No. 21-

In The

Supreme Court of the United States

SUSAN ELAINE DEVINE, *Petitioner*,

v.

ABSOLUTE ACTIVIST VALUE MASTER FUND LIMITED, ABSOLUTE EAST WEST FUND LIMITED, ABSOLUTE EAST WEST MASTER FUND LIMITED, ABSOLUTE EUROPEAN CATALYST FUND LIMITED, ABSOLUTE GERMANY FUND LIMITED, ABSOLUTE INDIA FUND LIMITED, ABSOLUTE OCTANE FUND LIMITED, ABSOLUTE OCTANE MASTER FUND LIMITED, AND ABSOLUTE RETURN EUROPE FUND LIMITED, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

IAN M. COMISKY
Counsel of Record
MATTHEW D. LEE
FOX ROTHSCHILD LLP
2000 Market Street, 20th Fl.
Philadelphia, PA 19103
(215) 299-2000
icomisky@foxrothschild.com
mlee@foxrothschild.com

Carl F. Schoeppl
SCHOEPPL LAW, P.A.
4651 N. Federal Highway
Boca Raton, Florida 33431
(561) 394-8301
carl@schoeppllaw.com

QUESTION PRESENTED

I. Whether a court considering a motion for an award of costs and attorney's fees pursuant to the court's inherent authority must require the movant to prove subjective bad faith, or whether an adequate showing of objective conduct under this Court's inherent-authority jurisprudence can be sufficient to merit an award of costs and fees.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Susan Elaine Devine was defendant in the district court and appellant in the court of appeals. Pursuant to Supreme Court Rule 29.6, Petitioner discloses the following: Petitioner has no parent company, and no publicly held company owns 10% or more of Petitioner's stock.

Respondents are Absolute Activist Value Master Fund Limited, Absolute East West Fund Limited, Absolute East West Master Fund Limited, Absolute European Catalyst Fund Limited, Absolute Germany Fund Limited, Absolute India Fund Limited, Absolute Octane Fund Limited, Absolute Octane Master Fund Limited, and Absolute Return Europe Fund Limited. Respondents were plaintiffs in the district court and appellees in the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), Petitioner provides the following statement of related cases:

U.S. District Court for the Middle District of Florida, No. 2:15-cv-328, *Absolute Activist Value Master Fund Limited et al v. Devine*, judgment entered August 1, 2019.

U.S. Court of Appeals for the Eleventh Circuit, No. 16-13047, *Absolute Activist Value Master, et al v. Susan Devine*, judgment entered August 18, 2017.

U.S. Court of Appeals for the Eleventh Circuit, No. 17-13364, *Absolute Activist Value Master, et al v. Susan Devine*, judgment entered February 20, 2018.

U.S. Court of Appeals for the Eleventh Circuit, No. 19-14147, *Absolute Activist Value Master, et al v. Susan Devine*, judgment entered September 16, 2020.

U.S. Court of Appeals for the Eleventh Circuit, No. 20-10237, *Absolute Activist Value Master, et al v. Susan Devine*, awaiting judgment.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Susan Elaine Devine respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this matter.

OPINIONS BELOW

The district court's decision denying, in part, Petitioner's motion for an award of costs and fees is unreported but is available at 2019 WL 3491962. That decision is reprinted in the appendix hereto ("App.") at App. 18a-50a. The district court's decision denying Petitioner's subsequent motion for reconsideration is unreported but is available at 2019 WL 4594589. That decision is reprinted at App. 9a-17a.

The decision of the Eleventh Circuit is reported at 826 Fed. App'x 876 and is reprinted at App. 1a-8a.

STATEMENT OF JURISDICTION

On September 16, 2020, the Eleventh Circuit issued its opinion affirming the district court's decision denying, in part, Petitioner's motion for an award of costs and fees. The district court had jurisdiction under 28 U.S.C. § 1332. The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).[1]

---

[1] On March 19, 2020, this Court issued an Order extending the deadline to file a petition for writ of certiorari due on or after

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, as follows: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

INTRODUCTION

Petitioner Susan Elaine Devine respectfully petitions for a writ of certiorari to review the Judgment of the Eleventh Circuit. This case implicates a question on which the circuit courts are in conflict. The question is exceptionally important because it involves the standard for the use of the courts' inherent power to sanction misconduct by ordering a non-movant to pay some or all of the movant's costs and attorney's fees when the non-movant has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 258-59 (1975) (citation and internal quotation marks omitted). The courts' application of an improperly restrictive

March 19, 2020 (which includes the subject petition) to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. One hundred and fifty days from September 16, 2020 is Saturday, February 13, 2021. Pursuant to Supreme Court Rule 30(1), the deadline for submission of the subject petition is Tuesday, February 16, 2021.

standard for granting such motions rewards abusive litigation practices and frustrates key aims of the judicial system—namely, using the courts' equitable powers to serve the dual purpose of "'vindicat[ing] judicial authority . . . and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) (quoting *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978)).

The circuit courts disagree as to whether the standard articulated by this Court in *Alyeska* for the imposition of inherent-authority sanctions requires a showing of subjective bad faith, and as to whether the multi-factor standard for such sanctions should be read conjunctively or disjunctively.

The Eleventh Circuit, like the Tenth and Third Circuits, permits courts to impose sanctions under their inherent authority only upon a showing of subjective bad faith on the part of the entity to be sanctioned. *See Hyde v. Irish*, 962 F.3d 1306, 1310 (11th Cir. 2020) ("In the context of inherent powers, the party moving for sanctions must show *subjective* bad faith.") (citations omitted); *Kornfeld v. Kornfeld*, 393 Fed. App'x 575, 580 (10th Cir. 2010) ("Whether the bad faith exception applies turns on the party's subjective bad faith. . . .") (citation and internal quotation marks omitted); *Gillette Foods Inc. v. Bayernwald-Fruchteverwertung, GmbH*, 977 F.2d 809, 812 (3d Cir. 1992) (describing "the subjective bad faith standard that we have required when a court imposes sanctions under its inherent power.") (citation omitted).

The Sixth Circuit employs a similar but slightly less restrictive standard: It permits an award of

attorney's fees "under this bad faith exception" where the district court finds "[1] that 'the claims advanced were meritless, [2] that counsel knew or should have known this, and [3] that the motive for filing the suit was for an improper purpose such as harassment.'" *BTD Prods. Inc. v. Lexmark Int'l, Inc.*, 602 F.3d 742, 752 (6th Cir. 2010) (quoting *Bank Yank Corp. v. Liberty Mut. Fire Ins. Co.*, 125 F.3d 308, 313 (6th Cir. 1997)). *See also United States ex rel. Tingley v. PNC Financial Services Group, Inc.,* 705 Fed. App'x 342, 345 (6th Cir. 2017) ("This court uses 'improper purpose' and 'bad faith' interchangeably.") (citation omitted).

The First Circuit, by contrast, permits the imposition of inherent-authority sanctions even in the absence of a finding of subjective bad faith. *See Dubois v. U.S. Dep't of Agric.*, 270 F.3d 77, 81 (1st Cir. 2001) ("[W]e agree with Dubois that a finding of subjective bad faith is not a prerequisite to an award of sanctions. . . .") (citation omitted).

The Fifth Circuit's standard for imposition of inherent-authority sanctions is closer to that of the First Circuit—it has rejected the restrictive "conjunctive tests" such as those employed by the Tenth and Sixth Circuits. *Gate Guard Servs., L.P. v. Perez*, 792 F.3d 554, 561 (5th Cir. 2015) ("These conjunctive tests appear to lack the flexibility equity requires and overlook that the common-law rule allows for attorneys' fees disjunctively wherever a party has 'acted in bath faith, *vexatiously, wantonly or for oppressive reasons*.'") (quoting *Alyeska,* 421 U.S. at 257). *See also Gate Guard*, 792 F.3d at 561 n.4 (holding that standard for "[v]exatious conduct implies not only that litigant knew a position was

unfounded, but that his purpose was to 'create trouble or expense' for the opposing party" and that the standard for "wantonness" is that "a litigant has recklessly pressed an objectively frivolous position.") (citations omitted).

Like the Fifth Circuit, the Ninth favors a disjunctive standard for the imposition of inherent-authority sanctions. *See Primus Automotive Fin. Servs., Inc. v. Batarse,* 115 F.3d 644, 649 (9th Cir. 1997) (permitting the imposition of inherent-authority sanctions for bad faith, which "is warranted where an attorney 'knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purposes of harassing an opponent.'") (quoting *In re Keegan Mgmt. Co., Sec. Litig.,* 78 F.3d 431, 436 (9th Cir. 1996)).

The standards employed by the Eleventh, Tenth, and Third Circuits (and to a lesser extent the Sixth Circuit) for the imposition of inherent-authority sanctions are incorrect and undermine the ability of trial courts to use their inherent powers to sanction abusive litigation practices, such as those employed by Respondents below. There is no reason for these circuits to impose such a high barrier to the trial courts' ability to use their equitable powers to award costs and attorney's fees as a sanction for serious misconduct. These circuits' standards also misapply this Court's precedents.

A resolution of this issue is important to clarify the proper standard that federal courts should apply when considering the hundreds of motions for inherent-authority sanctions that litigants file every year. A resolution of this issue would also promote responsible litigation conduct by removing an

unnecessarily high bar to the imposition of sanctions awards that can compensate litigants for the costs and attorney's fees they are forced to incur as a result of their adversaries' egregious misconduct. The decision of the Eleventh Circuit below frustrates these goals and incentivizes abusive litigation practices.

This Court should accept *certiorari*, clarify that the standard that applies, and reverse.

STATEMENT OF THE CASE

A. Factual Background

1. Respondents are nine former hedge funds incorporated in the Cayman Islands claiming to be victims of a penny stock manipulation scheme. App. 2a. Respondents' only business is asset recovery. Respondents alleged that the scheme was carried out by Petitioner's former husband, Florian Homm ("Homm"), and others associated with his business. App. 19a.

Petitioner, the lone defendant in the underlying litigation, is a citizen of the United States and Brazil and a resident of the State of Florida. Though she obtained a divorce from Homm in 2007, Respondents allege that she "illegally hid proceeds from [her former husband's purported stock manipulation] scheme." App. 2a.

2. Respondents conceded below that Petitioner was not involved in the purported stock manipulation scheme. Instead, they contended that Petitioner obtained all of her assets from Homm, who, Respondents allege, received millions of dollars for *his* role in the alleged scheme. App. 2a, 65a-66a. Respondents claimed, *inter alia*, that Petitioner's

divorce from Homm was a strategic pretext to obtain control of certain proceeds of the alleged stock scheme.

3. In 2013, Respondents formed a virtual partnership with a Swiss prosecutor (the "Office of the Attorney General" or "OAG"). App. 59a-60a. As Petitioner explained below, after Respondents obtained access to the OAG's investigative file, they analyzed those materials and provided strategic advice to the OAG. App. 63a. Respondents repeatedly attempted—without success—to persuade the OAG to bring criminal charges against Petitioner. Respondents also attempted to persuade the OAG to restrain assets belonging to Petitioner, which the OAG eventually did. Additionally, Respondents asked the OAG to submit requests to the U.S. government to restrain certain of Petitioner's assets in the U.S. The U.S. government never acted on the OAG's requests, which continued throughout the litigation below. App. 74a, 76a.

4. On May 26, 2015, Respondents filed with the OAG a private criminal complaint against Petitioner. App. 65a. Petitioner is the only putative defendant named in the private Swiss criminal complaint. Respondents' private Swiss criminal complaint was not filed publicly. Rather, Respondents did not reveal to Petitioner that they had filed a private Swiss criminal complaint against her until February 2016—well *after* they filed this case and negotiated a protective order with Petitioner. App. 67a n.7, 69a.[2]

---

[2] This protective order—which Respondents have employed to share confidential material with the OAG—has precluded Petitioner from using certain discovery to defend herself in the related Swiss proceedings in which Respondents are parties. This protective order is the subject of a separate appeal pending

B. The Proceedings Below

5. On June 1, 2015, just six days after they filed their private criminal complaint against Petitioner in Switzerland, Respondents filed a six-count, 144-page "shotgun" complaint against Petitioner in the district court, alleging that Petitioner engaged in a money laundering enterprise with her ex-husband to conceal the proceeds of the alleged penny stock scheme. App. 19a, 70a-71a.[3] The monies that Respondents sought to recover through their suit were those purportedly originating from the penny stock scheme. App. 2a.

Contemporaneously, Respondents filed with the district court an *ex parte* motion for a temporary restraining order and preliminary injunction (the "*Ex Parte* TRO Motion"). App. 66a. In an Opinion and Order issued on July 1, 2015 (the "*Ex Parte* TRO"), the district court granted the *Ex Parte* TRO Motion and required Respondents to post a bond of $10,000 (the "TRO Bond"). App. 66a.

The *Ex Parte* TRO imposed a worldwide freeze on the assets held by Petitioner and on those held by her children. The district court subsequently released from the *Ex Parte* TRO certain funds for Petitioner's living and counsel expenses. App. 15a.

6. Twenty-one days after Petitioner learned of the *Ex Parte* TRO and of Respondents' U.S. complaint

---

before the Eleventh Circuit. U.S. Court of Appeals for the Eleventh Circuit, No. 20-10237, *Absolute Activist Value Master, et al v. Susan Devine*, awaiting judgment.

[3] The district court used this very term in its January 5, 2016 order directing Respondents to file an amended complaint. App. 70a n.10.

against her, the district court entered a Stipulation and Protective Order governing the use of discovery material produced or created in connection with this case (the "Protective Order"). The Protective Order provided, in relevant part, that "[e]xcept as otherwise provided [therein], information or documents designated as Confidential by a Party . . . shall not be used or disclosed by any receiving Parties or their counsel . . . for any purposes whatsoever other than preparing for and conducting the litigation in this lawsuit . . . ."

However, as the parties were negotiating the terms of the Protective Order—and months *before* Petitioner became aware that Respondents had filed a secret Swiss criminal complaint against her—Respondents inserted into the agreement a clause stating that "[n]otwithstanding any provision of this Protective Order, the Parties may disclose Discovery Material marked as confidential . . . *pursuant to a request for information from any international . . . criminal authority*." (Emphasis added.) (The "IRC.")

The IRC was drafted to provide the OAG and Respondents with the ability to avoid the formal process whereby the OAG previously had obtained information from the United States—*i.e.*, by making formal "request[s] for mutual legal assistance" to the Office of International Affairs at the United States Department of Justice (the "DOJ"). While the formal Mutual Legal Assistance Treaty ("MLAT") process requires the involvement of the DOJ and places restrictions on the use of any documents so produced, the IRC did neither of those things.

Respondents exploited the IRC to forward material they obtained in this case to the OAG.

Specifically, Respondents employed the IRC to forward to the OAG not only confidential documents and deposition testimony, but also documents produced by third-parties in response to subpoenas that Respondents issued in the U.S.

7. Although Respondents waited until 2015 to commence this litigation, they were aware of Petitioner's relationship with her ex-husband years earlier. Respondents arranged for a private investigator to contact Petitioner in 2009, App. 53a, and decades-old public records regarding Petitioner's divorce were referenced in Respondents' complaint. These facts demonstrated that Respondents knew that the suit, especially the unjust enrichment count against Petitioner, was time barred years before it was filed. App. 53a-55a.

8. Respondents' amended complaint, filed on January 14, 2016, alleged two federal RICO claims (Counts I and II), a state RICO claim and a Florida Civil Remedies for Criminal Activities claim (Counts III and IV), a state law unjust enrichment claim (Count V), and a state law constructive trust claim. App. 20a. Petitioner moved to dismiss the amended complaint on July 19, 2017 (the "Motion to Dismiss").

On February 8, 2017, the district court issued an Opinion and Order granting in part and denying in part the Motion to Dismiss. In that order, the district court dismissed without prejudice Respondents' federal RICO claims, Florida RICO claim, and Florida RICO conspiracy claim. App. 21a. The district court dismissed with prejudice Respondents' "constructive trust" claim. App. 21a. Only Respondents' unjust enrichment claim survived. App. 21a. This claim was clearly time barred. App. 54a-56a.

On February 28, 2017, Respondents filed a notice stating that they had elected "not to file a Second Amended Complaint." App. 22a. On May 8, 2017, the district court issued an Order directing Respondents to file a Second Amended Complaint including only their remaining state law claim for unjust enrichment. App. 22a. Respondents filed their Second Amended Complaint seven days later. App. 22a. On July 25, 2017, the district court issued an Order granting Petitioner's motion to dissolve the *Ex Parte* TRO (the "Dissolution Order"). App. 22a.

9. On July 26, 2017, Respondents filed a notice of appeal regarding the Dissolution Order. App. 75a. The same day, Respondents filed an emergency motion for a stay of the Dissolution Order (the "District Court Stay Motion"). App. 75a. In the District Court Stay Motion, Respondents asserted, *inter alia*, that "they are likely to succeed on the appeal of the [Dissolution] Order." *Id*. On July 28, 2017, Respondents filed an emergency motion with the Eleventh Circuit requesting a stay of the Dissolution Order pending appeal (the "Appellate Stay Motion"). App. 75a. The Appellate Stay Motion contained the same language regarding Respondents' purported likelihood of success. *Id*.

Even as they assured both the district court and the Eleventh Circuit that they were likely to succeed on their appeal, Respondents urged the OAG to ask the U.S. to seize nine categories of Petitioner's assets. App. 76a. Those assets included property that had been encumbered by the *Ex Parte* TRO. *Id*. On August 30, 2017, Respondents wrote again to the OAG to urge it to "take [Petitioner] into custody." *Id*. In their August 30 letter to the OAG, Respondents cited

deposition testimony of a third-party witness—deposition testimony that Respondents obtained in this litigation and shared with the OAG unprompted—as purported proof of Petitioner's alleged misconduct. *Id*.

Just two weeks later, the OAG followed Respondents' lead and issued a new, "VERY URGENT" request to the DOJ pursuant to the U.S.-Swiss MLAT on September 14, 2017. App. 76a. In its September 14 letter, the OAG requested that the DOJ seize the same U.S. assets that Respondents had identified in their August 10 letter. The U.S. never acted on the request. *Id*.

10. On November 17, 2017, the district court issued an Opinion and Order denying Respondents' District Court Stay Motion. App. 77a-78a. On December 28, 2017, the Eleventh Circuit issued an Order lifting its stay and denying the Appellate Stay Motion. *Id*. As a result, the assets that had been restrained by the *Ex Parte* TRO were fully unencumbered as of December 28, 2017, two-and-a-half years after the litigation began. *Id*.

11. After the denial of their stay motions, Respondents' vexatious and abusive litigation tactics continued. Without moving for a protective order, Respondents simply refused to attend several party depositions that Petitioner noticed. App. 78a-81a. When the district court ordered Respondents to submit to depositions in early 2018—at which point not even *one* of the Respondents had testified on the record in this action—they instead voluntarily

dismissed their remaining claim and abandoned their already-briefed appeal. App. 81a-83a.[4]

11. The OAG continued to rely on U.S. discovery that Respondents obtained in this action. For instance, on March 16, 2018, the OAG published a 281-page report that purported to describe the "fraud" perpetrated by Homm. The report included numerous references to deposition transcripts that Respondents obtained in this action.[5] App. 84a.

13. On April 20, 2018, Petitioner moved for entry of a partial final judgment in her favor (the "Judgment Motion"). App. 22a. On July 11, 2018, the district court issued an Opinion and Order granting the Judgment Motion. App. 23a. That same day, the clerk of court entered judgment in Petitioner's favor and against Respondents. App. 23a.

On July 25, 2018, Petitioner filed her Motion for an Award of Costs and Fees (the "Fee Motion"). App. 19a. Petitioner's counsel filed a declaration in support of the Fee Motion (the "Fee Declaration") to which

---

[4] At the time of the dismissal, Petitioner's motion to dismiss the Second Amended Complaint remained pending. As a result, Petitioner never answered any of the complaints filed by Respondents. App. 59a.

[5] Respondents also obtained from the OAG materials that it had received from the U.S. government, including subpoenaed materials, and FBI work-product created in connection with a U.S. grand jury investigation. App. 60a. The OAG obtained the grand jury materials by way of an MLAT request to the U.S. and subsequently turned that information over to Respondents. Respondents, in turn, used that work-product in the litigation to create an expert report, which they served on Petitioner in the litigation below and then turned over to the OAG for use in *its* investigation. App. 60a.

they attached thirty supporting exhibits. App. 19a. In the Fee Motion, Petitioner requested an award of costs pursuant to Rule 54(d) of the Federal Rules of Civil Procedure; an award of costs and attorneys' fees pursuant to Rule 37(d) of the Federal Rules of Civil Procedure; an award of costs and attorneys' fees against the TRO Bond, pursuant to Rule 65 of the Federal Rules of Civil Procedure; an award of costs and attorneys' fees pursuant to the district court's inherent authority; and an award of costs and attorneys' fees pursuant to Fla. Stat. § 772.104. App. 44a, 46a. In the Fee Motion, Petitioner requested an award in an amount equal to all of the attorneys' fees and costs that Petitioner incurred in this action, with reductions for activities unrelated to the litigation.[6]

14. In 2019, the OAG sent a bill of indictment to the Swiss Court of Criminal Affairs in connection with the OAG's investigation of Homm and others. The identifying number assigned to that proceeding was SV.09.0135-FAL (the "135 Proceeding"). Petitioner was not charged in that proceeding. Certain of her assets remain restrained as a result of that indictment and will remain frozen while the 135 Proceeding is pending. App. 14a.[7]

Two days prior, on February 18, 2019, the OAG issued a note in the formal file relating to the 135 Proceeding (the "February 18 Note"). App. 14a-15a.

---

[6] In the course of briefing the Fee Motion, Petitioner filed an additional supporting declaration that attached, *inter alia*, hundreds of pages of invoices and billing entries from Petitioner's counsel. App. 19a.

[7] The U.S. Government seized only one of Petitioner's assets in 2014, and later released that restraint voluntarily.

The February 18 Note states, in relevant part, that the private Swiss criminal complaint that Respondents filed against Petitioner had been transferred to the file associated with a new proceeding. App. 14a-15a. The identifying number assigned to that new proceeding is SV.18.1255-FAL (the "1255 Proceeding"). App. 15a. Respondents are identified as the plaintiffs in the 1255 Proceeding and were the only party informed of the 1255 Proceeding. The February 18 Note also indicates that submissions sent by Respondents to the OAG on May 10, 2017, August 30, 2017, and December 5, 2018 in support of their private criminal complaint against Petitioner likewise would be transferred to the file associated with the 1255 Proceeding. The February 18 Note further stated that the 1255 Proceeding—whose *only named target is Petitioner*—was suspended pending the resolution of the 135 Proceeding. App. 14a-15a. Thus, the OAG commenced the 1255 Proceeding involving Petitioner based upon information that Respondents provided during the pendency of this action. App. 14a-15a.

15. On August 1, 2019, the district court issued an Opinion and Order granting in part and denying in part the Fee Motion (the "Fee Order"). App. 10a. In the Fee Order, the district court awarded Petitioner $22,199.67 in taxable costs and $886.60 in non-taxable expenses; the district court otherwise denied the Fee Motion. App. 43a, 50a. The district court rejected Petitioner's argument that "bad faith conduct on the part of the plaintiffs justifie[s] an award of attorneys fees and expenses on top of taxable costs," and concluded that "there is insufficient information to support the imposition of sanctions [pursuant to the

district court's inherent authority], even if plaintiffs were working with the Swiss government or collecting data for discovery in related cases." App. 45a. The district court based that conclusion, in part, on the proposition that in order to invoke the court's inherent authority to sanction a litigant for misconduct, a movant must satisfy a "subjective bad-faith standard" for proving bad faith on the part of the non-movant. App. 45a.

On August 29, 2019, Petitioner moved for reconsideration of the Fee Motion (the "Reconsideration Motion"). App. 10a. In the Reconsideration Motion, Petitioner argued, *inter alia*, that the district court incorrectly applied the law governing the issuance of inherent-authority sanctions, and that the recent developments relating to the 1255 Proceeding warranted reconsideration. App. 15a. On September 23, 2019, the district court denied the Reconsideration Motion. App. 17a. Petitioner timely filed a Notice of Appeal on October 21, 2019.

16. In pursuing her appeal to the Eleventh Circuit, Petitioner requested oral argument. The Eleventh Circuit instead decided the appeal on the written submissions in a perfunctory per curiam opinion based upon the subjective bad faith standard applied in that circuit. App. 45a-46a.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Split Regarding the Proper Standard for the Imposition of Inherent-Authority Sanctions.

1. This Court has long recognized the special importance of inherent-authority sanctions as a tool for the protection of federal courts and the parties who appear before them. This Court has held that inherent-authority sanctions may be imposed to sanction misconduct by ordering a non-movant to pay some or all of the movant's costs and attorney's fees when the non-movant has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska,* 421 U.S. at 258-59 (citation and internal quotation marks omitted).

2. In *Chambers*, for instance, this Court observed as follows:

> These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. . . . [W]hereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices.

501 U.S. at 46. One particularly important and unique aspect of inherent-authority sanctions is that they can "reach[ ] both conduct before the court and that beyond the court's confines." *Id*. at 44. This power was critical in *Chambers*, where portions of the sanctioned conduct occurred beyond the courtroom.

2. Because a court's inherent authority to sanction has such broad scope, it is a particularly

important tool for protecting the courts and litigants. Yet the Eleventh Circuit, like the Tenth and the Third, significantly impedes this critical function by permitting the imposition of inherent authority sanctions only upon a showing of subjective bad faith on the part of the entity to be sanctioned; these circuits thereby read this Court's *Alyeska* standard in the conjunctive. *See Hyde*, 962 F.3d at 1310 ("In the context of inherent powers, the party moving for sanctions must show *subjective* bad faith.") (citations omitted). *See also Kornfeld*, 393 Fed. App'x at 580 ("Whether the bad faith exception applies turns on the party's subjective bad faith . . . .") (citation and internal quotation marks omitted); *Gillette Foods*, 977 F.2d 809 at 812 (describing "the subjective bad faith standard that we have required when a court imposes sanctions under its inherent power.") (citation omitted).

The Sixth Circuit has a slightly less rigid standard, which requires, in part, that counsel "knew or should have known" that the "claims advanced were meritless." *BTD Prods.*, 602 F.3d at 752 (holding that "'[i]n order to award attorney fees under this bad faith exception, a district court must [also] find . . . that the motive for filing the suit was for an improper purpose such as harassment.'") (quoting *Big Yank*, 125 F.3d at 313). This requirement may be fatal in cases where sophisticated litigants and/or counsel can avoid or minimize the creation of the sort of smoking-gun evidence necessary to prove *subjective* bad faith. *See also Tingley,* 705 Fed. App'x at 345 ("This court uses 'improper purpose' and 'bad faith' interchangeably.") (citation omitted).

3. The First Circuit, by contrast, permits the imposition of inherent-authority sanctions even in the absence of a finding of subjective bad faith. *See Dubois*, 270 F.3d at 81 (1st Cir. 2001) ("[W]e agree with Dubois that a finding of subjective bad faith is not a prerequisite to an award of sanctions . . . .") (citation omitted).

4. Two other circuits have likewise rejected the restrictive conjunctive tests requiring proof of subjective bad faith and instead apply a disjunctive test. In *Gate Guard*, for instance, the Fifth Circuit concluded that "[t]hese conjunctive tests appear to lack the flexibility equity requires and overlook that the common-law rule allows for attorneys' fees disjunctively wherever a party has 'acted in bath faith, *vexatiously, wantonly or for oppressive reasons.*'" 792 F.3d at 561 (quoting *Alyeska*, 421 U.S. at 257). The Fifth Circuit clarified in *Gate Guard* that the standard for "[v]exatious conduct implies not only that litigant knew a position was unfounded, but that his purpose was to 'create trouble or expense' for the opposing party" and that the standard for "wantonness" is "a litigant has recklessly pressed an objectively frivolous position." *Id*. at 561 n.4 (citations omitted).

5. The Ninth Circuit also favors a disjunctive standard for the imposition of inherent-authority sanctions. *See Primus Automotive,* 115 F.3d at 649 (permitting the imposition of inherent-authority sanctions for bad faith, which "is warranted where an attorney 'knowingly or recklessly raises a frivolous argument, *or* argues a meritorious claim for the purposes of harassing an opponent.'") (quoting *In re Keegan,* 78 F.3d at 436) (emphasis added)).

6. By eschewing their sister circuits' onerous requirement that a movant prove subjective bad faith, the First, Fifth Circuits and Ninth Circuits accord due weight to the critical need for inherent-authority sanctions to fill the gaps created by other fee-shifting mechanisms. The approach of the these circuits is also preferable insofar as it accommodates the reality that the sort of smoking-gun evidence necessary to prove subjective bad faith can be impossible to find even in the face of incontrovertibly egregious misconduct.

Because the circuit courts have adopted competing and incompatible standard for the imposition of inherent-authority sanctions, and because motions seeking such sanctions are filed in hundreds of cases per year throughout the federal judiciary, the instant petition for a writ of certiorari should be granted.

II. The Standard Used by the Eleventh, Tenth, and Third Circuits Incentivizes Abusive Litigation Conduct and Constitutes an Unduly Restrictive Reading of *Chambers*.

1. The requirement that a movant prove subjective bad faith on the part of the entity to be sanctioned before a court can invoke its inherent authority incentivizes abusive litigation conduct. In the proceedings below, for instance, Petitioner was forced to incur millions of dollars in unnecessary costs and attorney's fees to defend a suit that Respondents used to exploit the permissive U.S. civil discovery rules to obtain evidence for use in a foreign proceeding against Petitioner. App. 59a-61a. Yet, because the

district court found that Petitioner did not adduce sufficient evidence of Respondents' subjective bad faith, App. 45a-46a, Petitioner was denied meaningful recourse against Respondents. Petitioner was forced to accept this inequity even though the pretextual nature of Respondents' U.S. suit became obvious once Respondents fled the jurisdiction and voluntarily dismissed their action just *one week* after they were forced to submit to what would have been their first deposition in the case. App. 80a-83a. The predictable result of such a standard is that abusive litigation conduct of the sort practiced by Respondents will become more rather than less common.

2. The restrictive Eleventh Circuit standard for imposition of inherent-authority sanctions constitutes an unduly restrictive reading of this Court's decision in *Chambers*. An examination of this Court's *Chambers* decision is important. In *Chambers*, the petitioner NASCO, Inc. sought to enforce the parties' contract for the sale of a television station. 501 U.S. at 35. When the seller refused to proceed with the sale, NASCO informed the seller—on a Friday—that it intended to file suit seeking specific performance and a restraining order. *Id.* at 36. In order to frustrate NASCO's lawsuit, Chambers and his attorney—acting on the following Sunday—created a trust and executed warranty deeds that purported to convey control of the subject property to Chambers's relatives. *Id.* at 36-37. When questioned by the district court on the following Monday about "the possibility that" Chambers "was negotiating to sell the properties to a third person," Chambers's attorney "made no mention of the recordation of the deeds earlier that morning." *Id.* at 37. The following day,

after "Chambers met with his sister and had her sign the trust documents," Chambers's attorney "informed the District Court by letter of the recordation of the deeds the day before and admitted that he had intentionally withheld information from the court." *Id*. The district court thereafter issued a preliminary injunction "to prevent the trustee from alienating or encumbering the properties" at issue and warned the seller and his attorney that their conduct was unethical. *Id*.

Thereafter, Chambers, undeterred, proceeded with a series of "meritless motions and pleadings and delaying actions." *Id*. at 38 (citation and internal quotation marks omitted). Chambers also "refused to allow NASCO to inspect [relevant] corporate records." *Id*. at 38. On the eve of trial, the parties stipulated that the agreement was enforceable and that Chambers had breached it. *Id*. After the district court entered judgment in favor of NASCO, Chambers nonetheless filed meritless motions with the trial court, the court of appeals, and the Supreme Court in an effort to stay the judgment; all such motions were denied. *Id*. at 39. The court of appeals eventually found Chambers's appeal to be frivolous, imposed sanctions, and remanded to determine whether further sanctions should be imposed. *Id*. at 40. On remand, the district court, relying on its inherent powers, imposed sanctions on Chambers for the entire amount of NASCO's litigation costs. *Id*. The district court concluded that Chambers had devised a plan of "obstruction, delay, harassment and expense sufficient to reduce NASCO to a condition of exhausted compliance." *Id*. at 41 (citation and internal quotation marks omitted).

There are striking similarities between *Chambers* and the instant case. In *Chambers,* the seller frivolously persisted in a matter in which it could not prevail, engaged in subterfuge outside the court before the suit was filed, engaged in misconduct during the litigation, and filed meritless applications for stays with higher courts. Here, Respondents likewise engaged in deceptive misconduct outside of the district court by bringing a private criminal complaint in Switzerland that they concealed from both Petitioner and the court. App. 61a. Respondents then exploited that act of concealment to induce Petitioner to enter into a Protective Order that allowed Respondents to funnel U.S. discovery material back to Switzerland. App. 61a. Respondents thereby used this litigation as a mere vehicle to further their foreign litigation campaign.

Moreover, as in *Chambers*, Respondents filed stay motions after the district court dissolved the *Ex Parte* TRO. App. 75a. Respondents later voluntarily dismissed the very same appeal with respect to which they sought that stay. App. 83a. Additionally, and like the litigant sanctioned in *Chambers*, Respondents refused to participate in discovery when it did not suit their aims; here, that meant refusing to be deposed after they had obtained the material they sought and forwarded it to the OAG in an effort to precipitate an investigation against Petitioner in Switzerland. App. 59a-60a, 78a-81a.

Given the clear parallels between Respondents' conduct here and the conduct that this Court found sanctionable in *Chambers*, it is apparent that the Eleventh Circuit construed this Court's precedent too narrowly in denying Petitioner the inherent-authority

sanctions that she seeks to redress Respondents' abusive litigation conduct.

III. The Issues Presented Are Important, and This Case Presents an Ideal Vehicle for Resolving Them.

1. The proper standard for imposing inherent-authority sanctions is an important question for this Court. In the balance lie the rights of litigants—such as Petitioner—not to be forced to endure years of extraordinarily expensive and emotionally draining time-barred litigation that an adverse party is pursuing merely to obtain discovery intended for use in a foreign forum. *See supra* Statement of the Case, sections B(2), (7). The nature of the evidentiary showing a movant must make in order to invoke the court's inherent authority to sanction also will determine whether such movants can obtain meaningful recompense—despite the absence of smoking-gun evidence of subjective bad faith—when their adversaries, like Respondents here, engaged in vexatious and wanton misconduct. *See id*. The lower courts face hundreds of motions seeking imposition of inherent-authority sanctions every year, but the circuits provide inconsistent rules for adjudicating those motions.

2. This case presents an ideal vehicle for clarifying those standards. Because of their adoption of an unreasonably restrictive standard for invocation of their inherent power to sanction, the courts below simply did not recognize that Petitioner's evidentiary showing was more than adequate to merit fee-shifting sanctions on Respondents under either an objective

standard or a standard applying objective facts to the disjunctive language employed by this Court. However, if this Court holds that the extensive proof of Respondents' abusive litigation practices set out in Petitioner's submissions to the district court is sufficient to merit an award of inherent-authority sanctions, *see* App. 64a-83a, then the lower courts' rulings must be reversed. This case therefore presents an ideal vehicle for this Court to clarify the standard for imposition of inherent-authority sanctions and to resolve the circuit split on that issue.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

IAN M. COMISKY
Counsel of Record
FOX ROTHSCHILD LLP
2000 Market St., 20th Floor
Philadelphia, PA 19103
(215) 299-2000
icomisky@foxrothschild.com

February 19, 2021