No. _____

In the Supreme Court of the United States

GMAG, L.L.C.; MAGNESS SECURITIES, L.L.C.; GARY D. MAGNESS; MANGO FIVE FAMILY INCORPORATED, IN ITS CAPACITY AS TRUSTEE FOR THE GARY D. MAGNESS IRREVOCABLE TRUST,

Petitioners,

v.

RALPH S. JANVEY, IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR THE STANFORD INTERNATIONAL BANK LIMITED, ET AL.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court deciding an equitable claim can disregard a jury's factual finding on a common issue without notice or an opportunity to be heard.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioners GMAG, L.L.C.; Magness Securities, L.L.C.; and Mango Five Family, Inc., in its capacity as trustee of the Gary D. Magness Irrevocable Trust, state that they have no parent corporations, and no publicly held company owns 10% or more of their stock.

RELATED PROCEEDINGS

The following cases are "directly related" to this case, as defined in this Court's Rule 14.1(b)(iii):

United States District Court for the Northern District of Texas:

SEC v. Stanford Int'l Bank, Ltd., No. 09-cv-298 (N.D. Tex.) (order underlying this appeal entered Apr. 25, 2022)

Janvey v. GMAG, L.L.C., No. 15-cv-401 (N.D. Tex.) (order underlying this appeal entered Feb. 1, 2022)

United States Court of Appeals for the Fifth Circuit:

SEC v. Stanford Int'l Bank, Ltd., No. 09-10392 (5th Cir.) (appeal dismissed Aug. 4, 2009)

SEC v. Universal Weather & Aviation, Inc., No. 09-10847 (5th Cir.) (appeal dismissed Dec. 31, 2009)

Janvey v. Stanford, No. 09-10963 (5th Cir.) (judgment entered Dec. 17, 2010)

Janvey v. Stanford, No. 09-11028 (5th Cir.) (appeal dismissed Mar. 18, 2010)

SEC v. Stanford Int'l Bank, Ltd., No. 10-10336 (5th Cir.) (judgment entered May 5, 2011)

SEC v. Stanford Int'l Bank, Ltd., No. 10-10387 (5th Cir.) (judgment entered June 20, 2011)

Janvey v. HP Fin. Servs. Venezuela C.C.A., No. 11-10355 (5th Cir.) (judgment entered Mar. 8, 2012)

SEC v. Stanford Int'l Bank, Ltd., No. 11-10480 (5th Cir.) (appeal dismissed July 22, 2011)

SEC v. Stanford Int'l Bank, Ltd., No. 12-10822 (5th Cir.) (judgment entered Jan. 8, 2014)

SEC v. Stanford Int'l Bank, Ltd., No. 15-10066 (5th Cir.) (appeal dismissed June 22, 2015)

SEC v. Stanford Int'l Bank, Ltd., No. 17-10663 (5th Cir.) (judgment entered June 17, 2019), *cert. denied*, 140 S. Ct. 2567 (2020)

SEC v. Stanford Int'l Bank, Ltd., No. 17-11073 (5th Cir.) (judgment entered July 22, 2019; opinion withdrawn and judgment entered Dec. 19, 2019), *cert. denied*, 141 S. Ct. 952 (2020)

Janvey v. GMAG, L.L.C., No. 17-11526 (5th Cir.) (judgment entered Jan. 9, 2019; opinion withdrawn May 24, 2019; judgment entered Oct. 8, 2020)

SEC v. Stanford, No. 18-10692 (5th Cir.) (appeal dismissed Aug. 24, 2018)

Janvey v. GMAG, L.L.C., No. 21-10483 (5th Cir.) (judgment entered Sept. 7, 2022)

Janvey v. GMAG, L.L.C., No. 21-10882 (5th Cir.) (judgment entered Sept. 7, 2022)

GMAG, L.L.C. v. Janvey, No. 22-10429 (5th Cir.) (judgment entered May 30, 2023; opinion withdrawn and judgment entered Mar. 20, 2024; opinion filed Aug. 26, 2024)

GMAG, L.L.C. v. Janvey, No. 22-10235 (5th Cir.) (judgment entered May 30, 2023; opinion withdrawn and judgment entered Mar. 20, 2024; opinion filed Aug. 26, 2024)

Stanford v. Trustmark Nat'l Bank, No. 23-10530 (5th Cir.) (appeal dismissed July 25, 2023)

Stanford v. Janvey, No. 23-10689 (5th Cir.) (appeal dismissed July 28, 2023)

Dickson v. Janvey, No. 23-10726 (5th Cir.) (judgment entered Aug. 9, 2024)

Stanford v. Janvey, No. 23-10891 (5th Cir.) (appeal dismissed Sept. 18, 2023), *cert. denied*, 144 S. Ct. 1399 (2024)

Supreme Court of Texas:

Janvey v. GMAG, L.L.C., No. 19-0452 (opinion issued Dec. 20, 2019), *cert. denied*, 142 S. Ct. 708 (2021)

This Court:

Becker v. Janvey, No. 19-919 (U.S.) (certiorari denied Mar. 30, 2020) (140 S. Ct. 2567)

Zacarias v. Janvey, No. 19-1402 (U.S.) (certiorari denied Dec. 14, 2020) (141 S. Ct. 952)

Rupert v. Janvey, No. 19-1411 (U.S.) (certiorari denied Dec. 14, 2020) (141 S. Ct. 950)

GMAG, L.L.C. v. Janvey, No. 21-110 (U.S.) (certiorari denied Dec. 13, 2021) (142 S. Ct. 708)

Stanford v. Janvey, No. 23-6835 (U.S.) (certiorari denied Apr. 22, 2024) (144 S. Ct. 1399)

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PETITION FOR A WRIT OF CERTIORARI

GMAG, L.L.C.; Magness Securities, L.L.C.; Gary D. Magness; and Mango Five Family, Inc., in its capacity as trustee for the Gary D. Magness Irrevocable Trust (collectively, "Magness") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The court of appeals' original opinion (App. 42a-50a) is published at 69 F.4th 259. The court of appeals' opinion granting rehearing and vacating and superseding its original opinion (App. 11a-41a) is published at 98 F.4th 127. The court of appeals' opinion recalling the mandate and denying rehearing (App. 1a-10a) is published at 113 F.4th 505. The decision of the district court (App. 51a-55a) in case number 09-cv-298 is not published but is available at 2022 WL 20014211. The decision of the district court (App. 56a-59a) in case number 15-cv-401 is not published but is available at 2022 WL 697487.

JURISDICTION

The court of appeals entered the operative judgment on March 20, 2024 (App. 11a-41a) and denied rehearing on August 26, 2024 (App. 1a-10a). On November 14, 2024, Justice Alito granted an extension of the time to file a petition for a writ of certiorari until December 20, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment's Due Process Clause provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

Relevant statutory provisions are reproduced in the appendix to this petition. App. 60a-64a.

INTRODUCTION

This case arises out of the ashes of one of the largest Ponzi schemes in history. More than 15 years after the long-running, multi-billion-dollar fraud came to light, many victims have received substantial recoveries—but one of the biggest victims is poised to never see a dime. He instead has been made to pay back over $100 million due to what can only be described as receivership proceedings run amok.

The procedural history in this case is complex but the constitutional deprivations arising from it are not. Until now, there had been a virtually unbroken consensus among the courts of appeals that courts resolving equitable claims are bound by a jury's findings on common issues. The Fifth Circuit's decision breaks with that consensus rule. And it does so in a manner that runs roughshod over both the Seventh Amendment and the Due Process Clause.

That decision warrants this Court's review on its own terms. But it is especially troubling in the receivership context in which it arises. Without meaningful statutory constraints on a receiver's powers, constitutional guardrails must be strictly enforced. This case is an exemplar of what happens when they are not. This Court's review is needed now.

STATEMENT OF THE CASE

1. Beginning around 1990, the Antigua-based Stanford International Bank (Stanford Bank) issued certificates of deposit (CDs) and marketed them throughout the United States and Latin America. *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 889 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 952 (2020); *see United States v. Stanford*, 805 F.3d 557, 563-64 (5th Cir. 2015), *cert. denied*, 580 U.S. 997 (2016). The CDs were attractive investments; they were marketed as "highly liquid," as offering above-market returns, and as being backed by "extensive insurance coverage." *Zacarias*, 945 F.3d at 889. Over the years, depositors poured over $7 billion into CDs issued by Stanford Bank. *Id.* at 890.

Magness was among the bank's largest depositors. *Janvey v. GMAG, L.L.C.* (*GMAG I*), 977 F.3d 422, 425 (5th Cir. 2020), *cert. denied*, 142 S. Ct. 708 (2021). Lured by the CDs' high interest rates and apparent safety, Magness purchased $79 million of CDs from Stanford Bank between 2004 and 2006. App. 13a; *see, e.g.*, ROA.24368-84.[1] Like many others during the financial crisis and Great Recession of 2008, Magness was in urgent need of cash to meet margin calls from

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[1] "ROA" citations refer to the record on appeal for Fifth Circuit Case No. 22-10235.

his lenders. *See* ROA.24450-55; *see also Stanford*, 805 F.3d at 564. In October 2008, he sought to obtain the necessary funds from Stanford Bank. *See* ROA.24450-55. The bank agreed to loan Magness up to 80% of the value of his CDs, as the CDs' terms expressly allowed. ROA.24457-58. The bank initially loaned Magness $25 million; after he repaid that loan with accrued interest from his CDs plus some additional funds, it loaned him roughly $63 million. ROA.24454-59.

In early 2009, Stanford Bank was revealed to be a massive—and, until then, well-concealed—fraud. *See Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 188-89 (5th Cir. 2013). The CDs' above-market "returns" actually came from new depositors, and "when the stream of new depositors ran dry" in the wake of the financial crisis, the scheme collapsed. *Zacarias*, 945 F.3d at 889-90. The Securities and Exchange Commission (SEC) charged R. Allen Stanford and other Stanford Bank officers with fraud. *See Democratic Senatorial Campaign Comm.*, 712 F.3d at 189.

The district court placed the bank into receivership, appointing Ralph S. Janvey as the receiver (Receiver). App. 13a. When the Receiver was appointed, it was "not readily evident to him or to anyone not privy to the inner workings of the Stanford Bank corporations that these entities were part of a massive Ponzi scheme." *Democratic Senatorial Campaign Comm.*, 712 F.3d at 196; *see also id.* at 197 ("[W]ithout an expert's examination of the corporations' books and records, no outsider, including the SEC, could have known or discovered

probative evidence that Stanford had operated a Ponzi scheme . . . .").

2. The Receiver sued Magness to claw back the funds Magness had received from Stanford Bank in October 2008, relying on the Texas Uniform Fraudulent Transfer Act (TUFTA). *GMAG I*, 977 F.3d at 425.[2]

a. Applying the so-called Ponzi scheme presumption, the district court had previously found that the loans were fraudulent transfers within the meaning of TUFTA. *See* ROA.3028; ROA.24331; *see also* Tex. Bus. & Com. Code Ann. § 24.005(a)(1). As a result, the seven-day jury trial focused on whether Magness could avail himself of TUFTA's good-faith defense. App. 15a; *see* ROA.24247-5784; Tex. Bus. & Com. Code Ann. § 24.009(a).

Per the district court's jury instructions, Magness could establish the good-faith defense in one of two ways: (1) if he took the funds from Stanford Bank without actual or inquiry notice of the bank's fraud; or (2) if he had only inquiry notice—*i.e.*, knowledge of facts that would have raised a reasonable person's suspicions and led him to investigate—but any investigation into the bank's dealings would have been futile. ROA.25727-28. The jury found the latter: that Magness had inquiry, but not actual, notice of fraud, and that any investigation would have been futile. App. 65a-68a; ROA.25781. Given those findings, the district court held that Magness had

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[2] By the time of trial, Magness had paid the Receiver approximately $8.5 million, leaving a disputed amount of around $79 million. App. 15a.

acted in good faith and entered judgment in his favor. *GMAG I*, 977 F.3d at 426.

b. The Receiver appealed, arguing that the jury's finding of inquiry notice defeated TUFTA's good-faith defense as a matter of law. *See id.* The Fifth Circuit initially agreed and reversed, rendering judgment for the Receiver. *Id.* On rehearing, the Fifth Circuit vacated its opinion and certified to the Texas Supreme Court the question whether TUFTA's good-faith defense is "available to a transferee who had inquiry notice of the fraudulent behavior, did not conduct a diligent inquiry, but who would not have been reasonably able to discover that fraudulent activity through diligent inquiry." *Id.* (citation omitted).

c. Answering that question, the Texas Supreme Court rejected the Receiver's categorical position that inquiry notice of fraud necessarily defeats TUFTA's good-faith defense. *See Janvey v. GMAG, L.L.C.*, 592 S.W.3d 125, 132 (Tex. 2019). The court instead held that, to show good faith, a transferee on inquiry notice of fraud must conduct a diligent inquiry, even if that inquiry would have been futile. *Id.* at 126, 133. The court expressly declined to decide what level of inquiry is sufficiently diligent to establish good faith or to address Magness's argument that there had been a diligent investigation. *Id.* at 128 n.1, 131-32.

d. Back in the Fifth Circuit, Magness argued that the court should affirm the judgment in his favor under the Texas Supreme Court's new interpretation of TUFTA's good-faith defense. He argued that he had conducted an investigation—and that the Receiver had conceded as much. *GMAG I*, 977 F.3d at 427-28. Magness further argued that the trial record established the reasonableness of his

investigation. *Id.* Alternatively, Magness urged the court to remand for a new trial, as the jury did not make findings about whether Magness had conducted a diligent investigation. *Id.* at 428.

The Fifth Circuit did neither; it reversed and rendered judgment for the Receiver. *Id.* at 431. The court discounted Magness's repeated investigations as "mere[] inquiries" into "the nature and health of Magness's investments"—rather than "investigations into suspected fraud"—that came "prior to and after October 2008," but not in October 2008 (when he accepted the loans). *Id.* at 428. And the court refused to remand, holding that the existing record did not reflect a diligent investigation and that the Texas Supreme Court's intervening decision did not warrant a new trial. *Id.* at 428-30.

e. On December 13, 2021, this Court declined to review that decision. *GMAG, L.L.C. v. Janvey*, 142 S. Ct. 708 (2021).

3. Once the TUFTA judgment became final, the Receiver moved to begin releasing funds from the roughly $135 million bond Magness had posted in order to stay the execution of the TUFTA judgment pending appeal. *See Janvey v. GMAG, L.L.C.*, No. 15-cv-401 (N.D. Tex.), Dkt. Nos. 340, 364. Magness sought to set off that judgment against the claims he had against the receivership estate. But an existing district court order barred creditors from asserting setoff without prior court approval. App. 13a. Magness accordingly moved for leave to file a setoff complaint in both the 2015 TUFTA action and the main receivership proceeding. App. 16a-17a.

The district court denied Magness's motion in the TUFTA proceeding on the ground that, under the

mandate rule, it "had no power to do anything other than enter final judgment in conformance with the judgment of the Fifth Circuit." App. 58a. In the receivership case, the court denied Magness's motion on the merits. That decision rested on three conclusions: (1) allowing Magness's setoff claims would bypass the court-approved claims process; (2) Texas law does not permit a setoff in equity under similar facts; and (3) Magness's setoff complaint would be futile because, due to his receipt of fraudulent transfers, he had "unclean hands." *See* App. 55a. The court raised and reached the third conclusion (*i.e.*, unclean hands) *sua sponte*, without any briefing by the parties, without acknowledging the jury's futility finding, and without giving Magness an opportunity to develop any factual record.

4. Magness appealed. The Fifth Circuit affirmed, issuing three opinions with shifting rationales.

a. The Fifth Circuit first held that Magness had forfeited his setoff claims. App. 49a. As the court explained, Magness had included setoff as a defense in his answer to the Receiver's TUFTA complaint. App. 48a. The Receiver then moved *in limine* to exclude the setoff defense at trial, and the parties ultimately stipulated that Magness would not raise setoff before the jury. *Id.* The court of appeals held that Magness had forfeited his setoff defense by failing to raise it when he opposed the Receiver's entry of final judgment in the TUFTA case. App. 49a.

b. After Magness petitioned for rehearing, the Fifth Circuit vacated its opinion and issued a new one. App. 12a. Accepting an argument Magness had made all along, the court of appeals concluded that Magness's setoff claim could have arisen after the

TUFTA judgment, so "consideration of a setoff was likely not forfeited." App. 14a n.2; *see* App. 28a. Turning to the merits, the Fifth Circuit rejected the district court's first rationale for denying leave to seek setoff and cast doubt on the second. App. 28a-37a. Looking to historical federal practice and Texas law on equity receiverships, the court of appeals found "no categorical rule" that would bar Magness's setoff claim in the receivership proceedings. App. 37a.

The Fifth Circuit nonetheless affirmed, based entirely on the district court's third rationale: that Magness had unclean hands. App. 37a-41a. The court of appeals emphasized that Magness had been held liable under a provision of TUFTA requiring "*actual intent* to hinder, delay, or defraud any creditor of the debtor." App. 40a (citation omitted). Extrapolating from the TUFTA jury's finding that Magness had inquiry notice of fraud, the court opined that Magness "may well have been acting on" suspicions of "possible financial improprieties" in seeking the loans. *Id.* The court rested its unclean hands determination on its view that Magness accepted the October 2008 loans despite having "enough notice of [Stanford Bank's] possible financial improprieties to be suspicious" and that he may have "contemplated significant financial troubles ahead" for Stanford Bank. App. 40a-41a. And it found unclean hands without addressing the jury's other finding—*i.e.*, that any investigation into Stanford Bank's fraud would have been futile. *See id.*

c. Magness again petitioned for rehearing. Magness argued, among other things, that the Fifth Circuit had improperly speculated as to his motives for obtaining the loans, pointing out that the relevant

TUFTA provision looks to the actual intent of the *transferor* (Stanford Bank) and not the *transferee* (Magness). CA5 Second Reh'g Pet. 6-7, ECF No. 130. More broadly, Magness argued that he had no opportunity to litigate the issue of unclean hands and that the court's unclean hands finding contradicted the jury's conclusion that any investigation into Stanford Bank would have been futile. *Id.* at 5-7.

The Fifth Circuit again denied rehearing while issuing a further opinion. App. 2a. As relevant here, the court misconstrued Magness's petition as arguing that "the finding of unclean hands must be made by a jury," not the court. *Id.* Looking to Texas law, the court held that unclean hands is a "question [for] the court, not a jury." App. 9a. The Fifth Circuit then re-affirmed the district court's decision holding that "Magness was not entitled to a setoff" under the unclean hands doctrine. *Id.* And, although that determination rested on rationales and inferences not mentioned in the district court's decision, the court of appeals disclaimed having made any "independent fact findings" of its own. App. 10a; *see* App. 40a-41a.

REASONS FOR GRANTING THE WRIT

When a party is entitled to a jury trial on a legal claim, a judge resolving an equitable claim with a common factual issue must give effect to the jury's findings. At least eleven courts of appeals have held exactly that. The Fifth Circuit decision below departs from that consensus. The departure itself violates the Seventh Amendment—both the jury right central to the Seventh Amendment and its Re-Examination Clause. And the manner of the court's departure runs roughshod over the fundamental due process rights of

one of the biggest victims of one of the biggest frauds in history.

That alone is reason for this Court's review. But the setting of these constitutional deprivations makes them even more egregious. The violations arose out of an equity receivership—a favored tool of the SEC. Unlike bankruptcy, receiverships are subject to few statutory constraints, making the constitutional protections that much more critical. And this case is the poster child for a receivership gone wrong. After a jury found that no amount of diligence would have uncovered the massive Stanford Bank Ponzi scheme, the Receiver continues to roadblock one of the scheme's largest victims from recovering any portion of the estate. This Court's review is needed to ensure that courts administering equity receiverships abide by the most basic constitutional guardrails.

I. THE FIFTH CIRCUIT DECISION CONFLICTS WITH A STRONG CONSENSUS OF THE COURTS OF APPEALS

At least eleven courts of appeals have held that, when a party is entitled to a jury trial on a legal claim, a court resolving an equitable claim with a common issue must give effect to the jury's findings. Because of the TUFTA jury's futility finding, application of that consensus rule should have precluded a determination of unclean hands in this case. In disregarding that jury finding, and holding that Magness had unclean hands, the Fifth Circuit created a lopsided circuit split ripe for this Court's review.

A. The First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have all held that a court resolving an equitable claim is bound by, and must give effect to,

jury findings on legal claims that share a common issue. Under these circuits' jury-respecting rule, a trial court cannot decide an equitable claim in a manner incompatible with the jury's findings.

Consider the Sixth Circuit's decision in *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004 (6th Cir. 1987). There, a claim for retaliation under a state civil rights law was tried to a jury, while a related claim for retaliation under Title VII was tried to the court. *Id.* at 1009. The two factfinders came to different conclusions. The jury found *for* the defendant school board on the state-law claim, whereas the court found *against* the school board on the related Title VII claim. *Id.* As both claims "arose out of the same underlying facts" and were governed by "identical" "standards of liability," the Sixth Circuit held that the court "was bound by the jury's finding on the retaliation issue" when resolving the Title VII claim. *Id.* at 1014. And because the court's ruling on the Title VII claim was "inconsistent" with the jury's verdict on the state-law claim, the Sixth Circuit reversed. *Id.* at 1015.

The Eighth Circuit's decision in *Garza v. City of Omaha* is similar. 814 F.2d 553 (8th Cir. 1987). There, a discrimination claim under 42 U.S.C. § 1983 was tried to a jury, while a related Title VII claim was tried to the court. *Id.* at 555-57. The jury found, "in answer to an interrogatory, that the discrimination was the result of a custom of the City of Omaha." *Id.* at 556. The district court nonetheless ruled that the plaintiff "did not produce evidence sufficient to establish a prima facie case under Title VII" and entered judgment for the City on the Title VII claim. *Id.* at 557. The Eighth Circuit held that the court was

"without power to render a judgment on the Title VII claim inconsistent with the jury's finding of discriminatory intent and custom on the § 1983 claim." *Id.* Based on that inconsistency, the Eighth Circuit reversed and directed entry of judgment for the plaintiff on the Title VII claim. *Id.* at 557-58.

This rule of law extends beyond a jury's explicit findings. For example, the Ninth Circuit reversed an order denying equitable relief because the district court's conclusion that the plaintiff would have been fired even absent an improper charge against him was "contrary to the implicit findings of the jury verdict." *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1472-75 (9th Cir. 1993); *see, e.g.*, *Teutscher v. Woodson*, 835 F.3d 936, 949-50 (9th Cir. 2016) (reversing a front pay award because the district court "failed to consider . . . the factual determinations implicit in the jury's verdict"). The Tenth Circuit has similarly explained that, if "necessary inferences from the verdict indicat[e] that certain views of the evidence were *not* taken by the jury," a court deciding an equitable claim cannot adopt a view of the evidence the jury rejected. *Ag Servs. of Am., Inc. v. Nielsen*, 231 F.3d 726, 733 (10th Cir. 2000), *cert. denied*, 532 U.S. 1021 (2001).

Decisions from the First, Second, Third, Fourth, Seventh, Eleventh, and D.C. Circuits are in accord.[3]

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[3] *See, e.g.*, *Perdoni Bros. v. Concrete Sys., Inc.*, 35 F.3d 1, 5 (1st Cir. 1994) ("Where an irreconcilable inconsistency exists between a bench decision and a jury verdict on different claims arising out of the same transaction, the jury finding must take precedence . . . ."); *Wade v. Orange Cnty. Sheriff's Off.*, 844 F.2d 951, 954 (2d Cir. 1988) ("[W]hen the jury has decided a factual

Together, these decisions represent a strong—indeed, near-universal—consensus that, as the Ninth Circuit put it, "the trial judge [must] follow the jury's implicit or explicit factual determinations." *Gates*, 995 F.2d at 1473 (citation omitted).

B. Applying that well-settled rule, the courts below should have given effect to the TUFTA jury's findings when considering related equitable claims, including Magness's setoff claim. *See, e.g.*, App. 28a-41a (treating Magness's setoff claim as an equitable claim subject to equitable defenses). Had they done so, the TUFTA jury's futility finding would have defeated the application of unclean hands.

The unclean hands doctrine gives courts discretion to withhold equitable relief on the basis of a plaintiff's

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issue, its determination has the effect of precluding the court from deciding the same fact issue in a different way."); *Kairys v. Southern Pines Trucking, Inc.*, 75 F.4th 153, 160-61 (3d Cir. 2023) ("[T]he District Court [had a] duty to ensure that its disposition of the equitable claim was consistent with any common factual findings underlying the jury's verdict on the legal claims."); *Fowler v. Land Mgmt. Groupe, Inc.*, 978 F.2d 158, 163 (4th Cir. 1992) ("[A]ny actual issues necessarily and actually decided by the jury are foreclosed . . . from subsequent reconsideration by the district court." (citation omitted)); *Snider v. Consolidation Coal Co.*, 973 F.2d 555, 559 (7th Cir. 1992) ("[W]hen common issues are simultaneously tried to both a judge and a jury, the jury's findings with respect to those common issues are binding upon the judge."), *cert. denied*, 506 U.S. 1054 (1993); *Lincoln v. Board of Regents of the Univ. Sys. of Ga.*, 697 F.2d 928, 934 (11th Cir.) ("When legal and equitable actions are tried together, the right to a jury in the legal action encompasses the issues common to both."), *cert. denied*, 464 U.S. 826 (1983); *Bouchet v. National Urb. League, Inc.*, 730 F.2d 799, 803 (D.C. Cir. 1984) (Scalia, J.) ("[W]hen a case contains claims triable to a jury and claims triable to the court that involve common issues of fact, the jury's resolution of those issues governs the entire case.").

own inequitable conduct. *See, e.g.*, *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 244-46 (1933). Courts "apply the maxim, not by way of punishment for extraneous transgressions, but upon considerations that make for the advancement of right and justice." *Id.* at 245. The doctrine thus "proscribes equitable relief when, but only when, an individual's misconduct has 'immediate and necessary relation to the equity that he seeks.'" *Henderson v. United States*, 575 U.S. 622, 625 n.1 (2015) (quoting *Keystone Driller*, 290 U.S. at 245).

Importantly, a party invoking the unclean hands doctrine "must show that he himself has been injured" by the inequitable conduct "to justify the application of the principle to the case." 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* 99 (5th ed. 1941). This injury requirement is settled as a matter of relevant state and federal law.

For example, in *Omohundro v. Matthews*, the defendant argued that the plaintiffs had unclean hands and could not recover against him because they had used confidential information belonging to others in the course of their joint venture with the defendant. 341 S.W.2d 401, 410 (Tex. 1960). The Texas Supreme Court disagreed, explaining that "[a]ny improper use" of such information "aided rather than injured" the defendant and would therefore "not prevent recovery." *Id.*; *see also Kinsel v. Lindsey*, 526 S.W.3d 411, 426 (Tex. 2017) ("[A] party relying on the 'unclean hands' doctrine must show that she herself suffered because of the opposing party's conduct.").

Similarly, in *Mitchell Brothers Film Group v. Cinema Adult Theater*, the defendant movie theaters showed a film without permission and argued that

they were not liable for copyright infringement because the film was obscene and the plaintiff copyright holders thus had unclean hands. 604 F.2d 852, 854 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). The Fifth Circuit explained that "the unclean hands doctrine could not properly be used as the vehicle for that defense" because the plaintiffs' allegedly wrongful conduct (disseminating an obscene film) "ha[d] not changed the equitable relationship between plaintiffs and defendants and ha[d] not injured the defendants in any way." *Id.* at 863 & n.24; *see also United States v. Buttorff*, 761 F.2d 1056, 1064 (5th Cir. 1985) ("[T]he alleged wrongdoing of the plaintiff does not bar relief unless the defendant can show that he has personally been injured by the plaintiff's conduct." (citation omitted)).

The TUFTA jury's findings are incompatible with this injury requirement. The Fifth Circuit and the district court believed Magness acted inequitably by accepting loans from Stanford Bank in October 2008 without conducting a diligent investigation for fraud. App. 40a-41a. But the jury found that Magness lacked actual notice of fraud, and that he would not have discovered Stanford Bank's fraud even through a diligent investigation. App. 65a-67a. It necessarily follows that, had Magness conducted even the most diligent of investigations, he still would have accepted the loans, and the parties would be in the same position. Because Magness's failure to investigate could not have affected the equitable relations between the parties or injured Stanford Bank or its other depositors, there can be no unclean hands. *See Keystone Driller*, 290 U.S. at 245; *see also, e.g.*, *Atlantic Cas. Ins. Co. v. Coffey*, 548 F. App'x 661, 664 (2d Cir. 2013) (unclean hands did not bar relief

because, even assuming insurer materially altered contract without notice, insured could not show injury because insurance claim would have failed anyway).

C. The Fifth Circuit's failure to reconcile its unclean hands determination with the TUFTA jury's futility finding breaks with the rule adopted by nearly all other courts of appeals.

On appeal, Magness argued that he could not have had unclean hands in accepting loans from Stanford Bank because "the jury found that any investigation conducted by the Magness Parties would have been 'futile.'" CA5 Opening Br. 42, ECF No. 46 (citation omitted). Yet the Fifth Circuit failed to even consider that jury finding. And it is hard to see that failure as inadvertent when the court *did* consider and rely on the jury's *other* finding—that Magness had inquiry notice of fraud—to support its conclusion that Magness had unclean hands. *See* App. 40a ("The loan under those conditions gave him 'unclean hands.' Supporting this finding is that a jury found Magness had enough notice of [Stanford Bank's] possible financial improprieties to be suspicious."). The Fifth Circuit's cherry-picking among the jury findings, and failure to reconcile its unclean hands determination with the *entirety* of the jury's view of the evidence, conflicts with the approach taken to resolving equitable claims with common issues by its sister circuits.

If any doubt remained, it was resolved on further rehearing when the Fifth Circuit doubled down on its outlier approach. Although Magness again argued that the unclean hands determination "contradict[ed]" the jury's futility finding, CA5 Second Reh'g Pet. 6-7, the court of appeals again refused to engage with that argument. The court focused instead on a question

nobody had asked: whether "unclean hands" is a question for the court or a jury as a matter of Texas law. App. 2a-9a. That was never the issue. Even assuming unclean hands was a question for the court, the court still needed to give effect to the TUFTA jury's findings. In holding that Magness had unclean hands despite the jury's futility finding, the Fifth Circuit decision cannot be reconciled with the rule adopted and applied in virtually every other circuit.

II. THE FIFTH CIRCUIT DECISION IS WRONG AND WORKS A DEPRIVATION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS

The Fifth Circuit decision is also flat wrong in a way that simultaneously violates two fundamental constitutional rights. The Fifth Circuit violated the Seventh Amendment when it resolved an equitable claim in a way inconsistent with a jury's findings on a common issue. And the manner in which it (wrongly) decided that issue violated Magness's due process rights by denying him a fair opportunity to show why unclean hands does not apply.

A. The Fifth Circuit Decision Violates The Seventh Amendment

The Seventh Amendment preserves the right to a jury trial on legal issues and circumscribes the re-examination of facts found by a jury. These fundamental rights require a court to resolve an equitable claim consistent with a jury's findings on common issues. The Fifth Circuit's decision violates the Seventh Amendment.

1. The previously well-settled rule that equitable claims must be resolved consistent with jury findings on common issues "flow[s] logically" from principles

established by this Court's decisions safeguarding the jury right in cases involving both legal and equitable claims. *Ag Servs.*, 231 F.3d at 730.

In *Beacon Theatres, Inc. v. Westover*, the plaintiff sued for declaratory relief and the defendant counterclaimed, both under the antitrust laws. 359 U.S. 500, 502-03 (1959). The district court and the court of appeals ruled that the complaint was equitable in nature and that a bench trial on the claims in the complaint should proceed prior to a jury trial on the counterclaim—even though a "common issue" existed, such that the bench trial of the claims in the complaint might "prevent a full jury trial of the counterclaim." *Id.* at 503, 505. This Court reversed. The Court instructed that, because the jury right is constitutional and "no similar requirement protects trials by the court," courts must "wherever possible" try legal claims to a jury before trying equitable claims to the court. *Id.* at 510. That sequencing, the Court recognized, would prevent the "right to a jury trial of legal issues" from "be[ing] lost through prior determination of equitable claims." *Id.* at 511.

The Court's decision in *Dairy Queen, Inc. v. Wood* reiterated and reinforced *Beacon Theatres*. 369 U.S. 469 (1962). In *Dairy Queen*, the plaintiffs sued for breach of a licensing contract and the defendant demanded a jury trial. *Id.* at 473-76. The district court held that the action was "'purely equitable' or, if not purely equitable, whatever legal issues that were raised were 'incidental' to equitable issues." *Id.* at 470. Either way, the district court ruled, "no right to trial by jury existed." *Id.* This Court, reversing the summary denial of mandamus relief, held otherwise. The Court recognized that the breach of contract

claim was legal in nature and that there was a right to a jury trial on that claim. *Id.* at 477-79. It did not matter that that claim was supposedly "'incidental' to equitable issues." *Id.* at 470. To preserve the right to a jury trial on any legal issues that were "common with those upon which [the] claim to equitable relief [was] based, the legal claims" had to be determined "prior to any final court determination of [the] equitable claims." *Id.* at 479. This Court has restated and reaffirmed these principles multiple times since then. *See, e.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333-34 & n.22 (1979); *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974).

The sequencing rule from *Beacon Theatres* and *Dairy Queen* ensures that the jury gets the first word on issues common to legal and equitable claims. The logical conclusion, then, is that the jury's word must also be the last. *See, e.g.*, *Bouchet v. National Urb. League*, 730 F.2d 799, 803 (D.C. Cir. 1984) (Scalia, J.) (citing *Beacon Theatres* and *Dairy Queen* for the "general rule" that, "when a case contains claims triable to a jury and claims triable to the court that involve common issues of fact, the jury's resolution of those issues *governs the entire case*" (emphasis added)). The Seventh Amendment requires that second component part to protect the jury right.

Some courts have instead applied the Seventh Amendment through the lens of preclusion. *See, e.g.*, *Snider v. Consolidation Coal Co.*, 973 F.2d 555, 559 (7th Cir. 1992), *cert. denied*, 506 U.S. 1054 (1993). That is, once a jury has made findings, those findings have preclusive effect and prohibit a court from resolving a common issue differently from the jury. *See id.* This doctrinal nuance is unimportant.

Preclusion is the "major premise" of the ordering rule in *Beacon Theatres* and *Dairy Queen*. *Parklane Hosiery*, 439 U.S. at 333. The Court required a jury trial on legal issues to happen first "to preserve the right to a jury trial" that could otherwise be lost if a bench trial involving common issues happened first. *Id.* at 334 n.22. If a court deciding equitable claims were free to disregard the jury's findings on common issues, the Seventh Amendment right to have the jury make findings on the issues in the first place would be "significantly attenuated," regardless whether the Seventh Amendment problem arises directly or indirectly via preclusion principles. *Kairys v. Southern Pines Trucking, Inc.*, 75 F.4th 153, 160 (3d Cir. 2023) (citation omitted); *see, e.g.*, *Ag Servs.*, 231 F.3d at 730; *Brinkman v. Department of Corr. of Kan.*, 21 F.3d 370, 372-73 (10th Cir.), *cert. denied*, 513 U.S. 927 (1994); *Wade v. Orange Cnty. Sheriff's Off.*, 844 F.2d 951, 954 (2d Cir. 1988).

2. The Seventh Amendment's Re-Examination Clause also requires the jury-respecting rule.

The Re-Examination Clause provides that, when "a trial by jury has been had in an action at law, . . . the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England." *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899); *see* U.S. Const. amend. VII. At common law, "no other mode of re-examination [was] allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law." *Capital Traction*, 174 U.S. at 13. "[U]nless a new trial has been granted in one of those two ways,

facts once tried by a jury cannot be tried anew . . . in any court of the United States." *Id.*; *see, e.g.*, *Parklane Hosiery*, 439 U.S. at 336 n.23 (discussing *Dimick v. Schiedt*, 293 U.S. 474 (1935), and explaining the Re-Examination Clause precludes a court from increasing damages above the amount found by a jury).

Put differently, the Re-Examination Clause requires courts deciding equitable claims to give effect to jury fact findings. Once a jury has decided an issue, a court deciding a related equitable claim must be bound by the jury's resolution of that issue. Were it otherwise, the court would be free to "re-examine[]" that issue even when a new trial has not been ordered—in violation of the Re-Examination Clause. *Capital Traction*, 174 U.S. at 13; *see, e.g.*, *Teutscher*, 835 F.3d at 944; *Ag Servs.*, 231 F.3d at 730.

By failing to grapple with the effect of the TUFTA jury's findings—all of them, including the jury's futility finding—the Fifth Circuit impermissibly "re-examined" those findings without ordering a new trial, vitiating the fundamental right to a jury trial in the process.

B. The Fifth Circuit Decision Violates The Due Process Clause

Even if it were somehow permissible under the Seventh Amendment to disregard a jury's factual findings without ordering a new trial, the Due Process Clause at least requires notice and an opportunity to be heard before depriving a fraud victim of property.

1. A claim for setoff is "a species of property" protected by the Due Process Clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). "[I]n its most basic form," due process "requires notice

and an opportunity to be heard." *SEC v. Torchia*, 922 F.3d 1307, 1316 (11th Cir. 2019); *see, e.g.*, *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). That means a party must receive "sufficient notice to enable [him] to identify the issues on which a decision may turn," *Lankford v. Idaho*, 500 U.S. 110, 126 n.22 (1991), a "meaningful" opportunity to be heard, *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971), and a chance to present evidence and mount a defense on disputed issues, *see, e.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007).

Receivership cases are not exempt from the Due Process Clause's requirements. *See, e.g.*, *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 668 (6th Cir. 2001); *Torchia*, 922 F.3d at 1316. If anything, a receiver's extraordinary—and often extra-statutory—authority makes enforcing these constitutional safeguards all the more critical. *See infra* at 26-29.

2. The manner in which the district court and the Fifth Circuit resolved the unclean hands issue deprived Magness of due process.

The district court invoked unclean hands *sua sponte* in the context of Magness's setoff claim. That claim was specifically reserved from the TUFTA trial, so no issues regarding setoff or unclean hands were resolved at trial. *See supra* at 8. Even after trial, setoff did not become a live issue until the TUFTA judgment against Magness became final. Once Magness moved for leave to seek setoff, the district court denied his request on the pleadings—and raised unclean hands *sua sponte*, for the first time in its decision, without briefing or argument, and as a tertiary reason for denying Magness relief. App. 55a; *see supra* at 7-8.

Without notice that the court was considering applying unclean hands, Magness had no meaningful "opportunity to make an argument that might have persuaded" the district court that the doctrine did not apply. *Lankford*, 500 U.S. at 124. And in applying that doctrine, the district court failed to engage with any governing legal standard. *See* App. 55a. It also evaded limitations on unclean hands that should have precluded its application here. As discussed above, the injury requirement could not have been satisfied because Magness's allegedly inequitable conduct—accepting fraudulent transfers without a diligent investigation—did not cause injury. *See supra* at 15-16. Moreover, that conduct should not have been used against Magness because he rectified the fraudulent transfers by satisfying the TUFTA judgment. *See* Pomeroy, *supra*, at 100 ("[O]ne who has asserted the wrongful nature of an act, and recovered from the perpetrator damages in a court of law, cannot, under the principle of this maxim, set up the wrong in a suit in equity arising out of the transaction in connection with which the wrong was committed.").

The district court instead used the TUFTA judgment to *support* its unclean hands determination. App. 55a. And it did so even though the TUFTA trial excluded setoff-related issues, Magness won that trial, and the Fifth Circuit refused to order a new trial upon reversal. *See* App. 14a-15a; *supra* at 5-8. The upshot is that the TUFTA judgment had a spillover effect on setoff and unclean hands that it was never meant to have—and the district court never gave Magness a fair shot at presenting evidence and "every available defense" in opposition. *Philip Morris*, 549 U.S. at 353 (citation omitted).

The Fifth Circuit could have set things straight. But instead, it compounded the problem. In its first opinion, the Fifth Circuit did not opine on unclean hands at all. App. 42a-50a. On rehearing, the Fifth Circuit flip-flopped and made unclean hands dispositive, but it filled in the district court's threadbare reasoning with a slanted and unsupported view of the record. In particular, the Fifth Circuit (i) imputed Stanford Bank's fraud to Magness, suggesting that because the bank made the loans to Magness with fraudulent intent—to maintain its appearance of legitimacy—Magness acted inequitably by taking them, *see* App. 40a; (ii) speculated that, when Magness took the loans, he "may well have been" acting on suspicions of "possible financial improprieties," *id.*, while denying that this was impermissible appellate factfinding, App. 10a; and (iii) refused to consider the TUFTA jury's futility finding, even though it plainly bore on the equities and the availability of unclean hands, *see supra* at 15-17. And in its final opinion, the Fifth Circuit ignored Magness's arguments, instead answering a question nobody had asked. *See supra* at 10.

The only unifying theme in the decisions below is that Magness should lose. And while the Fifth Circuit opined that Magness should be denied the chance to seek setoff so that he does not gain some "improper preference" over other Stanford Bank depositors, App. 41a, this Court has explained that "[w]here a set-off is . . . valid," it cannot be denied as a "preference," *Scott v. Armstrong*, 146 U.S. 499, 510 (1892); *see SEC v. Elliott*, 953 F.2d 1560, 1573 (11th Cir. 1992) ("The Receiver argues that if Hagstrom is allowed a setoff, he will receive a preference over other creditors. . . . The Receiver's argument has

been rejected repeatedly for almost a century."). The district court and the Fifth Circuit stretched the unclean hands doctrine to do just that.

3. Without this Court's intervention, this gamesmanship will only continue. Although Magness has satisfied the TUFTA judgment, the Receiver is now trying to prevent him from obtaining even the fractional recovery that other depositors are receiving. *See* CA5 Resp. Br. 9 n.6, 53-54 & n.29, ECF No. 54 (explaining that Magness had received no interim distributions because he was ineligible as a TUFTA defendant and had no allowed claims); Receiver's Mot. to Strike, *SEC v. Stanford Int'l Bank, Ltd.*, No. 09-cv-298 (N.D. Tex.), Dkt. No. 3431 (moving to strike Magness's motion for an order allowing amended claims), *granted*, Order, *SEC v. Stanford Int'l Bank, Ltd.*, No. 09-cv-298 (N.D. Tex.), Dkt. No. 3433.

The Receiver's death-by-a-thousand-cuts approach to justice—endorsed by the courts below—is impossible to square with notions of basic process and fairness guaranteed by the Constitution.

III. THE QUESTION PRESENTED IS IMPORTANT

This case presents a question of exceptional importance and an ideal vehicle for review.

A. The Court's review of the constitutional issues here is especially warranted because those issues arise in a context—an equity receivership—that has few built-in protections. This Court long ago warned of the "capacity for abuses" inherent in equity receiverships. *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 219 (1936); *see Michigan ex rel. Haggerty v. Michigan Tr. Co.*, 286 U.S. 334, 345 (1932) ("Receiverships for conservation have at times

a legitimate function, but they are to be watched with jealous eyes lest their function be perverted."). That admonition is even more true today.

Receivers are commonly appointed in cases, like this one, initiated by the SEC. *See* SEC, *Receiverships* (last updated Sept. 12, 2024), https://www.sec.gov/enforcement-litigation/receiverships (listing over 100 active cases in which receivers have been appointed). And receiverships are frequently used as a substitute for bankruptcy. But there is a critical difference between the two. The "special remedial scheme" of bankruptcy authorized by the Bankruptcy Clause may "terminate preexisting rights," but a receivership may not. *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); *see* U.S. Const. art. I, § 8, cl. 4. Receiverships should thus be *more* protective of creditors' rights.

If anything, though, the opposite has proven true. "The bankruptcy code contains hundreds of interlocking rules" that protect creditors' rights; the receivership statutes contain virtually none. *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071, 2077 (2024); *see* 28 U.S.C. §§ 754, 959. As a result, bankruptcy is "much better designed to protect the rights of interested parties." *SEC v. American Bd. of Trade, Inc.*, 830 F.2d 431, 436 (2d Cir. 1987) (citation omitted), *cert. denied*, 485 U.S. 983 (1988). The lack of meaningful statutory guardrails has predictably caused rampant conflict between receivers and creditors[4] and has led to the sacrifice of creditors'

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[4] *See, e.g.*, Alex C. Lakatos & E. Brantley Webb, *Troubles with Ponzi Scheme Receivers: White Knights, Evil Zombies, and the Flight of Icarus*, 30 J. Tax'n & Regul. Fin. Insts., no. 3, Spring 2017, at 23, 23-25, 27-28 (discussing "[t]he conflicts of

rights for the sake of efficiency.[5] Indeed, due to the patent inferiority of receiverships, at least one court of appeals has "disapproved" their use "as an alternative to bankruptcy." *Eberhard v. Marcu*, 530 F.3d 122, 132 (2d Cir. 2008); *see American Bd. of Trade*, 830 F.2d at 435-38.

Ironically, even the SEC seems to regret the free-for-all its own invocation of the receivership process has unleashed here. Mere months after asking the district court to appoint the Receiver in this case, the SEC filed an emergency motion to modify the receivership order, arguing that there was "little if any authority" for the Receiver's clawback claims against innocent investors seeking the return of principal; that those claims were "contrary to Commission practice"; and that they deprived "the Commission, as plaintiff, [of] the ability to shape its case and determine the type and scope of relief sought." Pl.'s Emergency Mot. Modify Receivership

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interest that arise between receivers who may wish to pursue or conclude litigation on the one hand, and investors who are compelled to finance that litigation on the other").

[5] *See, e.g.*, *Torchia*, 922 F.3d at 1317-18 (denial of due process where the court "did not allow" claimants "to meaningfully argue certain claims or defenses"); *Liberte Cap. Grp., LLC v. Capwill*, 421 F.3d 377, 384 (6th Cir. 2005) (denial of due process where claimant had no opportunity to "present[] evidence regarding her legal entitlement"); *Elliott*, 953 F.2d at 1567-68 (denial of due process where claimants lacked opportunity to present evidence about nature of transfer or affirmative defenses); *see also SEC v. Terry*, 833 F. App'x 229, 235 (11th Cir. 2020) (remanding for proceedings that would provide a "'full and fair'" opportunity to "present and argue" facts (citation omitted)).

Order 1, 3, *SEC v. Stanford Int'l Bank*, No. 09-cv-298 (N.D. Tex.), Dkt. No. 613.

The disregard of creditors' rights has serious consequences. In this particular case, Magness may end up far *worse* off than if Stanford Bank had filed for bankruptcy. While the courts below went out of their way to deny him setoff—and while the Receiver is still actively working to deny him any recovery at all—bankruptcy would have preserved his claim once he paid the TUFTA judgment. *See* 11 U.S.C. § 502(h). As this Court has recognized, courts may not use their equity powers "to craft a 'nuclear weapon' of the law" that wipes out property interests. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999). Review is warranted to ensure receivership courts do not continue to vitiate the rights of creditors like Magness.

B. The rights that the courts below denied Magness are undeniably important. This Court has taken pains to scrutinize—and thwart—attempts to curtail Seventh Amendment rights, including as recently as last Term. *See SEC v. Jarkesy*, 144 S. Ct. 2117, 2139 (2024). For good reason: The right to a jury trial protected by the Seventh Amendment is a "fundamental guarantee of the rights and liberties of the people" that "has always been an object of deep interest and solicitude." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 446 (1830). "[A]ny seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick*, 293 U.S. at 486. Yet the "fundamental and sacred" right to a jury trial means little if, as occurred below, the jury's findings are not given effect. *Jacob v. City of New York*, 315 U.S. 752, 752 (1942).

The right to due process is just as important, and the due process concerns here are just as weighty. "The right to due process reflects a fundamental value in our American constitutional system." *Boddie*, 401 U.S. at 374. And the Due Process Clause makes "essential constitutional promises" about what must happen before a person is deprived of life, liberty, or property—notice and an opportunity to be heard at a "'meaningful time and in a meaningful manner'" being the most significant. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (citation omitted). Yet although unclean hands eventually became the dispositive issue below, it was injected into the case by the district court as an afterthought and without notice, briefing, or factfinding. The Fifth Circuit's affirmance on unclean hands barely resembled the district court's reasoning, rested on cherry-picked jury findings, distorted Magness's knowledge and motives in accepting loans from Stanford Bank, and ignored Magness's constitutional objections. *See supra* at 8-10. This is not the stuff of which due process is made.

C. This case is an ideal vehicle for the Court to vindicate these critical rights. The constitutional issues were properly raised below (even if the Fifth Circuit ignored them). *See supra* at 9-10. They are also straightforward under this Court's precedents—indeed, so clear-cut that the Court could consider summary reversal. *Supra* at 18-22; s*ee, e.g.*, *City of Escondido v. Emmons*, 586 U.S. 38, 43 (2019). And the highly irregular course of proceedings—involving rounds of opinions with shifting rationales where the only consistency was Magness losing—calls out for this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 20, 2024

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Ralph S. JANVEY, in his Capacity as Court-Appointed Receiver for The Stanford International Bank Limited, et al., Plaintiff—Appellee,

v.

GMAG, L.L.C.; Magness Securities, L.L.C.; Gary D. Magness; Mango Five Family Incorporated, in its Capacity as Trustee for The Gary D. Magness Irrevocable Trust, Defendants—Appellants,

Securities and Exchange Commission, et al., Plaintiffs,

v.

GMAG, L.L.C.; Gary D. Magness Irrevocable Trust; Gary D. Magness; Magness Securities, L.L.C., Defendants—Appellants,

v.

Ralph S. Janvey, Appellee.

No. 22-10235 consolidated with No. 22-10429

FILED: August 26, 2024

[113 F.4th 505]

Before Stewart, Dennis, and Southwick, Circuit Judges.

ON SECOND PETITION FOR REHEARING EN BANC

Leslie H. Southwick, Circuit Judge:

On March 20, 2024, the court denied rehearing *en banc* but withdrew the initial opinion and substituted a new one. *Janvey v. GMAG, L.L.C.*, 98 F.4th 127 (5th Cir. 2024). The mandate issued upon denial of rehearing. On April 3, 2024, Defendants (who in our previous opinions and again here are referred to as "Magness") filed another petition for rehearing *en banc* or by the panel. We RECALL the mandate in order to rule on the petition. No judge in regular active service requested the court be polled on rehearing *en banc*; the second petition for rehearing *en banc* is therefore DENIED. Rehearing by the panel is also DENIED.

I.

The most recent petition for rehearing argues it was error for us to affirm the district court's finding that Magness had "unclean hands" and that a setoff would not be permitted. The error is said to be that the finding of unclean hands must be made by a jury, and that has not occurred.

The issue of the role of jurors is one of Texas law. Before examining that law, we review relevant procedural events in this long-running case. The determination of unclean hands was made by the district court based on a jury finding in 2017, affirmed by this court in 2020, that when Magness received the relevant transfer, he was on inquiry notice that the Stanford International Bank ("SIB") was a Ponzi scheme. *Janvey v. GMAG, L.L.C.*, 977 F.3d 422, 426 (5th Cir. 2020). The Supreme Court of Texas had earlier answered a certified question from this court about how being on inquiry notice but not investigating suspicions affected a party's "good faith" under the Texas Uniform Fraudulent Transfer Act, or

TUFTA. *Janvey v. GMAG, L.L.C.*, 592 S.W.3d 125, 126 (TEX. 2019); TEX. BUS. & COM. CODE § 24.001, *et seq*. The Texas court answered: "If a transferee has actual knowledge of facts that would lead a reasonable person to suspect the transfer is voidable under TUFTA but does not investigate, the transferee may not achieve good-faith status to avoid TUFTA's clawback provision." *Janvey*, 592 S.W.3d at 128. We applied the answer and held that the evidence "does not show the [Magness] Parties accepted the fraudulent transfers in good faith." *Janvey*, 977 F.3d at 428.

The specific ruling being contested now is the district court's 2022 denial of a setoff, a denial the court explained this way:

> But he who comes into a court of equity must do so with clean hands. The Receiver has obtained a judgment against Magness to rectify the latter's receipt of tens of millions of dollars of fraudulent transfers from the Stanford entities. By virtue of this adverse judgment Magness seeks preferential treatment in the form of what amounts to an option to put his CDs back to the receivership estate at par. The Court will not countenance this inequitable outcome.

We now consider whether a jury had to make the finding of unclean hands. Magness's rehearing petition cites three opinions that he argues support that a jury must make the relevant finding about unclean hands, not a judge: *Chow v. McIntyre*, No. 01-21-00658-CV, 2023 WL 7778602 (Tex. App.—Houston [1st Dist.] Nov. 16, 2023, no pet.); *FDIC v. Murex LLC*, 500 F. Supp. 3d 76 (S.D.N.Y. 2020); *LL B Sheet 1, LLC v. Loskutoff*, 362 F. Supp. 3d 804 (N.D. Cal. 2019).

The list includes one Texas intermediate court opinion and two federal district court opinions interpreting the law of other states. Before reviewing them, we will examine precedents from the Supreme Court of Texas. We then can decide if any of what at best may be persuasive authorities that Magness offers affects what the Texas high court has held.

As we consider the caselaw, we divide the analysis of unclean hands into three logical steps: (1) what did the defendant do; (2) do those actions constitute unclean hands; and (3) how should unclean hands affect any relief granted in the case? As we will explain, it is clear that the first issue is for the jury if the facts are contested and the third always for the court. Our question is whether what we have identified as the second step is what the jury must resolve to complete its work or whether it is the first part of the court's task.

As another preliminary matter, it will be helpful to know how Texas courts define the relevant concept. "Unclean hands" means that a party's "conduct in connection with the same matter or transaction has been unconscientious, unjust, or marked by a want of good faith, or one who has violated the principles of equity and righteous dealing." *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 899 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (quoting *Thomas v. McNair*, 882 S.W.2d 870, 880 (Tex. App.—Corpus Christi-Edinburg 1994, no writ)). Further, "[i]t is a matter within the sound discretion of the trial court to determine whether [a party] has come into court with clean hands." *Thomas*, 882 S.W. 2d at 880. We get ahead of ourselves — supreme court opinions first.

In a 1999 decision, the Supreme Court of Texas discussed whether an attorney had to forfeit his entire

fee because of his breach of a fiduciary duty to his client. *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999). The issues for the court were described this way:

> Thus, when forfeiture of an attorney's fee is claimed, a trial court must determine from the parties whether factual disputes exist that must be decided by a jury *before the court can determine whether a clear and serious violation of duty has occurred*, whether forfeiture is appropriate, and if so, whether all or only part of the attorney's fee should be forfeited. Such factual disputes may include, without limitation, whether or when the misconduct complained of occurred, the attorney's mental state at the time, and the existence or extent of any harm to the client. If the relevant facts are undisputed, these issues may, of course, be determined by the court as a matter of law.

Id. at 246 (emphasis added). Thus, the court held that it was for the court to decide the seriousness of the violation of a duty, *i.e.*, whether it was "unconscientious, unjust, or marked by a want of good faith." *In re Jim Walter Homes, Inc.*, 207 S.W.3d at 899.

In a later decision, that same court set out some general principles and discussed its *Burrow* decision. In general terms, it described the issue of the division of responsibility for jury and judge:

> [W]hen contested fact issues must be resolved before equitable relief can be determined, a party is entitled to have that resolution made by a jury. Once any such necessary factual disputes have been resolved, *the weighing of all*

> *equitable considerations* . . . and the ultimate decision of how much, if any, equitable relief should be awarded, *must be determined by the trial court.*

Hill v. Shamoun & Norman, LLP, 544 S.W.3d 724, 741 (Tex. 2018) (alterations in original) (emphasis added) (citations omitted).

The court then made this more pointed statement of law: "[I]n a quantum-meruit case, once the jury decides the disputed fact issues, the trial court should weigh 'all equitable considerations (*such as whether . . . the plaintiff has "unclean hands"*).' " *Id.* at 741–42 (emphasis added) (summarizing *Hudson v. Cooper*, 162 S.W.3d 685, 688 (Tex. App.—Houston [14th Dist.] 2005, no pet.)).

In the *Hudson* case on which the supreme court relied, the court elaborated on the unclean hands issue being one for the trial court:

> Once any such necessary factual disputes have been resolved, the weighing of all equitable considerations (such as whether the defendant has been unjustly enriched, the plaintiff would be unjustly penalized if the defendant retained the benefits of the partial performance without paying for them, and the plaintiff had "unclean hands") and the ultimate decision of how much, if any, equitable relief should be awarded, must be determined by the trial court (rather than a jury).

162 S.W.3d at 688 (citing *Burrow*, 997 S.W.2d at 245–46).

Similarly, there are several Texas appellate court opinions that make a holding much like the following: "The determination of whether a party has come to

court with unclean hands is left to the discretion of the trial court." *Dunnagan v. Watson*, 204 S.W.3d 30, 41 (Tex. App.—Fort Worth 2006, pet. denied) (citing *In re Francis*, 186 S.W.3d 534, 551 (Tex. 2006) (Wainwright, J., dissenting)). The cited *Francis* dissent discussed unclean hands, but the majority did not. The dissent explained that "[w]hether a party has come to court with clean hands is a determination left to the discretion of the trial court." *Francis*, 186 S.W.3d at 551 (Wainwright, J., dissenting) (citing *Grohn v. Marquardt*, 657 S.W.2d 851, 855 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)). The cited *Grohn* decision used the same language, that a "determination of whether a party has come to court with unclean hands is left to the discretion of the trial court." 657 S.W.2d at 855.

Each decision makes clear that once disputed facts of what a defendant did are resolved, it is the court that determines if that conduct constitutes unclean hands and how unclean hands should affect the relief in the case.

Next to be considered are the three opinions that Magness cites to us. We start with the Texas court of appeals decision that says "[t]he jury was not asked to find whether Chow and Holloway's conduct was inequitable, which is a fact question." *Chow*, 2023 WL 7778602, at *16. It cited another intermediate appellate court opinion that made a similar holding. *See Grant v. Laughlin Env't*, No. 01-07-00227-CV, 2009 WL 793638, at *11 (Tex. App.—Houston [1st Dist.] Mar. 26, 2009, pet. denied) (mem. op.). In the case before us, of course, a jury has already made one central decision, namely, that Magness was on inquiry notice of possible fraud. Moreover, decisions

by the supreme court override any contrary intermediate-court holdings.

Magness also cites two out-of-circuit district court cases. One of them applied New York law. *See Murex*, 500 F. Supp. 3d at 121–22. The court found disputed fact issues regarding what the allegedly unjust party had done. *Id.* at 122. Further, "Murex has not offered any argument or case authority — and the Court finds none — that such a lapse constitutes the 'immoral, unconscionable conduct' required for the unclean-hands defense to apply." *Id.* Looking for case authority that certain conduct constitutes unclean hands is looking for what courts have held, not juries.

The other cited opinion applied California law. *Loskutoff*, 362 F. Supp. 3d at 821. It rejected an argument about unclean hands because it found that the evidence at most supported negligent conduct. *Id.* Magness relies on one phrase at the end of the analysis, that "no reasonable juror could find that Plaintiff acted with unclean hands." *Id.* That court cited no authority that the unclean-hands issue under California law was for the jury.

Magness also insists that no authority supports that fault under TUFTA *automatically* results in unclean hands. We do not interpret the district court's decision here as having been automatic. Instead, it was a finding based on this judge's thorough knowledge of the facts of the transfer.

In conclusion, Magness found one intermediate Texas appellate court opinion that gives some support that it is a jury question whether certain facts constitute inequitable conduct. The jury finding made as to Magness may satisfy that holding, but regardless, we take our direction from the state's

supreme court. We see no disputed facts about the relevant conduct. A jury in 2017 found that Magness was on inquiry notice that SIB was engaged in fraud. This court in 2020 concluded the evidence did not support that Magness had acted in good faith when he received the relevant transfers.

We return to the point made earlier in this opinion that the analysis of unclean hands could be divided into three sequential questions — what did the party do; should those deeds be labeled unclean hands; if so, what is the effect on any relief in the case? The controlling caselaw gives that second question to the court, not a jury. Even if there is some role for a jury under Texas law as to that second question, the role was satisfied in this case.

The district court, with all the evidence before it, held that Magness was not entitled to a setoff. There was no error in that decision. That court did not hold that all TUFTA violations barred a setoff, but this one did. Indeed, nothing in our opinion should be interpreted as a holding that when TUFTA is violated, a setoff is categorically disallowed.

II.

There are a few other issues.

We agree with Magness that a factual recitation in our earlier opinion denying rehearing mislabeled what he was seeking leave to file. Our opinion stated the district court denied leave to amend his complaint when leave was sought to file a new complaint. The difference has no effect here.

Magness also takes issue with three other statements from our opinion. (1) "[A] jury found Magness had enough notice of SIB's possible financial improprieties to be suspicious. Magness may well

have been acting on those suspicions in seeking a loan." (2) "It is a fair assessment that Magness obtained the $79 million loan because he contemplated significant financial troubles ahead for SIB." (3) "After reports that the SEC was investigating SIB, Magness sought to redeem his investments." *Janvey*, 98 F.4th at 130–31, 143–44 (citation omitted).

The first two numbered statements are not independent fact findings. Our opinion properly reviewed the district court's denial of equitable relief under an abuse of discretion standard. Further, the statement of what "may well" have occurred is not a fact finding.

As to the third, Magness asserts "[t]hat statement is derived from [this court's 2020 opinion]. However, that portion of [the opinion] does not cite to the record and is inaccurate." The portion of the opinion it references is this: "In July 2008, Bloomberg reported that the SEC was investigating SIB. On October 1, 2008, the investment committee met and, given its perceived risk associated with continued investment in SIB, persuaded Magness to take back, at minimum, his accumulated interest from SIB." *Janvey*, 977 F.3d at 425. To the extent Magness contests a factual recitation in a 2020 opinion, a petition for rehearing now is far too late. Further, the statement that "Magness sought to redeem his investments" once learning of an SEC investigation of SIB is correct. *Janvey*, 98 F.4th at 130–31.

The petition for rehearing and all pending motions are DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Ralph S. JANVEY, in his Capacity as Court-Appointed Receiver for The Stanford International Bank Limited, et al., Plaintiff—Appellee,

v.

GMAG, L.L.C.; Magness Securities, L.L.C.; Gary D. Magness; Mango Five Family Incorporated, in its Capacity as Trustee for The Gary D. Magness Irrevocable Trust, Defendants—Appellants,

Securities and Exchange Commission, et al., Plaintiffs,

v.

GMAG, L.L.C.; Gary D. Magness Irrevocable Trust; Gary D. Magness; Magness Securities, L.L.C., Defendants—Appellants,

v.

Ralph S. Janvey, Appellee.

No. 22-10235 consolidated with No. 22-10429

FILED March 20, 2024

[98 F.4th 127]

Before Stewart, Dennis, and Southwick, Circuit Judges.

ON PETITION FOR REHEARING EN BANC

Leslie H. Southwick, Circuit Judge.

No judge in regular active service requested the court be polled on re-hearing *en banc*; therefore, the petition for rehearing *en banc* is DENIED. Treating the petition for rehearing *en banc* as a petition for panel rehearing, the petition is GRANTED. We withdraw our opinion, *Janvey v. GMAG, L.L.C.*, 69 F.4th 259 (5th Cir. 2023), and substitute the following.

In 2009, Stanford International Bank ("SIB") was exposed as a Ponzi scheme and placed into receivership. The Receiver sought to recover estate assets from various parties including Gary Magness and some of his affiliates. The district court refused to consider a setoff that would have reduced the Receiver's judgment against Magness, concluding among other reasons that a setoff would be inequitable. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

In 2009, the Securities and Exchange Commission ("SEC") exposed the fraudulent operations of SIB. *Janvey v. GMAG, L.L.C.*, 977 F.3d 422, 425 (5th Cir. 2020). For nearly two decades, SIB had issued fraudulent certificates of deposit ("CDs") that paid above-market interest rates. *Id.* The payments were derived from new investors' funds. *Id.* The scheme ultimately left thousands of investors with $7 billion in losses. *Id.* This court has frequently considered appeals from the receivership.[1] We summarize the facts relevant to this appeal.

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[1] *See Janvey v. Brown*, 767 F.3d 430 (5th Cir. 2014); *Janvey v. GMAG, L.L.C.*, 913 F.3d 452 (5th Cir.), *vacated & superseded by* 925 F.3d 229 (5th Cir. 2019); *Janvey v. GMAG, L.L.C.*, 977 F.3d 422 (5th Cir. 2020); *Janvey v. GMAG, L.L.C.*,

Defendants-Appellants are Gary Magness; GMAG, L.L.C.; and several other Magness entities (collectively, "Magness"). Between December 2004 and October 2006, Magness purchased $79 million in SIB-issued CDs. *Id.* After reports that the SEC was investigating SIB, Magness sought to redeem his investments. *Id.* SIB responded that redemptions were not possible but agreed to loan the value of the CDs and an additional amount as a result of accumulated interest. *Id.* In October 2008, through a series of loans, Magness received $88.2 million from SIB. *Id.*

In a 2009 proceeding brought by the SEC, the District Court for the Northern District of Texas appointed Ralph S. Janvey as Receiver to recover SIB's assets and distribute them to the victims. *Id.* We will use both "Janvey" and "the Receiver" in this opinion. The district court entered an order, amended in 2010, restraining creditors from: "The set off of any debt owed by the Receivership Estate or secured by the Receivership Estate assets based on any claim against the Receiver or the Receivership Estate," unless obtaining "prior approval of the Court."

The same 2010 order barred all persons from filing suit against the Receiver on claims "arising from the subject matter of this civil action." In 2012, the district court established a process allowing creditors to file claims against the Receivership and to participate in distributions. The order defined "[c]laim" as any "potential or claimed right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent,

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No. 21-10483 c/w 21-10882, 2022 WL 4102067 (5th Cir. Sept. 7, 2022).

mature, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured, against one or more of the Receivership Entities." Magness participated in this court-approved claims process and filed three proofs of claim alleging outstanding balances in his SIB CD accounts. Those claims are the basis for his seeking a setoff.

In a case separate from the underlying Receivership but also brought in the Northern District of Texas, the Receiver sued Magness, alleging the loans he received from SIB were fraudulent transfers and seeking return of those funds. Magness agreed the payments were fraudulent but argued they were taken in good faith under Texas law.

Magness initially included a setoff defense in his answer to the Receiver's complaint. The Receiver moved to exclude any setoff defenses before trial, arguing that any reference to setoff would be "unfairly prejudicial" and "an attempt to side-step the claims process."[2] Later, in a joint stipulation, the parties "agree[d] that during the trial of this matter," they would "not present . . . any reference to the Magness Parties' affirmative defenses of . . . setoff/offset." The

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[2] The Receiver notified the court of a recent opinion holding that a plaintiff forfeits a claim if the only assertion of it in district court was in the complaint. *Shambaugh & Son, L.P. v. Steadfast Ins. Co.*, 91 F.4th 364, 369–70 (5th Cir. 2024). The court also held, though, that usually forfeiture "will not apply 'when [an issue] fairly appears in the record as having been raised or decided.' " *Id.* at 370 (quoting *Lampton v. Diaz*, 639 F.3d 223, 227 n. 14 (5th Cir. 2011)). We conclude that consideration of a setoff was likely not forfeited, in part because, as we discuss, the time for seeking a setoff could be after the other party's claim had been resolved.

district court also entered a pretrial order, which made no mention of any setoff defense.

The dispute proceeded to trial. Magness had already returned $8.5 million to the Receiver, which was the amount he was loaned in excess of his original $79 million investment; the only issue for the jury was whether Magness was acting in good faith when he received $79 million in loans from SIB. Jurors found Magness had inquiry notice of the possibility of a Ponzi scheme but also determined any investigation would have been futile. *Janvey*, 977 F.3d at 426.

Based on the jury findings, the district court determined Magness had received the funds in good faith and entered judgment denying the Receiver any recovery. *Id.* Since Magness had no obligation to disgorge funds, setoff was not an issue. On appeal, we certified to the Supreme Court of Texas the question of whether good faith was a defense in these circumstances; the answer was "no." *Id.*; *Janvey v. GMAG, L.L.C.*, 592 S.W.3d 125, 133 (Tex. 2019). In October 2020, we reversed and rendered judgment for the Receiver as to Magness's liability for the $79 million. *Janvey*, 977 F.3d at 431.

Following our decision, the Receiver moved in district court for entry of final judgment for the $79 million. Magness's opposition did not include any reference to a setoff defense. On April 9, 2021, the district court entered final judgment for about $79 million, plus prejudgment interest and costs.

On May 6, 2021, Magness moved in district court for a stay of the final judgment pending (1) his appeal of that final judgment to this court and (2) the Supreme Court's ruling on his petition for a writ of certiorari for review of this court's liability judgment.

To obtain that relief, Magness agreed to deposit a cash *supersedeas* bond. Magness represented that he would not oppose release of the cash to satisfy the final judgment when no further appeal was possible. On May 11, 2021, the district court granted the requested relief. Magness then petitioned the Supreme Court for a writ of certiorari regarding this court's liability judgment.

On August 4, 2021, the district court entered final judgment on attorneys' fees. In a consolidated appeal to this court, Magness challenged the district court's award of prejudgment interest, costs, and attorneys' fees. Before our decision on the appeal, the Supreme Court on December 13, 2021, denied Magness's petition to review this court's liability judgment. We later affirmed the district court's award. *Janvey v. GMAG, L.L.C.*, No. 21-10483 c/w 21-10882, 2022 WL 4102067, at *4 (5th Cir. Sept. 7, 2022).

This brings us to the current appeal. After our 2022 decision, the Receiver moved in district court in the separate action he had filed against Magness to release the $79 million from the court registry. Despite his prior representation that he would not oppose the release of funds, Magness moved for leave to file a complaint. Magness's proposed complaint sought declaratory relief that the final judgment for $79 million should be reduced by the amount he was owed on his claims that had not yet been adjudicated. Magness argued the district court should first resolve his setoff claims before releasing any funds. In what we will call the "Initial Setoff Order," the district court denied Magness's motion for leave and granted the Receiver's motion to release funds.

In the main SEC Receivership proceeding, Magness filed a second, nearly identical motion for

leave to file his proposed complaint, again seeking a declaratory judgment pertaining to setoff. In the "Second Setoff Order," the district court once again denied leave.

Magness appealed both the Initial and the Second Setoff Order. We consolidated the appeals.

DISCUSSION

Magness seeks reversal of the district court's denial of a setoff. "We review the district court's actions pursuant to the injunction it issued for an abuse of discretion." *Newby v. Enron Corp.*, 542 F.3d 463, 468 (5th Cir. 2008). A district court's actions in supervising an equity receivership are also reviewed for an abuse of discretion. *SEC v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 373 (5th Cir. 1982). Similarly, a district court's denial of leave to amend a complaint is discretionary, reviewed here for possible abuse. *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 566 (5th Cir. 2003).

I. Preliminary matters

A. Magness's setoff claims and the district court's rulings

In his first proposed amended complaint, Magness sought a declaratory judgment that (1) "the continuation of the stay against setoff in the Appointment Orders is an unconstitutional pre-emption of state law rights of setoff," (2) Magness is "entitled to setoff against the Judgment the balance accrued pursuant to state and/or Antiguan law under certificates of deposits," and (3) Magness is "entitled to setoff against the Judgment any amounts they are entitled to receive as a distribution in the Receivership on account of satisfying the Judgment."

Though the motion referred to Antiguan law, no such law is argued here on appeal, making Texas law all we consider.

In its Initial Setoff Order, the district court reasoned that under the mandate rule, it "had no power to do anything other than enter final judgment in conformance with the judgment of the Fifth Circuit." *See Deutsche Bank Nat'l Tr. v. Burke*, 902 F.3d 548, 551 (5th Cir. 2018). Consequently, the court did not consider the merits of Magness's claim of a right to a setoff.

Magness also moved for leave to file a nearly identical complaint in the SEC Receivership proceeding. In its Second Setoff Order, the district court denied that motion on the merits. Later in our opinion, we will discuss the district court's reasons. We will not analyze that court's application of the mandate rule in the Initial Setoff Order because addressing the arguments for denying leave to amend in the Second Setoff Order will suffice.

On appeal, Magness contends he has setoff rights that "fall into two categories." The first category is the "20% CD Principal Setoff Amount plus accrued interest on that amount."[3] The second category is the

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[3] Magness claims this setoff amount is $58 million. As described earlier, Magness purchased $79 million in SIB CDs. SIB loaned him $88.2 million, $25 million in early October 2008, and $63.2 million in late October 2008. Magness claims he still has $58 million on deposit with SIB using the following calculation. The $25 million loan was paid off immediately with accrued interest on his CDs. As a result, Magness asserts that he only borrowed $63.2 million, leaving $15.8 million on deposit ($79 million minus $63.2 million). That $15.8 million principal, plus interest and "penalty revers[als]," is the basis of Magness's claim for a $58 million setoff.

"amount of distributions to which [Magness is] entitled as [a] victim[ ] of SIB."[4]

B. Historical federal practice and Texas law on setoffs

We first need to determine the applicable law. The SEC obtained a receivership over SIB. Had SIB been forced into bankruptcy, setoff rights would have existed statutorily, subject to specific requirements under the Bankruptcy Code and extensive caselaw. *See* 11 U.S.C. § 553. One treatise concluded that there is "no general equitable power to disallow a valid right of setoff preserved by section 553." 5 COLLIER ON BANKRUPTCY § 553.02[3] (Richard Levin & Henry J. Sommer, eds., 16th ed. 2023). In-stead, the rules for general equity receiverships apply here.

A federal statute and a procedural rule identify some of the requirements for a receiver's administration of a debtor's estate. First, the statute provides that a receiver appointed by a federal court "shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." 28 U.S.C. § 959(b). Second, the Federal Rules of Civil Procedure "govern an action in which the appointment of a receiver is sought or a receiver sues or is sued." FED. R. CIV. P. 66. This sentence immediately follows: "But the practice in

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[4] Magness argues he is entitled to $11 million in distributions from SIB. Magness alleges the "Estimated Recovery % to SIB Creditors" is 13.8% of the $79 million judgment the district court order released to the Receiver, which results in $11 million.

administering an estate by a receiver . . . must accord with the historical practice in federal courts or with a local rule." *Id.*

The line dividing "administration" governed by historical practice or local rule from the "action" governed by the federal rules was analyzed by one of the principal treatises on federal procedure:

> In our opinion "administration" means the receiver's dealings with the property, and the "practice" in such administration refers to orders he must get to allow him to dispose of the property, to spend money to protect it, to distribute it among the creditors or lienors, and the like. In short, the "practice" means the procedure by which he gets the power to do those things which an owner of the property would have without court authorization.

12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2982 (3d ed. 2023) (quoting *Phelan v. Middle States Oil Corp.*, 210 F.2d 360, 363 (2d Cir. 1954)). The *Phelan* case "indicates the general scope of 'the administration of estates by receivers' to which local practice rules and former equity usage, rather than the federal rules, apply." *Id.* For good or ill, "it is clear from the text of [Rule 66] itself that, in formulating it, the [Rules Advisory] Committee did not wish to undertake a revision of federal receivership practice." § 2981.

Though there is not much law, we accept this treatise's conclusion that a court's "orders [that a receiver] must get to allow him to dispose of the property, . . . to distribute it among the creditors or lienors, and the like" are part of "administration." *Phelan*, 210 F.2d at 363. The treatise reasonably adds

that "[o]ther aspects of a receivership that would be governed by former federal equity practice . . . include . . . his or her powers and discretion with regard to management and disposition of the property, the allowance and payment of claims, and accounting by and compensation of the receiver." 12 WRIGHT & MILLER, FED. PRAC. & PROC. § 2982 n.10. The issue before us—whether a receiver may deny a setoff—is at least an "allowance and payment of claims" and may fit other categories.

Therefore, under Rule 66 we are to apply either historical practice in federal court (not the Federal Rules of Civil Procedure) or a local rule to the availability of setoffs. To be clear, a "local rule" is a local district court rule, not a state court rule. *Id.* at n.11; *see also* § 3154 (listing receiverships as a local rule topic). No Northern District of Texas local rule has been cited to us. Though we are not to apply state law explicitly, such law may nonetheless be useful: "Of course, in the absence of substantial federal precedent in a particular context, federal courts are quite likely to look to state law for guidance." 12 WRIGHT & MILLER, FED. PRAC. & PROC. § 2983.

We start our examination of historical practices with our own precedent on the SIB receivership. Ten years ago, we identified the substantive state law that controls the SIB receiver's claims of fraudulent transfers—the Texas Uniform Fraudulent Transfer Act ("TUFTA"). *Janvey v. Brown*, 767 F.3d 430, 436 (5th Cir. 2014); TEX. BUS. & COM. CODE § 24.001. The district court had supplemental jurisdiction over the receiver's state-law TUFTA claims. *Janvey*, 767 F.3d at 434 n.10. That Act also supports the claims in this case. As to procedural rules, we have been cited to no precedent involving the SIB receivership in which

this court explored historical equity practice or the existence of a local rule, perhaps because a specific equity procedural issue has not been the subject of dispute.

Next, we consider the briefing in this appeal. Magness's brief explores historical equity practice to the limited extent of discussing Section 959(b) and the general history of setoffs, including that the right to a setoff was recognized in equity. The Receiver does not directly discuss details of historical practice. The most important practice would be whether setoffs of opposing claims were allowed, dollar for dollar, when one party was insolvent.

Further as to historical practice, we found an opinion involving a receivership for an insolvent national bank. *Scott v. Armstrong*, 146 U.S. 499, 13 S.Ct. 148, 36 L.Ed. 1059 (1892). The Supreme Court stated that being able to "assert set-off at law is of statutory creation, but courts of equity from a very early day were accustomed to grant relief in that regard independently as well as in aid of statutes upon the subject." *Id.* at 507, 13 S.Ct. 148. The Court described when a setoff was permitted:

> In equity, relief was usually accorded, says Mr. Justice Story, (Eq. Jur. § 1435,) "where, although there are mutual and independent debts, yet there is a mutual credit between the parties, founded at the time upon the existence of some debts due by the crediting party to the other. By 'mutual credit,' in the sense in which the terms are here used, we are to understand a knowledge on both sides of an existing debt due to one party, and a credit by the other

> party, founded on and trusting to such debt, as a means of discharging it."

Id. (quoting 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1435 (13th ed. 1886)). The Court held that "a debtor of the bank [can] set off against his indebtedness the amount of a claim he holds against the bank" if certain conditions were satisfied. *Id.* at 502, 13 S.Ct. 148 (certified question one), 513 (Court's answer).

The cite in *Scott* to Justice Story's writings leads us to examine his *Commentaries on Equity Jurisprudence*. An entire chapter concerns setoffs. 2 Story, COMMENTARIES §§ 1430–1444. There are a variety of details, such as generally not allowing a setoff of a liquidated and an unliquidated claim. § 1440 n.6. Without question, though, setoffs were a recognized part of historical equity practice in federal courts. The detail of the *Commentaries* is daunting, as is the frequency that Justice Story breaks out into multiple, lyrical sentences in Latin. Absent briefing, we will not explore the *Commentaries* beyond a few observations in the concluding section of this opinion.

In summary, setoffs were a right in federal courts before the federal procedural rules were adopted. Those practices continue to apply under Rule 66. The district court and both parties discuss Texas procedures for setoffs, though, not historical practice in federal courts. Due to that acceptance and the absence of briefing on pre-Rules federal practice, we apply Texas procedures on the specifics of setoffs unless they are inconsistent with more general principles regarding historical practice in federal courts.

Under Texas law, a setoff "is proper only where demands are mutual, between the same parties, and in the same capacity or right." *Capital Concepts Props. 85-1 v. Mutual First, Inc.*, 35 F.3d 170, 175 (5th Cir. 1994) (quoting *Brook Mays Organ Co. v. Sondock*, 551 S.W.2d 160, 166 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.)). The 1892 *Scott* opinion also described mutuality as necessary for a setoff. 146 U.S. at 507, 13 S.Ct. 148.

A Texas legal encyclopedia describes a setoff this way:

> A setoff is a form of counterclaim originally created by statute, which brings together obligations of opposing parties to each other and, by judicial action, makes each obligation extinguish the other. Setoff is in the nature of a cross-action.

67 TEX. JURIS. 3d *Setoffs, Counterclaims, Etc.* § 3 (2023) (footnotes omitted).

One of the authorities cited in that section of *Texas Jurisprudence* gave this description: "The great object of all discounts or set-offs is, to adjust the indebtedness between the parties, and to permit executory process to be enforced only for the balance that may be due." *Nalle v. Harrell*, 118 Tex. 149, 12 S.W.2d 550, 551 (Tex. Comm'n App. 1929) (quoting *Simpson v. Huston*, 14 Tex. 476, 481 (1855)). At the time of *Nalle*, procedural statutes controlled setoffs. *See* TEX. REV. CIV. STAT. ANN. arts. 2014–2017 (1925). For example, a setoff by one party of unliquidated claims could not be made against the other party's certain demands unless they arose "out of or incident to, or connected with, the plaintiff's cause of action." art. 2017. This prohibition currently appears in

Texas Rule of Civil Procedure 97(g), barring setoff or counterclaims of tort and contractual demands but with the same exceptions as in Article 2017.

As the *Texas Jurisprudence* explanation states, a setoff is a "form of counterclaim." 67 TEX. JURIS. 3d *Setoffs, Counterclaims, Etc.* § 3. To be classified as a setoff, we know the dueling demands must be mutual and involve the same parties in the same capacity. *Capital Concepts*, 35 F.3d at 175. The Texas Supreme Court held that when a setoff is brought as a counterclaim, it is not a compulsory one. *See Bonham State Bank v. Beadle*, 907 S.W.2d 465, 470 (Tex. 1995) (Owen, J.) (discussing general civil litigation, not a receivership).

Janvey relies on a holding in *Beadle* "that no right of set-off as to judgments can come into existence until both judgments have been rendered." *Id.* at 469 (quoting *Spokane Sec. Fin. Co. v. Bevan*, 172 Wash. 418, 20 P.2d 31, 33 (1933)). From that, Janvey argues that because there are not two judgments, there can be no setoff. We find that reading creates an improper barrier at least for this equitable receivership action. A setoff is a species of counterclaim, one that must satisfy certain rules. A Texas procedural rule provides that when "the defendant establishes a demand against the plaintiff upon a counterclaim exceeding that established against him by the plaintiff, the court shall render judgment for defendant for such excess." TEX. R. CIV. P. 302. Even if labeled a counterclaim, competing obligations that are mutual and involve the same parties in the same capacity can be the subject of a setoff.

The *Beadle* court identified one significant procedural distinction if two judgments are being setoff. Unlike with a counterclaim, the right to

recover the amount owed under a prior judgment is not factually dependent on the outcome of the second lawsuit because the earlier judgment is final. *Beadle*, 907 S.W.2d at 470.

Beadle itself provides support that setoffs do not always require two judgments. The court described the difference between a setoff based on two judgments and counterclaims in two ways. First was this:

> Unlike a counterclaim that has not been reduced to judgment (which must be asserted if it arises out of the same transaction or occurrence as the plaintiff's claims, *see* TEX. R. CIV. P. 97(a)), the right to recover the amount owed under a prior final judgment is not factually dependent on the disposition of the second lawsuit.

Id. Second, the court stated that "although the right to offset one claim against another can be an affirmative defense, the right to offset two judgments is not." *Id.* (citing *Ketcham v. Selles*, 96 Or.App. 121, 772 P.2d 419, 421 (1989)).

In addition, just before the statement on which Janvey relies, the *Beadle* court addressed the argument that there could not be a setoff because the party seeking it should have sought it even earlier, namely, before the second judgment was entered. *Id.* at 469. The court was a bit tentative but stated "[e]ven if the setoff sought by Bonham Bank could have been awarded in that court [that entered the second judgment], it does not follow that Bonham Bank is forever foreclosed from seeking an offset in another forum." *Id.* That at least leaves open whether a setoff can be obtained after one judgment.

We find further guidance from another opinion cited in *Beadle*. A setoff was an affirmative defense when "the judgment debtor was seeking to offset mere *claims* that he held against the judgment creditor." *Ketcham*, 772 P.2d at 421 (emphasis in original). That description supports that a setoff of a previously unlitigated claim at least *may* be brought in the suit that leads to the first judgment. The *Beadle* court might disagree that such claims are waived if not brought because it identified them as permissive counterclaims. As to whether a defendant who has a valid judgment against the plaintiff must argue for a setoff in the second lawsuit brought by its debtor, the *Beadle* court was clear it was not necessary. *Beadle*, 907 S.W.2d at 469–70.

In summary, we do not interpret *Beadle* as prohibiting in a receivership a counterclaim that is in effect a setoff. Moreover, our review of the historical practice in equity discovered no two-judgment requirement.

Could, though, a district court overseeing a receivership require that a defendant's setoff claims—its counterclaims not yet reduced to judgment—be brought at some specific stage of the case, either simultaneously with the receiver's claims or always after those claims? We already mentioned that, by general order, the district court in 2010 stated creditors were "enjoined, without prior approval of the Court, from . . . [t]he set off of any debt owed by the Receivership Estate . . . based on any claim against the Receiver or the Receivership Estate." How any other setoffs may have been handled is not before us, and by its terms the order did not prohibit bringing a claim for a setoff. We do not interpret *Beadle*, expressing general Texas procedures, as prohibiting a

district court from creating special rules for setoffs when overseeing a receivership. All we know here is that the district court required permission to bring the setoff and did not bar them categorically in any order identified to us. Magness was refused permission; thus, this appeal and our need to analyze the issue.

Magness's denied motions for leave to file a new complaint were seeking first a judgment on the amount of Magness's claims, then to have it setoff against the Receiver's judgment. Because of *Beadle*, we conclude that under state law, there was neither forfeiture nor waiver of the issue of setoff by waiting to raise it until after the judgment against Magness became final. Historical equity practice also does not raise a bar. Finally, the district court did not consider the possibility that Magness had waived a setoff by agreeing to a release of the $79 million if a writ of certiorari were denied. Consequently, we will not consider that possibility either.

Preliminaries behind us, we now consider whether Magness has shown error in the district court's denial of any setoff.

II. Magness's right to a setoff in these proceedings

In its Second Setoff Order, the district court denied a setoff in this case for three reasons:

(A) Summary proceedings on claims are permitted in equity receiverships, and Magness's seeking to bring an independent setoff action is an invalid effort to bypass those summary proceedings.

(B) Magness's setoff claim arises in equity, and Texas law does not permit a setoff under similar facts. The court cited *Cocke v. Wright*, 39 S.W.2d 590, 592–93 (Tex. Comm'n App. 1931).

(C) Magness's amended complaint would be futile. Because the setoff claim is equitable, Magness's claim would fail because his previous participation in fraudulent transfers means he has "unclean hands."

We will discuss each of these reasons.

A. Summary receivership procedures allow rejecting setoffs

In concluding that setoffs could be prohibited, the district court relied on caselaw that required all claims be brought in the Receivership:

> Courts frequently approve summary claims processes that deny claimants the right to pursue individual actions against the receivership estate. *See, e.g., SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 668 (6th Cir. 2001); *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *SEC v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986).

None of those authorities, though, specifically address whether it is proper to disallow setoffs when employing summary claims processing.

The district court also cited three of this court's opinions in the SIB receivership to demonstrate our approval of the district court's summary procedures. *See Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 903 (5th Cir. 2019); *SEC v. Stanford Int'l Bank, Ltd.*, 551 F. App'x 766, 769–71 (5th Cir. 2014); *SEC v. Stanford Int'l Bank Ltd.*, 465 F. App'x 316, 317 (5th Cir. 2012). This court's *Zacarias* opinion did not address setoffs; it upheld the district court's orders that prohibited suits by other investors against two parties that settled with the Receiver. *See Zacarias*, 945 F.3d at 889. The 2014 opinion was a later appeal in the same dispute as the 2012 opinion, and that

later appeal had no setoff analysis. *See SEC*, 551 F. App'x 766.

The cited 2012 Fifth Circuit opinion did discuss a setoff claim, but it was not comparable to the one Magness presents. There were three parties involved, and that makes all the difference:

> Trustmark National Bank, a creditor of Stanford International Bank Limited, appeals the decision of the district court allowing HP Financial Services Venezuela ("HPFS") to present a letter of credit to Trustmark for payment, but refusing to allow Trustmark to offset the funds from Stanford who is currently under the receivership of Ralph S. Janvey.

SEC, 465 F. App'x at 317 (two parentheticals omitted).

SIB deposited cash collateral with Trustmark, which caused Trustmark to issue letters of credit to several companies doing business with SIB. Therefore, Trustmark was a secured creditor, with setoff rights on the collateral should one of the businesses call on Trustmark to honor the letter. *Id.* at 318. One of the businesses, HPFS, was not paid on its lease of computer equipment to SIB; Trustmark refused to honor the letter of credit because the district court had already entered the bar order. *Id.*

In resolving the dispute, the district court found that "the letter of credit transaction involved three separate contracts and that the 'obligations and duties created by the contract between [Trustmark] and [HPFS] are completely separate and independent from the underlying transaction between' " HPFS and Stanford. *Id.* at 319 (footnote omitted). We affirmed. *Id.* at 321. We held that the party issuing

a letter of credit must honor it from its own assets. *Id.* at 320. Therefore, Trustmark had to pay HPFS with its funds, but its access to the cash collateral, now property of the receivership estate, had to be through the claims process.

The claim here is not tripartite, and there was no initial obligation on Magness to expend his own funds that stands between his claims and the Receivership. Our 2012 *Stanford* opinion involving Trustmark does not resolve the fundamental issue of whether a receivership may ignore recognition of equitable setoff rights in Texas. Indeed, we have not been cited to any authority in which this court, as to the SIB receivership or any other, has addressed the availability of a setoff. If such authority exists, it is not before us on this appeal.

B. Texas law on setoffs in receiverships

The district court also determined that Texas law would not allow a setoff in this case, holding that "Texas equity jurisprudence supports a refusal to allow setoff in exactly this circumstance. *Cocke v. Wright*, 39 S.W.2d 590, 592–93 (Tex. Comm'n App. 1931)." Our earlier discussion of historical equity practices included recognition that state law is at times applied absent clear evidence of historical practice.

We start by explaining that the Texas Commission of Appeals, which issued the *Cocke* opinion, formerly assisted the Texas Supreme Court with its backlog.[5]

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[5] The Texas Legislature twice created commissions to assist the state Supreme Court. Margaret Waters, *Commissions of Appeals, in* 2 NEW HANDBOOK OF TEXAS 251 (1996). "In 1918, because the Supreme Court was several years behind with its docket, [a second] Commission of Appeals was established in two

The weight given to Commission of Appeals opinions was explained by the state Supreme Court when it held the opinions "that were not adopted or approved by the Supreme Court . . . are not binding on the court in the same sense that the approved and adopted opinions are, but they are given great weight." *National Bank of Com. v. Williams*, 125 Tex. 619, 84 S.W.2d 691, 692 (1935). The court made that holding when discussing one opinion that had not been "approved." *Id.* (citing *Central Nat'l Bank of Com. v. Lawson*, 27 S.W.2d 125 (Tex. Comm'n App. 1930)).[6] We examined the *Lawson* opinion to learn how to identify an unapproved opinion. Immediately after the end of that Commission of Appeals opinion appears the same statement by the Chief Justice of the Supreme Court that comes after the end of the *Cocke* opinion: "Judgments of the Court of Civil Appeals and district court are both affirmed, as recommended by the Commission of Appeals." *Lawson*, 27 S.W.2d at 129; *Cocke*, 39 S.W.2d at 593.

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sections with three commissioners each. Decisions had to be submitted and accepted by . . . the Supreme Court." *Id.* This commission was abolished in 1945. *Id.*

[6] The Texas Supreme Court cited *Williams* in 2022 for the rule on adopted opinions, indicating the rule remains valid. *See Jordan v. Parker*, 659 S.W.3d 680, 685 n.20 (Tex. 2022). The *Jordan* opinion discussed an approved Commission of Appeals opinion, *id.* at 685–86, which stated this after its concluding paragraph: "Opinion adopted by the Supreme Court." *Clark v. Gauntt*, 138 Tex. 558, 161 S.W.2d 270, 273 (Tex. Comm'n App. 1942). The Supreme Court had made adoption automatic in 1934: "All opinions of the Commission of Appeals, accepted by the Court, will from and after this, the 21st of March [1934], be adopted by the Supreme Court, and the Clerk will enter this order in the minutes." *Courts – Opinions of Texas Commission of Appeals*, 12 TEX. L. REV. 356, 358 (1934).

Thus, *Cocke* was not an approved opinion but is entitled to "great weight," equivalent perhaps to an opinion by an intermediate Texas appellate court.

We now examine the dispute that led to the *Cocke* opinion. The litigation arose from the financial failure of the United Home Builders of America, which was a co-operative lending association that operated independently for a little more than a year beginning in January 1919. *Cocke*, 39 S.W.2d at 591. United Home Builders fell under the supervision first of a state agency, and then was controlled by a court-appointed receiver named G.G. Wright. *Id.* The Texas Legislature authorized such associations in 1915, then repealed the statute in 1923 and required their liquidation. *See Barlow v. Wright*, 279 S.W. 593, 595–96 (Tex. Civ. App.—Dallas 1925, writ ref'd). The caselaw we reviewed does not suggest these associations were another era's Ponzi schemes; instead, the decisions expose them as a doomed business model authorized by misbegotten legislation.

To understand some details, we find the Texas Court of Civil Appeals *Cocke* opinion, affirmed by the Commission of Appeals, to provide useful additional explanations. *See Cocke v. Wright*, 23 S.W.2d 449 (Tex. Civ. App.—Dallas 1929), *aff'd*, 39 S.W.2d 590 (Tex. Comm'n App. 1931). The district court here considered *Cocke* to have comparable facts because debtor Cocke had a claim against United Home Builders based on money he paid the association, while United Home Builders's receiver had a claim against Cocke based on an unpaid real estate loan. *Id.* at 451 (showing Cocke had two unpaid loans). Cocke's claim against the receiver had been reduced to judgment in the receivership action prior to the

trial on the receiver's claim that resulted in a money judgment against Cocke. *Id.* We have left out details, but key is the existence of two, potentially offsetting judgments.

The trial court and both appellate courts denied a setoff. The principal equitable factor was that there were two classes of members of the insolvent association. One included those who, like Cocke, were creditors of the insolvent association and also borrowed from the association; the other were those who had invested but never took out loans. *Cocke*, 39 S.W.2d at 592. The Commission of Appeals relied on the lack of funds to satisfy all claims to state that "care should be taken to adjust the burden equally, and not throw on either the borrowers or nonborrowers more than their respective share." *Id.* (quoting *People's Building & Loan Ass'n v. McPhillamy*, 81 Miss. 61, 32 So. 1001, 1006 (1902)). The goal of imposing losses equally required that borrowers repay their loans in full, but the assets of the estate would be divided among all claimants on a *pro rata* basis. *Id.*

Nonetheless, *Cocke* did not categorically disallow a setoff in the situation of an insolvency. The Commission of Appeals stated a setoff could have been sought at the trial that resulted in a judgment for the receiver:

> The [trial] court had rendered a judgment in favor of the receiver against Cocke and wife, from which no appeal was taken. This judgment concludes the rights of Cocke and wife in the premises, and establishes the lien on their property to secure its satisfaction. *Even though Cocke and wife had the right to plead an*

> *offset in the case, wherein judgment was rendered which is sought to be enjoined, Cocke's claim against the partnership, as now set up, should have interposed upon the trial of the case.*

Id. at 593 (emphasis added).

Allowing consideration of setoffs if timely raised is consistent with a slightly earlier opinion, involving the same receiver, the same debtor, and the same three appeals court judges.[7] *See Cocke v. Wright*, 299 S.W. 446 (Tex. Civ. App.—Dallas 1927, no writ). That decision allowed Cocke, who had been the attorney for the association, to offset the amount he owed on a loan by the amount he was owed as salary and for certain fees. *Id.* at 449. Both the receiver's claim for the balance on a loan and Cocke's claims for what he was owed as counsel were shown by evidence in this single action, so there were not two judgments. *Id.* at 447–48. The court denied that allowing the setoff would give Cocke a preference over others who had no counterclaim they could assert. *Id.* at 449. The court's analysis was that the receiver, in effect, never received the value of assets that was equivalent to the fees owed Cocke, as that setoff amount was not "due" from Cocke. *Id.* (citing *Scott*, 146 U.S. at 510, 13 S.Ct. 148).

One way to justify the different outcomes by the same three judges just two years apart is that in one

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[7] Though each opinion names the writing judge but not other panel members, we find in the lists of judges that appear in the introductory pages of the printed South Western Reporters that only three, and the same three, judges were on the Dallas Court of Civil Appeals at the time of both opinions. *See* 299 S.W. 446 (1928); 23 S.W.2d 449 (1930).

case, Cocke's counterclaim for legal fees was heard in the same trial as the receiver's claim; in the other, Cocke did not present his claim until execution on the judgment against him was sought.

We conclude these opinions weigh in favor, not against, allowing consideration of setoffs with equity receiverships. Even so, the only court to analyze the different outcomes in the 1927 and 1931 *Cocke* opinions held otherwise. *See Langdeau v. Dick*, 356 S.W.2d 945, 956 (Tex. Civ. App.—Austin, 1962, writ ref'd n.r.e.) (relying on the denial of a setoff by the Commission of Appeals without examining the effect of Cocke's failure to present the issue at trial). Regardless of interpretation, the Commission of Appeals *Cocke* opinion has been cited by *Langdeau* and only two other state courts[8] (and once by the district court here) to support denying a setoff. The opinion's relative lack of impact makes us cautious in concluding it represents current Texas law.

Much more recent Texas judicial opinions than those in the *Wright* and *Cocke* family discuss setoff rights in the context of receiverships. *See, e.g., New Braunfels Nat'l Bank v. Odiorne*, 780 S.W.2d 313 (Tex. Ct. App.—Austin 1989, writ denied). In *Odiorne*, the court held that "the legislature did not intend for the Insurance Code to destroy the common-law right of offset simply because a receiver had become the successor-in-title to the property of the insurer." *Id.* at 319. Therefore, the "receiver takes the insurer's property subject to the rights and

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[8] *Thompson v. Prince*, 126 S.W.2d 574, 576 (Tex. Civ. App.—Waco 1939, writ ref'd); *Fidelity Bldg. & Loan Ass'n v. Thompson*, 45 S.W.2d 167, 170 (Tex. Comm'n App. 1932, opinion not adopted).

equities of third persons." *Id.* An Eleventh Circuit opinion discussed by the parties in the current appeal dealt with an SEC receivership that allowed setoffs. *See SEC v. Elliott*, 953 F.2d 1560, 1573 (11th Cir. 1992). We thus find no categorical rule against setoffs in receiverships.

Nonetheless, we need not decide whether Magness's claims would otherwise be eligible for a setoff because of our conclusions about the final reason the district court gave for denying a setoff.

C. An amended complaint would be futile

The primary question here is when a setoff can be denied. To start, we return to Justice Story's discussion of the general rules of equity.

Justice Story wrote that among the distinctions between courts of equity and courts of law is that "[s]ome modifications of the rights of both parties may be required; some restraints on one side, or on the other, or perhaps on both sides; some adjustments involving reciprocal obligations or duties." 1 STORY, COMMENTARIES § 27. Further, though courts of equity "have prescribed forms of proceeding, the latter are flexible, and may be suited to the different postures of cases. . . . [T]hey may vary, qualify, restrain, and model the remedy so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties." § 28. Those "prescribed forms of proceeding" subject to variance include setoffs.

Justice Story also wrote that among the recognized equity maxims is "he who seeks equity must do equity[,] . . . for the court will never assist a wrong-doer in effectuating his wrongful and illegal purpose." § 64e. In a discussion of fraud, Justice

Story gives a broad definition: "Fraud indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence . . . or by which an undue and unconscientious advantage is taken of another." § 187. Finally, "a Court of Equity has an undoubted jurisdiction to relieve against every species of fraud." § 188. Justice Story uses the word "fraud" in a broader sense than we might today. Regardless, a receiver has authority to "relieve" against a setoff right that exists only because of "an undue and unconscientious advantage."

Our survey of historical equity practice is useful but does not give us the more granular detail we need. Therefore, we follow the course we mentioned before that "in the absence of substantial federal precedent in a particular context, federal courts are quite likely to look to state law for guidance." 2 WRIGHT & MILLER, FED. PRAC. & PROC. § 2983.

Under Texas law, "a party seeking an equitable remedy must do equity and come to court with clean hands." *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988). "[E]quity will compel fair dealing, disregarding all forms and subterfuges, and looking only to the substance of things," and "[w]hether a party has come into court with clean hands is a matter for the sound discretion of the court." *Jackson L. Off., P.C. v. Chappell*, 37 S.W.3d 15, 27 (Tex. App.—Tyler 2000, pet. denied). Hence, as the party seeking an equitable remedy, Magness must come to court with clean hands and demonstrate entitlement to a setoff because of "the *substance* of things." *Id.* (emphasis added). The unclean hands "doctrine applies against a litigant whose own conduct in connection with the same matter or transaction has been unconscientious,

unjust, marked by a want of good faith, or violates the principles of equity and righteous dealing." *Flores v. Flores*, 116 S.W.3d 870, 876 (Tex. App.—Corpus Christi–Edinburg 2003, no pet.). As one Texas Court of Appeals stated:

> The rule does not go so far as to prohibit a court of equity from giving its aid to a bad or faithless man or a criminal. The dirt upon his hands must be his bad conduct in *the transaction complained of*. If he is not guilty of inequitable conduct toward the defendant in that transaction, his hands are as clean as the court can require.

Lazy M Ranch, Ltd. v. TXI Operations, LP, 978 S.W.2d 678, 683 (Tex. App.—Austin 1998, pet. denied) (emphasis in original) (quoting 2 POMEROY'S EQUITY JURISPRUDENCE § 399, at 95–96 (5th ed.1941)).

We agree with the analysis in one of this court's unpublished opinions that "[t]he balancing of the equities required to evaluate money had and received and unclean hands can 'sound[ ] in negligence' too." *Midwestern Cattle Mktg., L.L.C. v. Legend Bank, N. A.*, 800 F. App'x 239, 251 (5th Cir. 2020) (alteration in original) (quoting *Bank of Saipan v. CNG Fin. Corp.*, 380 F.3d 836, 841–42 (5th Cir. 2004)). Specifically, *Bank of Saipan* interpreted a Texas unclean hands defense as comparable to "a comparative (as opposed to contributory) negligence regime . . . for ordinary tort claims." *Bank of Saipan*, 380 F.3d at 841.

When evaluating Janvey's conduct regarding SIB, the Supreme Court of Texas stated that a transferee seeking to prove good faith must show that it investigated the suspicious facts diligently. *Janvey*, 592 S.W.3d at 131. "A transferee who simply accepts

a transfer despite knowledge of facts leading it to suspect fraud does not take in good faith." *Id.* Further, that court held, because Magness had actual knowledge of facts that raised a suspicion of fraud, and he chose to "remain willfully ignorant of any information an investigation might reveal," his conduct was "incompatible with good faith" and incapable of being "characterized as acting with honesty in fact." *Id.* As a result, Magness's actions constituted comparative negligence of "such magnitude that [Magness] did not come to the court of equity with clean hands." *Jackson*, 37 S.W.3d at 27.

The statutory text of TUFTA also supports this conclusion, as Magness was held liable under the provision that requires "*actual intent* to hinder, delay, or defraud any creditor of the debtor." TEX. BUS. & COM. CODE § 24.005(a)(1) (emphasis added).

The district court here properly analyzed Janvey's actions. The court determined that equity barred a setoff because Magness participated in a fraudulent transfer. The transfer was Magness's obtaining an $88.2 million loan that allowed recoupment of the $79 million used to purchase CDs, plus interest. The loan under those conditions gave him "unclean hands." Supporting this finding is that a jury found Magness had enough notice of SIB's possible financial improprieties to be suspicious. *Janvey*, 977 F.3d at 426. Magness may well have been acting on those suspicions in seeking a loan. "A transferee on inquiry notice of fraud cannot shield itself from TUFTA's clawback provision without diligently investigating its initial suspicions" of fraud. *Id.* at 426–27 (explaining the answer to the certified question given in *Janvey*, 592 S.W.3d at 133). What an investigation

likely would have revealed is irrelevant. *Id.* "The record does not show [Magness] accepted the fraudulent transfers in good faith." *Id.* at 428.

In summary, had Magness not been one of the largest investors and not been given special—dare we say, preferential—treatment from SIB, he would not have received the $79 million for which repayment has been ordered. His funds would have remained with SIB, and what was left of them seized by the Receiver.

The district court determined that allowing Magness a setoff would allow him to gain an improper preference over other creditors. Of course, a setoff is not itself a preference. In the Supreme Court's 1892 *Scott v. Armstrong* opinion we discussed earlier, the Court held that if "a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference." *Scott*, 146 U.S. at 510, 13 S.Ct. 148. Immediately before that statement, the Court stated an "otherwise valid" transaction must occur "prior to insolvency and not in contemplation thereof." *Id.* It is a fair assessment that Magness obtained the $79 million loan because he contemplated significant financial troubles ahead for SIB. The district court's reasoning that a setoff here would be inequitable is thus consistent with *Scott*'s holding.

There are rights to setoffs in receiverships; Magness may not have waited too long to assert the setoff. Even so, the district court did not abuse its discretion in refusing to allow Magness to pursue a setoff of the claims he raised in his proposed amended complaints. AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Ralph S. JANVEY, in his Capacity as Court-Appointed Receiver for The Stanford International Bank Limited, et al., Plaintiff—Appellee,

v.

GMAG, L.L.C.; Magness Securities, L.L.C.; Gary D. Magness; Mango Five Family Incorporated, in its Capacity as Trustee for The Gary D. Magness Irrevocable Trust, Defendants—Appellants,

Securities and Exchange Commission, et al., Plaintiffs,

v.

GMAG, L.L.C.; Gary D. Magness Irrevocable Trust; Gary D. Magness; Magness Securities, L.L.C., Defendants—Appellants,

v.

Ralph S. Janvey, Appellee.

No. 22-10235 consolidated with No. 22-10429

FILED: May 30, 2023

[69 F.4th 259]

Before Stewart, Dennis, and Southwick, Circuit Judges.

Leslie H. Southwick, Circuit Judge:

In 2009, Stanford International Bank was exposed as a Ponzi scheme and placed into receivership. Since

then, the Receiver has been recovering Stanford's assets and distributing them to victims of the scheme. To that end, the Receiver sued Gary Magness, a Stanford investor, to recover funds for the Receivership estate. The district court entered judgment against Magness. Magness now seeks to exercise setoff rights against that judgment. Because Magness did not timely raise those setoff rights, they have been forfeited. AFFIRMED.

FACTUAL AND PROCEDURAL BACKGROUND

This case stems from the collapse of the Stanford International Bank ("SIB"), which has been the subject of several appeals before this court.[1] We summarize the facts as relevant to this appeal.

In 2009, the Securities and Exchange Commission ("SEC") exposed the fraudulent operations of SIB. *Janvey v. GMAG, L.L.C.*, 977 F.3d 422, 425 (5th Cir. 2020). For nearly two decades, SIB had issued fraudulent certificates of deposit, or CDs, that paid above-market interest rates. *Id.* The payments, though, were derived from new investors' funds. *Id.* The scheme ultimately left thousands of investors with $7 billion in losses. *Id.*

Defendants-Appellants are Gary D. Magness and several entities in which he maintains his wealth. We will refer to all as "Magness."

Between December 2004 and October 2006, Magness purchased $79 million in CDs issued by SIB.

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[1] *Janvey v. Brown*, 767 F.3d 430 (5th Cir. 2014); *Janvey v. GMAG, L.L.C.*, 913 F.3d 452 (5th Cir. 2019), *vacated & superseded by* 925 F.3d 229 (5th Cir. 2019); *Janvey v. GMAG, L.L.C.*, 977 F.3d 422 (5th Cir. 2020); *Janvey v. GMAG, L.L.C.*, No. 21-10483 c/w 21-10882, 2022 WL 4102067 (5th Cir. Sept. 7, 2022).

Id. After reports that the SEC was investigating SIB, Magness sought to redeem his investments. *Id.* SIB informed Magness that redemptions were not possible but agreed to loan Magness money instead. *Id.* In October 2008, through a series of loans, Magness received $88.2 million in cash from SIB. *Id.*

In 2009, in a proceeding brought by the SEC, the U.S. District Court for the Northern District of Texas appointed Plaintiff-Appellant Ralph S. Janvey as Receiver to recover SIB's assets and distribute them to victims. *Id.* The district court later entered a stay order. That order, amended in 2010, restrains creditors from bringing "any judicial . . . proceeding against the Receiver" and from "[t]he set off of any debt owed by the Receivership Estate."

In 2012, the district court established a claims process allowing creditors to file claims against the Receivership and to participate in distributions. Magness filed three proofs of claim. Those claims remain pending.

The Receiver has brought suits to recover assets for the Receivership estate. In a separate case also in the Northern District of Texas, the Receiver sued Magness, alleging the loans he received from SIB were fraudulent transfers and seeking return of those funds. Magness agreed that the payments were fraudulent but argued that they were taken in good faith under Texas law.

The case proceeded to trial. Because Magness had returned to the Receiver the amount he was loaned in excess of his original investment, the only issue presented to the jury was whether Magness was acting in good faith when he received $79 million in loans from SIB. We will explain the trial in more

detail below. For now, we highlight that the pretrial order did not identify a setoff defense, and the parties stipulated that setoff would not be presented at trial.

After trial, the district court entered judgment in Magness's favor, finding he had received the funds in good faith. *Id.* at 426. Since Magness had no obligation to disgorge funds, setoff was not an issue. We certified to the Supreme Court of Texas the question of whether good faith was a defense in these circumstances; the answer was "no." *Id.*; *Janvey v. GMAG, L.L.C.*, 592 S.W.3d 125, 133 (Tex. 2019). In October 2020, we reversed and rendered judgment for the Receiver as to Magness's liability. *Janvey*, 977 F.3d at 431.

Following our decision, the Receiver moved in district court for entry of final judgment. Magness opposed, but his opposition did not include any reference to a setoff defense. On April 9, 2021, the district court entered final judgment for $79 million, prejudgment interest, and costs.

On May 6, 2021, Magness moved in district court for a stay of the final judgment pending (1) his appeal of that final judgment to this court and (2) his seeking a writ of certiorari from the United States Supreme Court for review of this court's liability judgment. To obtain that relief, Magness agreed to deposit a cash *supersedeas* bond. As we detail further below, Magness represented that he would not oppose release of the cash to satisfy the final judgment when no further appeal was possible. On May 11, 2021, the district court granted the requested relief. Magness then petitioned the Supreme Court for a writ of certiorari regarding this court's liability judgment.

On August 4, 2021, the district court entered final judgment on attorneys' fees. In a consolidated appeal to this court, Magness challenged the district court's award of prejudgment interest, costs, and attorneys' fees. Before our decision on the appeal, the Supreme Court on December 13, 2021, denied Magness's petition to review this court's liability judgment. We later affirmed the district court's award. *Janvey v. GMAG, L.L.C.*, No. 21-10483 c/w 21-10882, 2022 WL 4102067 (5th Cir. Sept. 7, 2022).

After our decision, the Receiver moved in district court to release funds from the court registry for the $79 million, plus post-judgment interest. Despite his prior representation that he would not oppose the release of funds, Magness moved for leave to file a complaint in the proceedings the Receiver had initiated against him, *i.e., Janvey v. GMAG*, 22-10325. Magness's proposed complaint asserted that the final judgment was subject to setoff rights that had never been adjudicated. Magness asserted that the district court should first resolve his setoff claim before releasing any funds. In what we will call the "Initial Setoff Order," the district court denied Magness's motion for leave and granted the Receiver's motion to release funds.

In the main SEC Receivership proceeding, Magness filed a second, nearly identical motion for leave to file his proposed complaint.[2] In what we will

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[2] Magness notes that his initial leave was filed in *Janvey v. GMAG*, 22-10235, because it was in that proceeding that judgment was entered and the Receiver had sought to release the *supersedeas* bond. Magness then moved for identical leave in the SEC proceeding because that is where the stay order, which bars adjudication of setoff rights, was entered.

call the "Second Setoff Order," the district court also denied leave.

Magness appealed both the Initial Setoff Order and the Second Setoff Order. This court consolidated the appeals.

DISCUSSION

Magness seeks relief from the district court's stay order, which restrains creditors from seeking setoffs. "We review the district court's actions pursuant to the injunction it issued for an abuse of discretion." *Newby v. Enron Corp.*, 542 F.3d 463, 468 (5th Cir. 2008). A district court's actions in supervising an equity receivership, and its denials of leave, are likewise reviewed for abuse of discretion. *SEC v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 373 (5th Cir. 1982); *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 566 (5th Cir. 2003).

The Receiver asserts that Magness has waived any setoff defense. We address that argument first, and last.

"[F]orfeiture is the failure to make the timely assertion of a right." *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021) (quotation marks and citation omitted). "A party forfeits an argument by failing to raise it in the first instance in the district court." *Id.* Waiver, a related concept, "is the intentional relinquishment or abandonment of a known right." *Id.* (quotation marks and citations omitted).

The Receiver contends that Magness waived his setoff defense because it was not included in the pretrial order in the *Janvey v. GMAG* proceeding. A pretrial order supersedes all pleadings. *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 206 (5th Cir.

1998). "Once [a] pretrial order is entered, it controls the scope and course of the trial. If a claim or issue is omitted from the order, it is waived." *Valley Ranch Dev. Co. v. F.D.I.C.*, 960 F.2d 550, 554 (5th Cir. 1992) (quotation marks, citations, and alterations omitted).

Here, Magness initially raised a setoff defense in his answer to the Receiver's complaint. The Receiver moved *in limine* to exclude any setoff defenses before trial, arguing that any reference to setoff would be "unfairly prejudicial" and "an attempt to sidestep the claims process."

Later, in a joint stipulation, the parties "agree[d] that during the trial of this matter," they would "not present . . . any reference to the Magness Parties' affirmative defenses of . . . setoff/offset." The district court also entered a pretrial order, which made no mention of any setoff defense, even in sections of the order that listed contested issues of law.

The Receiver argues that the failure to include the setoff defense in the pretrial order constituted a waiver of that right. Magness responds that the omission is not fatal because the setoff defense was not for the jury. The pretrial order, though, listed several contested issues of law that were not for the jury. Further, we have held that even issues of law should be included in the pretrial order or else they are waived. *See Elvis Presley Enters., Inc.*, 141 F.3d at 206 (concluding that plaintiff waived right to attorneys' fees under the Texas Property Code because plaintiff "never reference[d]" the relevant Texas statute in the pretrial order).

On the other hand, the parties' joint stipulation provided only that setoff would not be presented "during [ ] trial." Should that be interpreted as

reserving the issue until its relevance post-trial became clear? There certainly was no explicit statement that Magness was abandoning the issue of a possible setoff. We will not create law that the facts of this case do, or do not, knowingly waive the setoff defense. That is because we conclude that, later, Magness did either intentionally waive or unintentionally forfeit the defense. We will use forfeiture as the concept.

As we mentioned earlier, in 2020, after receiving the answer to our certified question, we held that Magness was liable to the Receiver for $79 million and related amounts. *See Janvey*, 977 F.3d at 431. Back in district court, the Receiver moved for entry of final judgment. Magness opposed entry of final judgment. His opposition, however, did not include any reference to a setoff defense. In April 2021, the district court entered final judgment.

Forfeiture occurred then. If Magness sought to raise a setoff defense, he should have done so before the district court entered final judgment. Indeed, there was no barrier to raising a setoff defense prior to the district court's final judgment. Magness failed "to make the timely assertion of a right" and therefore forfeited any setoff defense. *See Rollins*, 8 F.4th at 397 (quotation marks and citation omitted).

Magness responds that his setoff rights only arose after the Supreme Court denied his petition to review this court's liability judgment in December 2021, well after the district court's entry of final judgment in April 2021. As the Receiver states, however, Magness's setoff defense did not suddenly spring from the Supreme Court's denial of certiorari. That setoff defense was viable after this court's 2020 decision and the case had returned to district court, but Magness

did not then assert it.[3] Magness does not direct us to authority supporting that he was entitled to wait until the Supreme Court denied certiorari before raising his defense.

Moreover, in May 2021, when Magness moved for a stay of the district court's final judgment, he represented that, should the Supreme Court deny certiorari, he would "not oppose a motion by the Receiver to release" funds. Yet, when the Supreme Court denied certiorari, Magness changed course and registered his opposition. Further, during his appeal to this court challenging the district court's award of prejudgment interest, costs, and attorneys' fees, Magness similarly represented that "this Court's mandate [in *Janvey v. GMAG, L.L.C.*, 977 F.3d 422 (5th Cir. 2020)] unquestionably required Magness to pay" the $79 million in fraudulent transfers. Magness later again changed course, pursuing this appeal to assert setoff rights and thereby reduce his obligations.

Because Magness failed to raise his setoff defense before the district court's entry of final judgment, he has forfeited that defense.

AFFIRMED.

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[3] Had Magness raised setoff, and the district court allowed or refused the setoff, the aggrieved party could have appealed to this court. Magness did appeal the district court's award of prejudgment interest, costs, and attorneys' fees. *See Janvey*, 2022 WL 4102067.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
Plaintiff,	§	Civil Action
v.	§	No. 3:09-CV-0298-N
STANFORD INTERNATIONAL BANK, LTD., *et al.*,	§	
Defendants.	§	

[2022 WL 20014211]

ORDER

This Order addresses GMAG LLC, Magness Securities, LLC, Gary D. Magness, and Mango Five Family, Inc., in its capacity as Trustee of the Gary D. Magness Irrevocable Trust's (collectively "Magness") motion for leave to file a complaint against the Receiver to exercise rights of setoff. The Court concludes that the proposed complaint would be futile and denies the motion for leave.

I. THE ORIGINS OF THE MOTION

In over a dozen years of litigation, this Court and the Fifth Circuit have recounted the facts of the underlying Stanford Ponzi scheme and the factual and procedural background of the litigation brought by the Receiver against Magness numerous times.

The Court assumes familiarity with these facts, but a detailed recitation may be found in the Fifth Circuit's most recent opinion addressing the Magness case. *Janvey v. GMAG, L.L.C. (GMAG IV)*, 977 F.3d 422, 425-27 (5th Cir. 2020).

Following the United States Supreme Court's denial of Magness's petition for certiorari seeking to challenge the finding of liability against him, Magness moved for leave to file a complaint asserting his right to setoff amounts owed to him as a Stanford Certificate of Deposit ("CD") investor against the judgment amount. The Court denied that motion for leave, concluding that it extended beyond the Fifth Circuit's mandate on remand. Order 3, in *Janvey v. GMAG, L.L.C.*, Civil Action No. 3:15-cv-401 (N.D. Tex. Feb. 1, 2022) [364]. Magness thereafter filed a motion in this case seeking identical relief and raising materially identical arguments.

II. THE COURT DENIES LEAVE TO SEEK SETOFF

Magness seeks leave of court to institute a direct action against the Receiver to set off the amount allegedly owed on the CDs Magness still owned at the time the Stanford scheme collapsed against the amount of the Final Judgment the Receiver has obtained. Magness asks for permission to file the contemplated lawsuit because the Court's injunction in this case undisputedly prohibits Magness from pursing direct claims against the Receiver absent the Court's consent. For that reason, the Court agrees with Magness that he has standing to move for relief in this case.

In his motion, Magness contends that the Court will violate his constitutional right to due process if it does not grant the relief he seeks. Magness's

argument proceeds as follows: The Securities and Exchange Commission elected to wind up the Stanford entities by means of an equity receivership rather than bankruptcy, and this procedure preserves claimant's state law rights; Magness has a state law right to setoff the amount owed him by the receivership estate against the amount of the judgment the Receiver has obtained against him; And, the Court's refusal to condone the lawsuit that Magness seeks to bring against the Receiver will thwart his effort to obtain a final adjudication of his right to a setoff, thereby denying him due process. The Court rejects Magness's argument as futile and denies him leave to bring his lawsuit against the Receiver.

First, Magness's argument simply proves too much. Magness objects that, while an equity receiver possesses broad powers, these are not unlimited. In Magness's telling, the Receiver must still respect state-created rights of claimants, including the right to set off mutual obligations. But this "generic due process complaint[ ]," Receiver's Resp. 7, in *Janvey v. GMAG, L.L.C.*, Civil Action No. 3:15-cv-401 (filed Jan. 10, 2022) [360], runs headlong into the reality of accepted practice in equity receiverships. Courts frequently approve summary claims processes that deny claimants the right to pursue individual actions against the receivership estate. *See, e.g.*, *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 668 (6th Cir. 2001); *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *SEC v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986). And the Fifth Circuit has indicated approval of the process adopted in this receivership. *Zacarais v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 903 (5th Cir. 2019); *SEC v. Stanford Int'l Bank, Ltd.*,

551 F. App'x 766, 769–71 (5th Cir. 2014). Try as he might to dress up his argument as something unique, Magness's attempt to obtain setoff is nothing more than an effort to recoup losses suffered on Stanford CDs.[1] He provides no basis to distinguish his claim from that of any other defrauded CD investor. If the Court accepts that it must—for due process reasons—allow Magness to pursue his state law right to setoff it can perceive no reason why it must not then permit every Stanford CD investor to pursue an individual action against the Receiver. In other words, if Magness is correct, then the entire concept of the equity receivership cannot exist under American law.

Second, even if the Court accepted the premise of Magness's due process challenge, he would ultimately fail on the merits of his proposed lawsuit. Magness fails to articulate any statutory or contractual basis for his purported right to setoff.[2] Following the cases cited, the Court treats Magness's claim as an equitable one. Texas equity jurisprudence supports a refusal to allow setoff in exactly this circumstance. *Cocke v. Wright*, 39 S.W.2d 590, 592–93 (Tex. Comm'n App. 1931). More pertinently, the Fifth Circuit has affirmed this Court's refusal to allow a secured creditor to exercise a contractual right to setoff in this receivership. *SEC v. Stanford Int'l Bank, Ltd.*, 465 F. App'x 316, 320–21 (5th Cir. 2012). Accordingly, the

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[1] Magness objects that he does not seek affirmative payment, but the Court fails to apprehend how crediting the amount allegedly owed on the Stanford CDs against his matured liability to the receivership estate differs in any meaningful way from a direct payment.

[2] In fact, he fails to provide *any* support for the assertion that the right to setoff exists under Antiguan law.

Court concludes that the law justifies a refusal to allow setoff in this case.

Finally, even if the Court has erred in the forgoing, adequate alternative grounds exist to support a finding that the proposed lawsuit would be futile. As previously noted, Magness does not identify a statutory or contractual basis for the purported right to setoff, and the Court has treated this request as one sounding in equity. But he who comes into a court of equity must do so with clean hands. The Receiver has obtained a judgment against Magness to rectify the latter's receipt of tens of millions of dollars of fraudulent transfers from the Stanford entities. By virtue of this adverse judgment Magness seeks preferential treatment in the form of what amounts to an option to put his CDs back to the receivership estate at par. The Court will not countenance this inequitable outcome. If Magness is to receive repayment of the amount owed him by SIB, those repayments will come as part of distributions pursuant to the Court-approved claims process and not ex ante in the form of a setoff.

CONCLUSION

For the foregoing reasons, the Court concludes that Magness's proposed complaint would be futile. Accordingly, the Court denies his motion for leave.

Signed April 25, 2022.

/s/ David C. Godbey
David C. Godbey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RALPH JANVEY, IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR THE STANFORD INTERNATIONAL BANK, *et al.*,	§	Civil Action No. 3:15-CV-0401-N
Plaintiff,	§	
v.	§	
GMAG LLC, *et al.*	§	
Defendants.	§	

[2022 WL 697487]

ORDER

This Order addresses Defendants GMAG LLC, Magness Securities LLC, Gary D. Magness, and Mango Five Family, Inc., in its capacity as Trustee for the Gary D. Magness Irrevocable Trust's (collectively "Magness") motion for leave to file a new complaint [347] and Ralph Janvey's (the "Receiver") motion to withdraw funds from the court's registry [349].[1] Concluding that it lacks authority to provide Magness the relief he requests, the Court denies the motion for leave. As the claims Magness sought to test by way

[1] The Court also acknowledges Magness's notice of request for oral argument [351], which is denied as moot.

of a new complaint also formed the sole basis of his objection to the Receiver's motion, the Court grants the motion to withdraw funds from the court registry.

I. THE ORIGINS OF THE MOTION

In over a dozen years of litigation, this Court and the Fifth Circuit have recounted the facts of the underlying Stanford Ponzi scheme and the factual and procedural background of this case numerous times. The Court assumes familiarity with these facts, but a detailed recitation of which may be found in the Fifth Circuit's most recent opinion addressing this case. *Janvey v. GMAG, L.L.C. (GMAG IV)*, 977 F.3d 422, 425-27 (5th Cir. 2020).

Following the United States Supreme Court's denial of Magness's petition for certiorari seeking to challenge the finding of liability against him, Magness moved for leave to file a complaint asserting his right to setoff amounts owed to him as a Stanford Certificate of Deposit ("CD") investor against the judgment amount. Contemporaneously, the Receiver moved to withdraw funds from the Court registry in an amount equal to the portion of the final judgment that is no longer appealable.

Magness does not specify the procedural basis for his motion for leave, but the Court lacks the authority to permit Magness the relief he seeks. The mandate rule restricts the proceedings that a district court can conduct on remand. As the Fifth Circuit has explained:

> Absent exceptional circumstances, the mandate rule compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court.

> Moreover, the rule bars litigation of issues decided by the district court but foregone on appeal or otherwise waived, for example because they were not raised in the district court. Accordingly, a lower court on remand must implement both the letter and the spirit of the appellate court's mandate and may not disregard the explicit directives of that court. In implementing the mandate, the district court must take into account the appellate court's opinion and the circumstances it embraces.

U.S. v. Lee, 358 F.3d 315, 321 (5th Cir. 2004) (internal quotation marks, alterations, and citations omitted). Put more bluntly, the "mandate rule requires a district court on remand to effect [the circuit court's] mandate *and do nothing else*." *Deutsche Bank Nat'l Tr. v. Burke*, 902 F.3d 548, 551 (5th Cir. 2018) (emphasis added). This case has returned to this court following the Fifth Circuit's rendering of judgment in favor of the Receiver. In this posture, the Court had no power to do anything other than enter final judgment in conformance with the judgment of the Fifth Circuit. Accordingly, the Court denies Magness leave to file a new complaint in this action.

The Court then turns to the Receiver's motion to withdraw funds from the Court registry. The Court agrees with the Receiver that the amount of the judgment excluding interest is both final and may not be appealed. The Court also takes notice of Magness's representation that he would not object to the withdrawal of funds subject to a judgment that is final and not subject to further appeal. Accordingly, the Court grants the Receiver's motion to withdraw funds from the registry.

CONCLUSION

Having concluded that it lacks the power to grant leave to entertain a new complaint, the Court denies Magness's motion. The Court further grants the Receiver's motion to withdraw funds equal to the principal amount of the judgment plus post judgment interest. The Court directs the clerk to release $79,723,077.13 ($79,684,042.86 principal judgment plus $39,034.27 in postjudgment interest) from the registry by way of a check payable to Ralph S. Janvey in his capacity as receiver of the Stanford Financial Group Receivership. The funds are to be delivered to the Receiver at the following address: Stanford Financial Group Receivership c/o Ralph S. Janvey, Krage & Janvey, L.L.P., 2100 Ross Ave., Suite 2600, Dallas, TX 75201.

Signed February 1, 2022.

/s/ David C. Godbey
David C. Godbey
United States District Judge

Tex. Bus. & Com. Code Ann. § 24.005

§ 24.005. Transfers Fraudulent as to Present and Future Creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining actual intent under Subsection (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Tex. Bus. & Com. Code Ann. § 24.009

§ 24.009. Defenses, Liability, and Protection of Transferee

(a) A transfer or obligation is not voidable under Section 24.005(a)(1) of this code against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Section 24.008(a)(1) of this code, the creditor may recover judgment for the value of the asset transferred, as adjusted under Subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) the first transferee of the asset or the person for whose benefit the transfer was made; or

(2) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(c)(1) Except as provided by Subdivision (2) of this subsection, if the judgment under Subsection (b) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(2) The value of the asset transferred is not to be adjusted to include the value of improvements made by a good faith transferee, including:

(A) physical additions or changes to the asset transferred;

(B) repairs to the asset;

(C) payment of any tax on the asset;

(D) payment of any debt secured by a lien on the asset that is superior or equal to the rights of a voiding creditor under this chapter; and

(E) preservation of the asset.

(d)(1) Notwithstanding voidability of a transfer or an obligation under this chapter, a good faith transferee or obligee is entitled, at the transferee's or obligee's election, to the extent of the value given the debtor for the transfer or obligation, to:

(A) a lien, prior to the rights of a voiding creditor under this chapter, or a right to retain any interest in the asset transferred;

(B) enforcement of any obligation incurred; or

(C) a reduction in the amount of the liability on the judgment.

(2) Notwithstanding voidability of a transfer under this chapter, to the extent of the value of any improvements made by a good faith transferee, the good faith transferee is entitled to a lien on the asset transferred prior to the rights of a voiding creditor under this chapter

(e) A transfer is not voidable under Section 24.005(a)(2) or Section 24.006 of this code if the transfer result s from:

(1) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) enforcement of a security interest in compliance with Chapter 9 of this code.

(f) A transfer is not voidable under Section 24.006(b) of this code:

(1) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(2) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RALPH S. JANVEY, RECEIVER,	§	
Plaintiff,	§	Civil Action
	§	No. 3:15-CV-0401-N
v.	§	
GMAG LLC, *et al.*,	§	
Defendants.	§	

COURT'S CHARGE TO THE JURY

* * *

QUESTION NO. 1:

Did the Magness Parties act in good faith when they received the transfers from Stanford in October 2008?

Answer "Yes" or "No" for:

a. no actual notice

Yes

b. no inquiry notice

No

INSTRUCTIONS FOR QUESTION NO. 1:

The Magness Parties have the burden to prove good faith by a preponderance of the evidence.

The Magness Parties acted in good faith if they did not have actual notice or inquiry notice in October 2008 that Stanford was engaged in a Ponzi scheme.

Actual notice is based on what one actually knows. It also includes the knowledge of agents acting within the scope of their agency. An agent is a person who is authorized to act on behalf of another. Examples of agents include officers, directors, employees, and attorneys. A person has actual notice if the person has actually reached the conclusion that Stanford was engaged in a Ponzi scheme or if the person has knowledge of facts that would have led a reasonable person to reach that conclusion.

Inquiry notice is knowledge of facts relating to the transaction at issue that would have excited the suspicions of a reasonable person and led that person to investigate. Inquiry notice can be based on both facts that one actually knows and facts known by agents acting within the scope of their agency.

If your answer to Question No. 1.a is "yes" and your answer to Question No. 1.b is "no," then answer the following question. Otherwise do not answer the following question.

QUESTION NO. 2:

Would an investigation have been futile?

Answer "yes" or "no":

Yes

INSTRUCTIONS FOR QUESTION NO. 2:

The Magness Parties have the burden to prove futility by a preponderance of the evidence.

An investigation would be futile if a diligent inquiry would not have revealed to a reasonable person that Stanford was running a Ponzi scheme.

To establish futility the Magness Parties are not required to prove that they actually conducted a diligent inquiry.

* * *

SIGNED this 18 day of January, 2017.

s/ David C. Godbey
David C. Godbey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RALPH S. JANVEY, RECEIVER,	§	
Plaintiff,	§	Civil Action
v.	§	No. 3:15-CV-0401-N
GMAG LLC, *et al.*,	§	
Defendants.	§	

VERDICT OF THE JURY

We, the jury, have answered the above questions as indicated, and now return those questions and answers to the Court as our verdict.

SIGNED this 18 day of January, 2017.

s/ Lois Melissa Bass
PRESIDING JUROR