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,

Applicants,

v.

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

Respondents.

APPLICATION DIRECTED TO THE HONORABLE SAMUEL A. ALITO, JR. FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KRISTIN C. HOLLADAY
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
(212) 906-1200

MELISSA ARBUS SHERRY
Counsel of Record
ERIC J. KONOPKA
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3386
melissa.sherry@lw.com

Counsel for Applicants

November 11, 2024

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Applicants, by and through their undersigned counsel, hereby certify that GMAG, LLC; Magness Securities, LLC; and Mango Five Family, Inc., Trustee of the Gary D. Magness Irrevocable Trust have no parent corporations, and no publicly held company owns 10 percent or more of their stock.

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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.2 of the Rules of this Court, Applicants GMAG, L.L.C.; Magness Securities, L.L.C.; Gary D. Magness; and Mango Five Family Incorporated, in its Capacity as Trustee for The Gary D. Magness Irrevocable Trust, respectfully request a 25-day extension of time, to and including December 20, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The Fifth Circuit issued an opinion and judgment on May 30, 2023, *see* App. A (First Op.), published at 69 F.4th 259; withdrew that opinion and judgment on March 20, 2024; issued a new opinion and judgment on March 20, 2024, upon the denial of rehearing en banc, *see* App. B (Second Op.), published at 98 F.4th 127; and issued another opinion on August 26, 2024, upon the denial of a second petition for rehearing en banc, *see* App. C (Third Op.), published at 113 F.4th 505. Without an extension, the time for filing a petition for a writ of certiorari will expire on November 25, 2024. This application is being filed more than 10 days before the date a petition would be due. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

BACKGROUND

1. Between 2004 and 2006, Applicants Gary D. Magness and affiliated entities (Magness) purchased $79 million of certificates of deposit (CDs) from Stanford International Bank (Stanford Bank). Second Op. 3. Magness continued to hold that principal at Stanford Bank when the financial crisis and Great Recession

of 2008 roiled the global markets. In October 2008, Magness found himself in urgent need of cash to meet margin calls from his lenders. *See* ROA.24450-52.[1] Stanford Bank agreed to loan Magness funds against the value of his CDs. *See* ROA.24458.

In early 2009, Stanford Bank was revealed to be a massive fraud. For nearly two decades, the bank issued fraudulent CDs that purported to pay above-market interest rates—when, in reality, the "returns" to investors derived from new investors' funds. *Janvey v. GMAG, L.L.C.* (*GMAG I*), 977 F.3d 422, 425 (5th Cir. 2020), *cert. denied*, 142 S. Ct. 708 (2021). The SEC brought suit against various individuals and entities involved in the fraud. *See Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 189 (5th Cir. 2013). Stanford Bank was placed into receivership, and the district court appointed Ralph S. Janvey as the receiver (Receiver). *Id.* 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." *Id.* at 196.

2. Six years after his appointment, the Receiver sued Magness to claw back the funds Magness had received in October 2008, claiming they were fraudulent transfers under the Texas Uniform Fraudulent Transfer Act (TUFTA). *See* Tex. Bus. & Com. Code Ann. § 24.005; *GMAG I*, 977 F.3d at 425. The case proceeded to a jury trial that centered on whether Magness could avail himself of TUFTA's good-faith defense. *GMAG I*, 977 F.3d at 426. The jury found that Magness had inquiry (not

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

actual) notice of fraud—but that any investigation into the well-concealed fraud would have been futile. *See id.* Given that futility finding, the district court held that Magness had received the funds in good faith and entered judgment in his favor. *See id.*

3. The Receiver appealed, arguing that the jury's finding of inquiry notice defeated a good-faith defense under TUFTA as a matter of law. *See id.* The Fifth Circuit initially agreed and reversed, rendering judgment for the Receiver. *Id.* After Magness petitioned for rehearing, the Fifth Circuit vacated its prior 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.* 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 reserved decision on what level of inquiry is sufficiently diligent to establish good faith and on whether Magness had conducted a diligent investigation. *Id.* at 128 n.1, 131-32.

Back in the Fifth Circuit, Magness argued that the court should affirm because he had conducted an investigation—as the Receiver conceded—and the trial evidence

established the reasonableness of his investigation. *GMAG I*, 977 F.3d at 427-28. Alternatively, Magness urged the court to remand for retrial, since the jury had not made a finding about whether Magness actually investigated, but had instead found that any investigation would have been futile. *Id.* at 428. The Fifth Circuit did neither; it reversed and instructed the district court to enter judgment for the Receiver. *Id.* at 431. On December 13, 2021, this Court declined to review that decision. 142 S. Ct. 708 (2021).

4. Once the TUFTA judgment became final, Magness sought to set off the judgment against his claims against the receivership estate. The district court had previously entered an order barring creditors from setting off any debt owed by the receivership estate without prior approval of the court. Second Op. 3. Magness accordingly moved for leave to file a setoff complaint. *Id.* at 6. The court denied leave. As most relevant here, the court's decision rested on three conclusions: (1) allowing Magness's setoff claim would bypass the 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 Magness had "unclean hands" by virtue of receiving constructively fraudulent transfers. *Id.* at 16. As to the third conclusion, the parties had not briefed the issue of unclean hands; the court raised it *sua sponte*.

Magness appealed. The Fifth Circuit first held that Magness had forfeited his setoff claim by waiting too long to raise it. First Op. 6-9. Magness timely petitioned for rehearing, and the panel vacated its opinion. Second Op. 2. In a new opinion, the panel reversed course, concluding that "consideration of a setoff was likely *not*

forfeited." *Id.* at 4 n.2 (emphasis added). Considering the district court's decision on the merits, the panel rejected the district court's first rationale for denying leave to seek setoff and cast doubt on the second, finding "no categorical rule" that would bar Magness's setoff claim in the receivership proceedings. *Id.* at 23; *see id.* at 27. The Fifth Circuit nonetheless affirmed, holding that Magness had unclean hands because he had inquiry notice of Stanford Bank's fraud and did not investigate. *Id.* at 23-27.

Magness again petitioned for rehearing. Among other things, Magness argued that he was denied due process because he had no opportunity to litigate the issue of unclean hands. CA5 Second Pet. for Reh'g 5, ECF No. 130. Magness further argued that the court's unclean hands finding contradicted the jury's conclusion that any investigation into Stanford Bank would have been futile. *Id.* at 6-7. The panel denied rehearing but issued a further opinion. *See* Third Op. 2. As relevant here, it construed Magness's petition as arguing that unclean hands is an issue for the jury, not the judge. Looking to Texas law, the panel held that unclean hands was a question for the court to decide. *Id.* at 2-8.

REASONS FOR GRANTING THE APPLICATION

1. The Fifth Circuit's decision departs from a broad consensus in the courts of appeals that a judge cannot resolve equitable claims in a way that contradicts a jury's findings on a legal claim. It is also incompatible with this Court's Seventh Amendment and due process jurisprudence.

a. The courts of appeals broadly recognize that a jury's factual findings bind a judge considering equitable claims that rest on common issues of fact. *See, e.g.*, *Wade v. Orange Cnty. Sheriff's Off.*, 844 F.2d 951, 954 (2d Cir. 1988); *Kairys v.*

S. Pines Trucking, Inc., 75 F.4th 153, 160-61 (3d Cir. 2023).[2] The Fifth Circuit's decision departed from that consensus rule. The district court and the Fifth Circuit evaluated Magness's setoff claim as an equitable claim subject to the equitable defense of unclean hands. *See* Second Op. 23-25. Under the consensus rule, the TUFTA jury's findings had to be given effect in rendering a decision on the setoff claim. But the district court raised unclean hands *sua sponte* and without meaningfully considering the impact of the TUFTA jury's findings. And while the Fifth Circuit relied on one of the jury's findings—that Magness was on inquiry notice of fraud—it ignored the jury's futility finding, despite Magness's urging. *See id.* at 26; CA5 Second Pet. for Reh'g 6-7; *see also* Third Op. 2-9.

The unclean hands determination is incompatible with the TUFTA jury's futility finding. 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). But the TUFTA jury's futility finding means that Magness could not have injured Stanford Bank or its other depositors. The TUFTA jury necessarily

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[2] *Perdoni Bros., Inc. v. Concrete Sys., Inc.*, 35 F.3d 1, 5 (1st Cir. 1994); *Fowler v. Land Mgmt. Groupe, Inc.*, 978 F.2d 158, 163 (4th Cir. 1992); *Kitchen v. Chippewa Valley Schs.*, 825 F.2d 1004, 1014 (6th Cir. 1987); *Snider v. Consolidation Coal Co.*, 973 F.2d 555, 559 (7th Cir. 1992), *cert. denied*, 506 U.S. 1054 (1993); *Garza v. City of Omaha*, 814 F.2d 553, 557 (8th Cir. 1987); *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993); *Ag Servs. of Am., Inc. v. Nielsen*, 231 F.3d 726, 730-31 (10th Cir. 2000), *cert. denied*, 532 U.S. 1021 (2001); *Lincoln v. Bd. of Regents of the Univ. Sys. of Georgia*, 697 F.2d 928, 934 (11th Cir.), *cert. denied*, 464 U.S. 826 (1983); *Bouchet v. Nat'l Urb. League, Inc.*, 730 F.2d 799, 803-04 (D.C. Cir. 1984) (Scalia, J.).

determined that, even if Magness had conducted a diligent investigation after being put on inquiry notice of fraud, *he would not have uncovered anything*. So he still would have accepted the October 2008 loans from the bank—leaving the parties identically situated—and could not have acted with unclean hands. The total disregard of the TUFTA jury's futility finding conflicts with the solicitude given to jury findings by other courts of appeals.

b. The consensus approach is correct, and the Fifth Circuit erred in departing from it. That approach "safeguard[s]" the Seventh Amendment jury trial right, *Wade*, 844 F.2d at 954, which would be "significantly attenuated" if a court deciding equitable claims could disregard the jury's findings on common facts, *Kairys*, 75 F.4th at 160 (citation omitted). The consensus approach is similarly required by the Seventh Amendment's Re-Examination Clause, which ensures that, "unless a new trial has been granted . . . , facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States." *Cap. Traction Co. v. Hof*, 174 U.S. 1, 13 (1899).

c. Even if it were ever permissible to disregard the TUFTA jury's futility finding, doing so would require more process than Magness received here. Due process requires "sufficient notice to enable [Magness] to identify the issues on which a decision may turn." *Lankford v. Idaho*, 500 U.S. 110, 126 n.22 (1991). "Without such notice," "the adversary process [cannot] function properly, [and] there is an increased chance of error"—"and with that, the possibility of an incorrect result." *Id.* at 127.

The TUFTA jury's findings bore directly on the issue of unclean hands. The district court nonetheless injected that issue into the case *sua sponte*, without seriously considering the implications of those findings or any other evidence or arguments relevant to the doctrine's applicability in this case. In affirming, the Fifth Circuit relied on the TUFTA jury's finding that Magness had inquiry notice of fraud—but ignored the jury's futility finding and the lack of any meaningful process on the issue of unclean hands. This cherry-picking of the TUFTA jury's findings, without notice or opportunity to be heard, deprived Magness of due process.

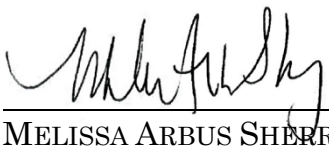
2. Magness respectfully seeks a 25-day extension within which to prepare a petition for a writ of certiorari in this case. Undersigned counsel did not represent Magness in the proceedings below. This case has a protracted procedural history that includes several trips to the Fifth Circuit and multiple rounds of briefing and decisions in Magness's most recent appeals. The press of other matters, including the preparation for, and presentation of, oral argument in this Court on November 5, 2024, has reduced the time counsel have been able to devote to this case in recent weeks. In the coming weeks, counsel will be heavily engaged with other matters, including an opening brief in an expedited Second Circuit appeal due November 20, 2024; an opening brief in an Eleventh Circuit appeal currently due December 9, 2024; a reply brief in a Sixth Circuit appeal currently expected to be due December 12, 2024; an opening brief in the New York Court of Appeals currently due December 18, 2024, and a reply brief in a Seventh Circuit appeal currently due December 26, 2024. A modest 25-day extension of time is warranted to permit counsel to research and, as

appropriate, refine the issues for this Court's review and prepare a petition that addresses the important questions raised by this case in the most direct and efficient manner for the Court's consideration. Finally, granting this extension will not materially impact the Court's consideration of this case or the timing thereof.

CONCLUSION

For the foregoing reasons, Magness respectfully requests a 25-day extension of time, to and including December 20, 2024, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,



KRISTIN C. HOLLADAY
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
(212) 906-1200

MELISSA ARBUS SHERRY
Counsel of Record
ERIC J. KONOPKA
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3386
melissa.sherry@lw.com

Counsel for Applicants

November 11, 2024

APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 30, 2023
Lyle W. Cayce
Clerk

No. 22-10235

RALPH S. JANVEY, *in his Capacity as Court-Appointed Receiver for* THE STANFORD INTERNATIONAL BANK LIMITED, *et al.*,

Plaintiff—Appellee,

versus

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,

CONSOLIDATED WITH

No. 22-10429

SECURITIES AND EXCHANGE COMMISSION, *et al.*,

Plaintiffs,

versus

GMAG, L.L.C.; GARY D. MAGNESS IRREVOCABLE TRUST; GARY D. MAGNESS; MAGNESS SECURITIES, L.L.C.,

Defendants—Appellants,

versus

RALPH S. JANVEY,

Appellee.

Appeals from the United States District Court
for the Northern District of Texas
USDC Nos. 3:15-CV-401, 3:09-CV-298

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.

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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).

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

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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

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

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proceeding because that is where the stay order, which bars adjudication of setoff rights, was entered.

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

[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.

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.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 20, 2024
Lyle W. Cayce
Clerk

No. 22-10235

RALPH S. JANVEY, *in his Capacity as Court-Appointed Receiver for* THE STANFORD INTERNATIONAL BANK LIMITED, *et al.*,

Plaintiff—Appellee,

versus

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,

CONSOLIDATED WITH

No. 22-10429

SECURITIES AND EXCHANGE COMMISSION, *et al.*,

Plaintiffs,

versus

GMAG, L.L.C.; GARY D. MAGNESS IRREVOCABLE TRUST; GARY D. MAGNESS; MAGNESS SECURITIES, L.L.C.,

Defendants—Appellants,

versus

RALPH S. JANVEY,

Appellee.

Appeals from the United States District Court
for the Northern District of Texas
USDC Nos. 3:15-CV-401, 3:09-CV-298

ON PETITION FOR REHEARING EN BANC

Before STEWART, DENNIS, and SOUTHWICK, *Circuit Judges*.

LESLIE H. SOUTHWICK, *Circuit Judge*:

No judge in regular active service requested the court be polled on rehearing *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.

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

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

defined "[c]laim" as any "potential or claimed right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, 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 district court also entered a pretrial order, which made no mention of any setoff defense.

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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.

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, Magness0 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 "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). Instead, 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

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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.

[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.

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 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 (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. 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 (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.

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*, 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*, 20 P.2d 31, 33 (Wash. 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*, 772 P.2d 419, 421 (Or. Ct. App. 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 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); *SEC v. Stanford Int'l Bank Ltd.*, 465 F. App'x 316, 317 (5th Cir. 2012). This court's *Zacarais* 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] 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*, 84 S.W.2d 691, 692 (Tex. 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*

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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 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*, 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).

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. 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*, 32 So. 1001, 1006 (Miss. 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.

[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

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).

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

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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. v (1928); 23 S.W.2d v (1930).

[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).

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 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. 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.

APPENDIX C

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED
August 26, 2024

Lyle W. Cayce
Clerk

No. 22-10235

RALPH S. JANVEY, *in his Capacity as Court-Appointed Receiver for* THE STANFORD INTERNATIONAL BANK LIMITED, *et al.*,

Plaintiff—Appellee,

versus

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,

CONSOLIDATED WITH

No. 22-10429

SECURITIES AND EXCHANGE COMMISSION, *et al.*,

Plaintiffs,

versus

GMAG, L.L.C.; GARY D. MAGNESS IRREVOCABLE TRUST; GARY D. MAGNESS; MAGNESS SECURITIES, L.L.C.,

Defendants—Appellants,

versus

RALPH S. JANVEY,

Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC Nos. 3:15-CV-401, 3:09-CV-298

ON SECOND PETITION FOR REHEARING EN BANC

Before STEWART, DENNIS, and SOUTHWICK, *Circuit Judges*.

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 that the evidence did not support that Magness had acted in good faith when he received the relevant transfers and that the result would be to deny a setoff.

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.