

## Judge rebuffs TD Bank post-trial motions, as seminal 'aiding and abetting' case moves to Atlanta



Judge Marcia G. Cooke

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By: ACFCS Staff

Post-trial motions in a civil case are normally resolved within weeks of the end of a trial. But as with most things about the TD Bank-Coquina Investments case, nothing follows a template and all developments seem to place a landmark in the financial crime landscape.

Nine months ago, Coquina, a Texas firm that became one of the many victims of the billion-dollar fraud of TD customer, Scott Rothstein, won a \$67 million jury verdict in Miami federal court. It proved that the global institution had "aided and abetted fraud," a novel legal theory that for the first time held a bank liable for the losses suffered by a victim of a fraud and money laundering scheme perpetrated by one of its customers.


On September 28, US District Judge Marcia G. Cooke closed the door on any lingering hope that TD Bank may have had in her courtroom to diminish the size of the verdict, which included \$35 million in punitive damages, or to retry the case. The trial that ended in January took 72 days to complete.

Judge Cooke's "Omnibus Order on Post-Trial Motions" rejected more than a dozen TD Bank arguments on why it deserved a new trial, ranging from flawed jury instructions to improperly-awarded damages.


The die was cast against TD Bank in an August 3 ruling by Cooke that "established" that the bank knew about Rothstein's fraud and had maintained "unreasonable" money laundering and fraud controls.

Cooke reminded the bank repeatedly in her new order of that any error was "harmless" in light of her ruling that it is "established" that TD Bank had "actual knowledge of Rothstein's fraud."

TD Bank, Greenberg discovery failings led to uncommon sanction



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TD Bank's post-trial motions had been sidelined after Coquina revealed in March that the bank and its former attorneys at Greenberg Traurig had altered and failed to produce key evidence at trial.

Cooke sanctioned TD Bank and its Greenberg counsel for discovery abuses, ordering them to pay Coquina's legal fees and finding that TD had knowledge of Rothstein's fraud and money laundering, a finding that now haunts the bank.

Judge Cooke heard from the lawyers on September 25. TD, which dismissed Greenberg during the discovery post-trial battles, is now represented in the case by McGuireWoods and McDermott Will & Emery.

Cooke rebuffs bank's 'adverse inference' argument

TD Bank's objections focused in part on the testimony of Frank Spinosa, its former regional vice president who played a key role in Rothstein's fraud and money laundering. Rothstein, who is seeking to reduce his 50-year prison term, has testified from prison that Spinosa supplied him with sham "lock letters" on TD Bank letterhead that he used to lull victims into thinking their investments were safe at the bank.

At trial, Spinosa took the stand and invoked his Fifth Amendment privilege against self-incrimination in response to every question by Coquina's attorneys, the Miami firm, Mandel & Mandel. Cooke instructed the jury that they "may, but need not infer that Spinosa's refusal to answer... would be adverse to TD Bank's interests." TD Bank said this "adverse inference" instruction was prejudicial. Cooke disagreed and said the instruction complied with "well-settled" law.

Bank says jury instructions tainted trial

TD Bank contended that other instructions by Cooke to the jury were flawed, especially one stating that "the knowledge and actions of... Frank Spinosa may be imputed to [TD Bank]." Cooke should have told the jury, the bank argued, that before imputing Spinosa's actions to TD, they had to find that he "was acting within [his] scope of employment."

Net worth of \$28 billion enables bank to pay judgment, judge says

In moving to reduce damages, TD Bank argued that the verdict from the jury used to assign damages was faulty because it allowed the jury to assess an "improper double recovery for the same conduct."

Cooke noted that the total compensatory damages awarded did not exceed Coquina's fraud losses and that the jury's damages award was supported by the evidence.

"The jury was entitled to find... that it was particularly reprehensible that a high-level official at a bank, as well as other employees, would make fraudulent misrepresentations to investors, and that a bank... would aid and abet a Ponzi scheme," said Cooke.

"It was clear that the Bank is able to pay the judgment, as... the Bank's net worth in 2011 was \$28 billion," she added.

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## Post-trial court order now opens door to dormant appeal

TD Bank's appeal before the 11th US Circuit Court of Appeals, in Atlanta, which had been stayed pending resolution of the post-trial TD motions may now proceed. TD must prepare the record on appeal and await the marching orders of the Atlanta federal court on when briefs are due and oral argument may be held.

A TD Bank spokesperson stated that the bank "respectfully disagrees with the Court's Order denying TD Bank's post-trial motions. The Bank plans to continue to vigorously defend itself and will appeal the final judgment to the Court of Appeals."

[View Judge Cooke's Omnibus Order on Post-Trial Motions](#)



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