Langley,* 484 U.S. at 94-95).

In explaining the reach of the *D 'Dench* doctrine, the Eleventh Circuit cited one of its earlier decision in

---

[19] In *Young v. FDIC,* 103 F.3d 1180 (4th Cir. 1997), the Fourth Circuit explained the relationship between *D'Oench* and§ 1823(e) slightly differently. The Fourth Circuit stated that the statute "essentially encompasses the principles of the common-law *D'Oench* doctrine[, but it] ... does not ... preempt the *D'Oench* doctrine." 103 F.3d at 1187. Thus, although the statute and *D 'Oench* are often construed together, "the common-law doctrine and the statute remain separate and independent grounds for decision." *Id.* (citations omitted).

Twin Construction, Inc. v. Boca Raton, Inc., 925 F.2d 378 (11th Cir. 1991). As relevant here, the Eleventh Circuit held in *Twin Construction* that "a document in the failed bank's records is not enough to bring a party's claim outside of *D'Dench* protection *unless* the document was *executed* by the failed bank." *Id.* at* IO (italics added to the word "executed") (citing *Twin Constr.,* 925 F.2d at 382-84). The Eleventh Circuit defined the term "executed" in the context of§ 1823(e) as meaning that the bank "signed" the agreement at issue. *Twin Constr.,* 925 F.2d at 384. "Where only a single party has signed a document, that document itself does not establish that the non-signatory is required to perform any obligations contained in the document." *Id.* Moreover, while it may be permissible in a typical contract case to assess whether a non-signatory's words or actions bound it to an agreement, such an assessment is not permitted under *D'Oench* and § 1823(e) as the agreement must be signed to be enforceable against the FDIC-Receiver. *Id.* Additionally, the "'doctrine applies even where the customer is completely innocent of any bad faith, recklessness, or negligence.'" *Landcastle Acquisition Corp.,* at *11 (quoting *Baumann v. Savers Fed. Sav. & Loan Ass'n,* 934 F.2d 150, 1515 (1 lth Cir. 1991)). Lastly, as stated by the district court in the Southern District of Georgia, "[t]he burden of establishing that an agreement satisfies § 1823(e)(1)'s requirements Jays with the party claiming the adverse interest." *Lindley v. FDIC,* No. 4:1l-cv-147, 2012 WL 27576, at *3 (S.D. Ga. Jan. 4, 2012) (citations omitted).

Applying these principles to this case, Borrowers find themselves in an untenable position. Despite a sizable jury award, First State collapsed while the case was on appeal. Unfortunately for Borrowers, the

bank's collapse ushered in a new set of federal rules, affording the FDIC-Receiver protections under§ 1823(e) that First State did not have when the case was tried. Specifically, as Borrowers' only claim is for a breach of contract, they have the burden to establish that an authorized representative of First State signed the contracts they assert were breached. Therefore, regardless of the parties' additional disputes over the merits of the underlying breach of contact claim against First State itself,[20] Borrowers now are statutorily required to produce an *executed* contract by First State.

Here, likely due to First State's haphazard procedures, lack of controls, and overall ineptness that ultimately led to its demise, no one from the bank ever signed the loan documents at issue.[21] However, this Court has no authority to waive the requirements Congress has established in § 1823(e), and Congress

---

[20] The FDIC-Receiver further argues there were several trial errors that warrant a JNOV. Borrowers dispute those arguments and point to the fact that First State never objected at trial to several of the alleged errors and, therefore, they were waived. The FDIC-Receiver also insists the state court erred by ruling that First State breached the contracts before Borrowers breached. Thus, the FDIC-Receiver asserts Borrowers' claim cannot survive under West Virginia law. *See Jones v. Kessler,* 126 S.E. at 350 (stating "a plaintiff has no right of action for damages for breach of contract, where he himself has breached the contract" (citation omitted)). However, for the reasons stated *infra,* this Court need not sift through all the alleged trial errors and the relative timing of who breached first because Borrowers' claim cannot survive under § 1823(e).

[21] Borrowers make a cursory statement that they do not believe First State provided them with complete discovery. However, the time to address discovery issues was during the discovery phase prior to trial, and this Court will not entertain reopening discovery at this point in the proceedings.

has made it clear that "any agreement which does not meet the requirements set forth in section 1823(e) . . . shall not form the basis of, or substantially comprise, a claim against the receiver or the [FDIC]." 12 U.S.C. § 1821(d)(9)(A). Thus, as the contracts alleged to have been breached were not signed by anyone at First State, § 1823(e) unequivocally bars the claim against the FDIC-Receiver. Moreover, as argued by the FDIC-Receiver, Borrowers have not pointed to any specific written provision within those documents regarding an obligation by First State to advance any "missing" funds. As § 1823(e) requires the agreement to be in writing, any words, actions, or implied agreements that may have bound First State to such an obligation are not enforceable against the FDIC-Receiver.

In a last ditch effort, Borrowers argue they are exempt from § 1823(e)'s requirements because the Pledge Agreement they entered into with First State in lieu of an appellate bond is a "qualified financial contract" (QFC) and falls within an exception in *§* 1823(e)(2). *See Pls. ' Reply to FDIC-Receiver's Resp. in Opposition to Motion to Amend. J,* at 5, ECF No. 58. However, the Pledge Agreement clearly does not meet the definition of a QFC under the statute. *See* 12 U.S.C.A. § 1821(e)(8)(D)(i) (providing "[t]he term 'qualified financial contract' means any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Corporation determines by regulation, resolution, or order to be a qualified financial contract for purposes of this paragraph"). Moreover, even if the Pledge Agreement was a QFC, it is unclear to the Court how an obligation in lieu of an appellate bond somehow saves the deficiencies in

the underlying breach of contract claim. Therefore, the Court denies Borrowers' argument.

IV.
CONCLUSION

Accordingly, for the reasons stated above, the Court finds that the remittitur was improper, the jury's verdict was excessive, and The Wall Guy, Inc., Jeffrey Frye, and JR Contractors' breach of contract claim is not enforceable against the FDIC-Receiver. Therefore, the Court **DENIES** Borrowers' Motion to Alter and/or Amend the Court's Judgment Reflecting the Remittitur Order and Grant an Enhanced and Larger Judgment. ECF No. 47. On the other hand, the Court **GRANTS** the FDIC-Receiver's motion to the extent it moves to Amend this Court's Judgment Reflecting the State Court's Remittitur Order and moves for judgment in its favor, but **DENIES** the same to the extent the FDIC-Receiver alternatively moves for a new trial. ECF No. 42. To ensure the record is complete, the Court further **GRANTS** Borrowers' pending Motion to Supplement the Record. ECF No. 70.

Additionally, the Court recognizes that this Memorandum Opinion and Order primarily resolves Case One (3:20-304), and it is unclear whether the FDIC-Receiver seeks any further relief in Case Two (3 :20-305). As these cases are consolidated, the Court **DIRECTS** the FDIC-Receiver to file a report with the Court **on or before February 13, 2023**, addressing whether it intends to proceed with Case Two and, if so, what issues it believes are left to be resolved. Additionally, the FDIC-Receiver seems to concede in its briefing that the trial evidence shows $5,125 was never advanced to Borrowers. Thus, the Court

ORDERS the FDIC-Receiver to address whether it intends to credit that amount to Borrowers' loans or believes that amount also is not recoverable. The Court **DIRECTS** Borrowers to file a Response, if any, **on before February 17, 2023**. Prior to any filings, the Court further encourages the parties to discuss the issues amongst themselves and determine whether they can reach a mutual agreement. In the meantime, the Court will **HOLD IN ABEYANCE** entry of a final judgment order in favor of the FDIC-Receiver in Case One until the status of Case Two can be determined.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented parties.

ENTER: February 7, 2023

ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE

[FILED MAY 14, 2024]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1414 (L)
(3:20-cv-00304)

THE WALL GUY, INC.; JEFFREY FRYE; JR CONTRACTORS

Plaintiffs - Appellants

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for The First State Bank

Defendant - Appellee

No. 21-1387
(3 :20-cv-00304)

THE WALL GUY, INC.; JEFFREY FRYE; JR CONTRACTORS

Plaintiffs - Appellees

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for The First State Bank

Defendant - Appellant

No. 23-1380
(3 :20-cv-00304)

THE WALL GUY, INC.; JEFFREY FRYE; JR CONTRACTORS

Plaintiffs - Appellees

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for The First State Bank

Defendant - Appellant

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Agee, Judge Wynn, and Judge Thacker.

For the Court

/s/ Nwamaka Anowi, Clerk