APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14147
Non-Argument Calendar

D.C. Docket No. 2:15-cv-00328-JES-MRM

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, et al.,

Plaintiffs-Appellees,

Versus

SUSAN ELAINE DEVINE,

Defendant-Appellant,

LAIRD LILE,
as custodian f/b/o Isabella Devine, et al.,

Defendants.

Appeals from the United States District Court
for the Middle District of Florida

(September 16, 2020)

Before WILSON, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

The dust has settled in this money-laundering case; all that's left is a fight over fees. The appellees are hedge funds that were allegedly defrauded in a stock-manipulation scheme. They claimed that the appellant Susan Devine illegally hid proceeds from the scheme. The hedge funds thus sued Devine in the Middle District of Florida, alleging a litany of federal and state claims. The district court held that the hedge funds were likely to prevail, so it entered a temporary restraining order (TRO) that froze Devine's assets. Under Federal Rule of Civil Procedure 65(c), it also ordered the hedge funds to post a $10,000 bond to secure the TRO.

For various reasons, the district court eventually dismissed the complaint and dissolved the injunction. Devine then moved for an award of fees and costs, citing (among other things) the district court's inherent power to sanction, Federal Rule of Civil Procedure 37(d), and Federal Rule of Civil Procedure 65(c). The

district court, for the most part, declined to award fees under these authorities. Devine appeals, and we affirm.

I

We will start with inherent power. A federal court has the inherent power to sanction a party. *Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218, 1223 (11th Cir. 2017). Because these powers are substantial, a court must exercise "restraint and discretion" when invoking them. *Id.* To justify a use of inherent power, "the party moving for sanctions must show *subjective* bad faith." *Hyde v. Irish*, 962 F.3d 1306, 1310 (11th Cir. 2020). "This standard can be met either (1) with direct evidence of …subjective bad faith or (2) with evidence of conduct so egregious that it could only be committed in bad faith." *Id.* (internal quotation mark omitted).

We review a court's decision not to award a sanction under its inherent power for abuse of discretion. *Id.* "The application of an abuse-of-discretion review recognizes the range of possible conclusions the trial judge may reach." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc). "When employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1238 (11th Cir. 2007) (alteration accepted).

Devine takes three issues with the district court's ruling. None hold merit.

She first says that the court applied the wrong legal standard. In Devine's eyes, the district court did not recognize that a party can prove subjective bad faith "with evidence of conduct so egregious that it could only be committed in bad faith." *Hyde*, 962 F.3d at 1310 (internal quotation mark omitted). Devine claims that the court erroneously required direct evidence of subjective bad faith. We disagree. The court correctly noted that inherent-power sanctions turn on subjective bad faith, but nothing in its order suggests that it ignored the possibility that objective evidence could be so great that it establishes subjective intent. To the contrary, the court listed objective circumstances that can show bad faith and then found that the circumstances here did not reveal subjective bad faith "by any stretch of the imagination." It did not apply an incorrect legal standard.

Next, Devine says that the court committed error by failing to explain why it did not find bad faith. But the court did just that. It cited examples of what facts typically reveal bad faith—"fraud on the Court, proof of forum shopping, unreasonable and vexatious multiplying of proceedings, pursuing a case barred by the statute of limitations, or purposely vexatious behavior." And it found that Devine's evidence did not bring this case to "[the] level" of bad faith needed "to support the imposition of sanctions." A court need not discredit a party's evidence

line-by-line when holding that the party failed to justify the need for sanctions. The court's analysis here was more than enough.

Last, Devine claims that, in any event, the district court erred in failing to award sanctions. She says that she established that the hedge funds sued her—and continued their suit well after viability—to harass her and pick off information for use in a different matter. But even if her evidence could support the finding she seeks, it does not rule out an equally justified finding: that the hedge funds acted earnestly. Given the district court's extensive factual findings and the accompanying record, we easily conclude that the district court acted within its zone of choice in finding that the evidence did not justify the extraordinary use of inherent power. *See Frazier*, 387 F.3d at 1259.

II

Devine also challenges the court's refusal to award attorney's fees connected with the hedge funds' missed depositions. Federal Rule of Civil Procedure 37(d)(1)(A)(i) allows a court to sanction a party who "fails, after being served with proper notice, to appear for [its own] deposition." If the court orders sanctions, it "must require" the culpable party to pay "reasonable expenses, including attorney's fees . . . unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(d)(3). "The standard of review for an appellate court in considering an appeal of sanctions under Rule 37 is

sharply limited to a search for an abuse of discretion and a determination that the findings of the trial court are fully supported by the record." *Serra Chevrolet, Inc. v. Gen. Motors Corp.*, 446 F.3d 1137, 1146–47 (11th Cir. 2006) (alterations accepted).

The hedge funds, before the court dismissed their case, failed to sit for duly noticed depositions. Devine requested about $28,000 in fees as a result. The court here apparently exercised its discretion to partially sanction the hedge funds for their failure to attend their depositions: It granted Devine's reimbursement requests for some meals and for "messenger services, the air travel, the taxi/Uber expenses, and the hotel" expenses related to the depositions. But the court refused to award all the corresponding attorney's fees. Devine says this was error. It was not.

As the district court explained in both its fee order and its order denying reconsideration, Devine failed to provide specific support for her attorney's-fee requests. Instead, Devine submitted hundreds of redacted billing entries, leaving the court to sift through the entries to determine whether the records supported her requested fees. Punting the ball even farther down the field, Devine said that the court could request an "in camera" hearing if it wanted to sort through the unredacted entries itself.

The district court rejected this minimal effort. It declined to "carry the burden to aid [Devine's] collection efforts." It also found that, at any rate, the

amounts requested "greatly exceeds any reasonable attorney's fees that would have been incurred for the failure to appear." Given the large bill, and given that we, even on appeal, cannot make heads or tails of Devine's unspecific and redacted billing records, we cannot hold that the district court abused its discretion in declining to award more than it did. *See id.*

III

Finally, the district court ordered the hedge funds to post a $10,000 bond to secure the TRO. *See* Fed. R. Civ. P. 65(c). "[A] prevailing defendant is entitled to damages on the injunction bond unless there is a good reason for not requiring the plaintiff to pay in the particular case." *State of Ala. ex rel. Siegelman v. U.S. E.P.A*, 925 F.2d 385, 390 (11th Cir. 1991). We review the district court's decision not to assess damages on an injunction bond for abuse of discretion. *Id.* at 389. One factor a court may consider in conducting its analysis is whether the plaintiff sought the TRO in good faith, though that is not dispositive. *See id.* at 390. Another is whether an unforeseen change in the law occurred after the plaintiff sued, "effectively prevent[ing] the plaintiff from obtaining permanent injunctive relief." *Id.* at 391.

The district court did not abuse its discretion here. For one, the court found that the hedge funds sought the injunction in good faith. *See id.* at 390. The record supports this finding, as do the district court's findings that the hedge funds were

likely to succeed on their claims. For another, an intervening change in the law— *RJR Nabisco, Inc. v. European Community*, 579 U.S. ___, 136 S. Ct. 2090 (2016)—also supports the court's decision. Indeed, the court dissolved the injunction only after this change in the law lowered the hedge funds' likelihood of success to a minimal level. Given these circumstances, we cannot say that the district court abused its discretion in finding that there was good reason not to assess damages on the bond.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

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,
Plaintiffs,

v. Case No: 2:15-cv-328-FtM 29MRM

SUSAN ELAINE DEVINE,
Defendant.

OPINION AND ORDER

This matter comes before the Court on defendant's Motion for Reconsideration of Court's

Opinion and Order Granting in Part and Denying in Part Her Motion for Award of Costs and Fees (Doc. #770) filed on August 29, 2019. Plaintiff filed a Memorandum in Opposition (Doc. #774) on September 12, 2019. Also before the Court is defendant's Amended Motion for Leave to Submit Attorney Billing records for *In Camera* Review (Doc. #772) and plaintiffs' Memorandum in Opposition (Doc. #774).

On August 1, 2019, the Court issued an Opinion and Order (Doc. #761) granting in part and denying in part defendant's Motion for Award of Costs and Fees. The Court granted taxable costs and some non-taxable expenses pursuant to Fed. R. Civ. P. 37(d), but no attorney fees. Under Rule 60(b),

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> **(1)** mistake, inadvertence, surprise, or excusable neglect;
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> **(2)** newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
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> **(3)** fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
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> **(4)** the judgment is void;

> **(5)** the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> **(6)** any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Defendant appears to rely solely on Rule 60(b)(6), and the Court finds that (1) through (5) do not apply, except as to the one issue of 'newly discovered evidence.' "Federal courts grant relief under Rule 60(b)(6) only for extraordinary circumstances." Frederick v. Kirby Tankships, Inc., 205 F.3d 1277, 1288 (11th Cir. 2000) (citation omitted). "Consequently, relief under Rule 60(b)(6) requires showing 'extraordinary circumstances' justifying the reopening of a final judgment." Arthur v. Thomas, 739 F.3d 611, 628 (11th Cir. 2014) (citations and quotation marks omitted)."The courts have delineated three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; (3) the need to correct clear error or prevent manifest injustice." Sussman v. Salem, Saxon & Nielsen, P.A., 153 F.R.D. 689, 694 (M.D. Fla. 1994). "It is well established in this circuit that '[a]dditional facts and arguments that should have been raised in the first instance are not appropriate grounds for a motion for reconsideration.'" Wallace v. Holder, 846 F. Supp. 2d 1245, 1248 (N.D. Ala. 2012) (citation omitted).Court opinions are "not

intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." Quaker Alloy Casting Co. v. Gulfco Indus., Inc., 123 F.R.D. 282, 288 (N.D. Ill. 1988).

Defendant argues that it would be manifestly unjust to deny her: (1) the attorney fees pursuant to Rule 37(d) attributable exclusively to plaintiffs' failure to appear at the depositions; (2) an award pursuant to the Court's inherent authority for the costs and attorneys' fees; and (3) an award for damages against the $10,000 TRO Bond.

1. Attorney Fees under Rule 37(d)

The Court found that defendant was entitled to fees and expenses as a sanction pursuant to Fed. R. Civ. P. 37(d) for the failure of plaintiff's counsel to attend properly noticed depositions. The Court noted that "Defendant incurred costs in the amount of $28,200.86 as a result of plaintiffs' failure to attend the depositions. (Doc. #742, ¶ 28.)" (Doc. #761, p. 26.) However, defendant did not provide any redacted billing statements to support this specific amount, and Matthew D. Lee's original Declaration instead offered "[t]o the extent that the Court wishes to examine Ms. Devine's counsels' unredacted billing records to verify that the sums cited herein are accurate, Ms. Devine will submit those records to the Court for in camera review." (Doc. #714, p. 7 n.2.) As a result, the Court allowed only $886.60 in expenses because it was "not inclined to carry the burden" of sifting through all the billable hours to determine which ones were attributable to the failure to attend the depositions.

Defendant argues that she "incurred – at a minimum - $3,750 in fees charged by her counsel for

attorney time that is attributable exclusively" to the failure to appear. (Doc. #770, p. 5.) Defendant goes on to state that "her attorneys spent at least eleven additional hours preparing a motion to compel." (Id.) Defendant argues that the records establish that she "incurred at least $8,843 in fees", and therefore reconsideration is warranted. (Id., p. 6.) Defendant's use of "at a minimum" and "at least" , and only now pointing out specific entries, see Doc. #770, p. 5 n. 4-5, reflects just how impossible it was for the Court to verify the hours to determine the reasonableness of the fees upon review of the original motion and reply. The Court declines to revisit the issue because there was no error, and it would be unjust to give defendant a second bite at the apple to justify the amount of fees.

2. Inherent Authority

The Court declined to impose sanctions pursuant to its inherent power to do so because "[a]lthough defendant continually raises this theory of bad faith and collusion, there is insufficient information to support the imposition of sanctions, even if plaintiffs were working with the Swiss government or collecting data for discovery in related cases." (Doc. #761, p. 29.) The Court found that this case did not rise to the level of Purchasing Power[1] "by any stretch of the imagination." (Id.)

Defendant argues that the Court incorrectly applied the law because as the litigation progressed, it at least became substantially motivated by plaintiffs' bad faith. Defendant argues that the Court failed to consider the evidence in the reply regarding

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[1] Purchasing Power, LLC v. Bluestem Brands, Inc., 851 F.3d 1218, 1223 (11th Cir. 2017).

the undisclosed existence of the private Swiss criminal complaint. Defendant cited to the Report of Lawrence J. Fox, a former chairman of the ABA Standing Committee on Ethics and Professional Responsibility, concluding that the concealment of the criminal complaint violated several ethics rules and effectuated a fraud on Defendant and the Court. (Doc. #770, pp. 11-12.) As additional proof, defendant points out plaintiffs' contrary positions in this case from the criminal complaint filed in Switzerland. Defendant argues that plaintiffs did engage in "purposely vexation behavior" towards her, and specifically after the Court's 2017 rulings despite the Court's denial of sanctions. (Id., p. 13.) The Court did in fact "assess that compelling evidence" presented by defendant, Doc. #770, p. 10, and simply disagreed that it was sufficient. This is not tantamount to an incorrect application of the law. Reconsideration is denied.

Defendant also submits "newly available evidence" supporting bad faith. (Id., pp. 16-17.) Defendant is admittedly not one of the individuals charged in a bill of indictment connected to the 135 Proceeding, but she is considered a third party with limited rights. Defendant argues that her assets remain restrained as a result of the indictment and will remain frozen while the Proceeding is pending before the Swiss Court of Criminal Affairs. On February 18, 2019, months before the Court issued its Opinion and Order, the Attorney General of Switzerland issue a note in the 135 Proceeding that the private criminal complaint initiated by plaintiffs would be transferred to another

proceeding under a different Proceeding number but the Attorney General did not inform
defendant's Swiss counsel of same. (Doc. #770, pp. 17-18.) Defendant argues that it was not until April 2019, when her Swiss counsel learned of the new 1255 Proceeding, which has been suspended. Defendant's Swiss counsel has appealed the new Proceeding which targets defendant as a result of the discovery in this case. Defendant argues that this 'newly available evidence' shows that the collusion with the Attorney General of Switzerland is no longer conjecture. (Id., p. 20.) None of this information constitutes new evidence, and does not otherwise change the conclusion. The Court finds it remains insufficient evidence to justify sanctions in *this* case. The proceedings in Switzerland cannot form the basis for sanctions in this case. The request for reconsideration is granted to the extent the Court considered the 'new evidence', but the request is otherwise denied.

3. The TRO Bond

On July 1, 2015, in a 69-page Opinion and Order (Doc. #10), the Court granted a temporary restraining order against defendant and directed plaintiffs to post a $10,000 bond. After several continuances, the Court consolidated the preliminary injunction hearing with the trial on the merits. (Doc. #83.) The Court modified the temporary restraining order several times to release funds as required, and on April 19, 2016, the Court denied a motion to dissolve the injunction. (Doc. #368.) Defendant filed an interlocutory appeal from this Opinion and Order. (Doc. #383.) The appeal was stayed pending a decision

on a motion for reconsideration, which was denied as moot on July 25, 2017, after the dismissal of federal claims. (Doc. #574.) The injunction was dissolved because the Court found that plaintiffs were requesting monetary damages on the remaining state law claim for unjust enrichment, and Florida law precludes the injunctive relief to preserve the ultimate availability of otherwise unrestricted fund. (Doc. #575, pp. 15-16.) The Court found that the commingling of funds in accounts and difficulty in tracing assets meant that plaintiffs were substantially unlikely to prevail on the imposition of a constructive trust. The injunction was dissolved. (Id., pp. 17-18.) The case and the interlocutory appeal were voluntarily dismissed. (Docs. ## 681, 682.)

Defendant points out that good faith in seeking the injunction is not sufficient to refuse damages on a bond under State of Ala. ex rel. Siegelman v. U.S. E.P.A., 925 F.2d 385, 390 (11th Cir. 1991). The case also stated that "good faith is a factor that should only be noteworthy when absent or when coupled with another basis for discharge." Id. An award of damages pursuant to an injunction bond rests in the sound discretion of the district court. City of Riviera Beach v. Lozman, 672 F. App'x 892, 895 (11th Cir. 2016). "To recover against an injunction bond, a party must prove that it was wrongfully enjoined and that its damages were proximately caused by the erroneously issued injunction." Milan Exp., Inc. v. Averitt Exp., Inc., 254 F.3d 966, 981 (11th Cir. 2001).

The Court found that the injunction was properly granted and that it was timely dissolved because the commingling of funds made the

likelihood of success minimal. Therefore, the Court found good reason for not requiring damages to be paid by plaintiffs. (Doc. #761, p. 33.) As there is no finding that the injunction was improper or erroneously issued, the Court stands by the decision to deny the damages. Reconsideration is denied.

Accordingly, it is hereby

ORDERED:

1. Defendant's Motion for Leave to Submit Attorney Billing records for *In Camera* Review (Doc. #771) is **DENIED** as moot.
2. Defendant's Amended Motion for Leave to Submit Attorney Billing records for *In Camera* Review (Doc. #772) is **DENIED** as moot.
3. Defendant's Motion for Reconsideration of Court's Opinion and Order Granting in Part and Denying in Part Her Motion for Award of Costs and Fees (Doc. #770) is **GRANTED** to the extent reconsidered herein, and otherwise **DENIED** on the merits.

DONE and ORDERED at Fort Myers, Florida, this 23rd day of September, 2019.

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JOHN E. STEELE
SENIOR UNITED
STATES DISTRICT
JUDGE

Copies:
Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

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,

Plaintiffs,

v.

Case No: 2:15-cv-328-FtM 29MRM

SUSAN ELAINE DEVINE,

Defendant.

OPINION AND ORDER

This matter comes before the Court on defendant's Motion for Award of Costs and Fees (Doc. #713 and Doc. #741[1]) filed on July 25, 2018. Also filed are the Declaration of Matthew D. Lee (Doc. #714) and a proposed Bill of Costs (Doc. #715) in the amount of $104,725.37. Plaintiffs filed an Opposition (Doc. #732) on August 22, 2018, along with the Declaration of David Spears in Support (Doc. #733). Defendant filed a Reply in Support (Doc. #750) of her motion and another Declaration (Doc. #751) with exhibits on October 2, 2018. Plaintiffs filed a Sur-Reply (Doc. #752), and a Declaration of Christopher Dysard (Doc. #753) on October 23, 2018. The parties were granted leave to file the motion, response, and supporting declarations under seal. (Docs. ## 728, 729, 738, 739, 741, 742.)

I. Procedural History

The Court briefly summarizes the relevant portions of the lengthy and contentious procedural history of this case as follows:

The case was initiated on June 1, 2015, by a Complaint (Doc. #2) and an E*x Parte M*otion (Doc. #3) filed under seal. (Doc. #7.) The six-count, 144-page Complaint alleged a money laundering enterprise to conceal fraudulently obtained funds taken in a penny stock scheme orchestrated by defendant Susan Devine and her nonparty former husband Florian Homm.

On July 1, 2015, the Court entered a 69-page Opinion and Order (Doc. #10) granting plaintiffs an *ex parte* Temporary Restraining Order enjoining defendant from transferring, converting, withdrawing or otherwise

[1] A public version and a sealed version of the motion were filed.

disposing of any money or other assets. Defendant was also enjoined from the destruction or disposal of her financial documents, and limited discovery was permitted. Plaintiffs were required to post a $10,000 bond, and a preliminary injunction hearing was set. The bond monies were deposited with the Clerk of Court on July 7, 2015. (Doc. #15.)

The Temporary Restraining Order was extended through July 30, 2015 (Doc. #55), and then through October 1, 2015 (Doc. #67), and was modified and extended on August 3, 2015 (Doc. #68) to exclude certain assets and August 24, 2015 (Doc. #76) to release sums to pay expenses. On September 17, 2015, the Court granted the parties' joint request to consolidate the preliminary injunction hearing with the trial on the merits (Doc. #83). On September 25, 2015, a Case Management and Scheduling Order (Doc. #89) was entered. Laird Lile, Orion Corporate and Trust Services, Ltd., and Conrad Homm were allowed to intervene for the limited purpose of protecting their interests in the assets described in their motions. (Doc. #156.)

On January 14, 2016, plaintiffs filed an Amended Complaint (Doc. #196) to correct certain pleading deficiencies. The 147-page Amended Complaint 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 (Count VI).

On February 1, 2016, the temporary restraining order was further amended to allow defendant to pay

for the maintenance and upkeep of foreign properties from foreign accounts, and to allow the opening of accounts to accept rental income for entities with rental income. (Doc. #230.) On February 2, 2016, the temporary restraining order was modified to allow a release of funds for the reasonable living and educational expenses and attorneys' fees for Isabella Devine and Conrad Homm. (Doc. #233.) On March 21, 2016, a modification was granted to allow defendant to rent out a villa in Spain with the rental income to be reported to plaintiffs on a monthly basis. (Doc. #333.)

On April 19, 2016, the Court denied defendant's request to dissolve the Temporary Restraining Order, leaving the issue of the preliminary injunction for trial. (Doc. #368.) Defendant filed a Notice of Interlocutory Appeal (Doc. #383), but the appeal was later voluntarily dismissed. (Doc. #601.)

On February 8, 2017, the Court granted in part defendant's Motion to Dismiss Amended Complaint. (Doc. #521.) The Court dismissed Counts I and II (the federal RICO counts) and the Florida RICO and Florida Civil Remedies for Criminal Activities claims (Count III and IV) without prejudice because they did not set forth plausible claims that the wrongful acts were committed domestically and not abroad. (Id., p. 56.) Count VI was dismissed with prejudice because constructive trust is not a freestanding cause of action but a remedy to the unjust enrichment claim. (Id., p. 62.) The motion was denied as to the unjust enrichment claim. (Id., p. 63.) The Court granted plaintiffs leave to file a second amended complaint. (Id., p. 65.)

On February 28, 2017, plaintiffs notified the Court that they were choosing not to file a Second Amended Complaint (Doc. #527), leaving only Count V for unjust enrichment as the operative claim. Defendant moved to dissolve the Temporary Restraining Order as not being justified by the unjust enrichment claim, the only remaining claim. (Doc. #530.) On May 8, 2017, the Court directed plaintiffs to file a Second Amended Complaint which included only the remaining state claim of unjust enrichment without the superfluous allegations. (Doc. #559.) On May 15, 2017, the Second Amended Complaint (Doc. #560) was filed.

On July 25, 2017, the Court issued an Opinion and Order (Doc. #575) granting defendant's motion to dissolve the Temporary Restraining Order. Plaintiffs filed an interlocutory appeal (Doc. #576), which on February 20, 2018, was deemed voluntarily dismissed by plaintiffs. (Doc. #681.) On February 14, 2018, plaintiffs filed a Notice of Voluntary Dismissal Without Prejudice Pursuant to Rule 41(a)(1)(A)(i) (Doc. #680).

On February 21, 2018, the Court entered an Order (Doc. #682) dismissing the case without prejudice pursuant to the Notice of Voluntary Dismissal Without prejudice (Doc. #680), and directed the Clerk to close the case.

On April 20, 2018, defendant filed a Motion for Entry of Partial Final Judgment (Doc. #685). This Motion sought entry of a final judgment in favor of defendant as to the counts of the Amended Complaint which had been dismissed on February 8, 2017. After extensive briefing, on July 11, 2018, the

Court directed judgment in favor of defendant and against plaintiffs dismissing Counts I, II, III, IV, and VI with prejudice. (Doc. #707.) Judgment (Doc. #708) was issued on July 11, 2018.

Defendant now seeks an award of costs pursuant to Federal Rule of Civil Procedure 54(d) as a prevailing party; costs and attorney's fees pursuant to Fed. R. Civ. P. 37(d), the Court's inherent authority, and the Florida RICO Act; and damages pursuant to Fed. R. Civ. P. 65 against the temporary restraining order bond. The Court discusses each below.

II. Taxable Costs

Defendant seeks taxable costs of either $105,425.37 (Doc. #713, p. 11; Doc. #714, p. 2 ¶ 4) or $104,725.37 (Bill of Costs, p. 1) pursuant to Fed. R. Civ. P. 54(d) as the prevailing party in this case. A "prevailing party" is entitled to recover costs other than attorney fees as a matter of course unless a federal statute, the Federal Rules, or a court order provide otherwise. Fed. R. Civ. P. 54(d)(1). The costs which may be taxed in favor of a prevailing party are set forth in 28 U.S.C. § 1920. Plaintiffs object to many of the costs, discussed below, and seek to reduce taxable costs to $3,264.50. (Doc. #732, p. 29.) Plaintiffs have provided a chart (Doc. #753-10) of the requested costs and their objections.

A. Costs Incurred After February 28, 2017

Plaintiffs argue the Court should deny all costs incurred after February 28, 2017, the date plaintiffs filed their Notice of election to pursue only the unjust enrichment count. (Doc. #527.) Plaintiffs implicitly acknowledge that defendant became the prevailing

party as to the five counts plaintiffs decided not to pursue as of this date. Plaintiffs argue, however, that their subsequent February 14, 2018 voluntary dismissal of the unjust enrichment count pursuant to Rule 41(a)(1)(A)(i) did not create prevailing party status as to that last remaining count because a voluntary dismissal is not a resolution on the merits. Since defendant was not a prevailing party as to the unjust enrichment count, plaintiffs argue, it would be inequitable to tax any costs incurred between these dates since these costs could only relate to the unjust enrichment claim. (Doc. #732, pp. 30-32.) Plaintiffs compute these impermissible costs as totaling $12,712.33. (Doc. #753-10, p. 8.) The Court rejects this position for several reasons.

It is certainly well-settled that "[p]revailing parties are entitled to receive costs under Fed. R. Civ. P. 54(d)", U.S. EEOC v. W&O, Inc., 213 F.3d 600, 620 (11th Cir. 2000), while non-prevailing parties cannot be awarded such costs, Lipscher v. LRP Publ'ns, Inc., 266 F.3d 1305, 1321 (11th Cir. 2001). But prevailing party status relates to the case, not just individual counts within the federal case. Thus, a party may be considered a "prevailing party" under Rule 54(d) without prevailing on all counts. Head v. Medford, 62 F.3d 351, 354-55 (11th Cir. 1995); Lipscher, 266 F.3d at 1321. To be a prevailing party,

> [a] party need not prevail on all issues to justify a full award of costs, however. Usually the litigant in whose favor judgment is rendered is the prevailing party for purposes of rule 54(d).... A party who has obtained some relief usually will be

> regarded as the prevailing party even though he has not sustained all his claims.... 10 Wright & Miller, supra, § 2667, p. 129–130. Cases from this and other circuits consistently support shifting costs if the prevailing party obtains judgment on even a fraction of the claims advanced.

Medford, 62 F.3d at 354-55 (quoting United States v. Mitchell, 580 F.2d 789, 793–94 (5th Cir. 1978) (citations omitted)). Ordinarily, to be a prevailing party requires a judgment or some "judicial *imprimatur*" that prompts a material alteration in the legal relationship of the parties. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 605 (2001).

The five unpursued counts were dismissed with leave to amend on February 8, 2017; plaintiffs decided not to re-file such counts on February 28, 2017; and an order and a judgment were entered on July 11, 2018 dismissing the five counts with prejudice and the unjust enrichment count in the Second Amended Complaint without prejudice. (Docs. ## 707, 708.) Defendant thus became the prevailing party in the case as of July 11, 2018, when defendant succeeded on significant claims and there was a change in the legal relationship between the parties through a resulting enforceable judgment. Farrar v. Hobby, 506 U.S. 103, 109, 111 (1992). The Court will not exclude costs simply because they were incurred after February 28, 2017.

B. Items of Taxable Costs

Defendant submitted a proposed Bill of Costs (Doc. #715) of $104,725.37. It is undisputed that the

Court may tax six categories of litigation expenses as costs:

> **(1)** Fees of the clerk and marshal;
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> **(2)** Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
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> **(3)** Fees and disbursements for printing and witnesses;
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> **(4)** Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
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> **(5)** Docket fees under section 1923 of this title;
>
> **(6)** Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920. All parties agree that taxable costs are limited to those costs enumerated in § 1920. The Court addresses each category of costs sought by defendant.

(1) Filing and Docket Fees

Pursuant to 28 U.S.C. § 1923, the Bill of Costs seeks the costs of docket fees associated with plaintiffs' discontinuance of the civil action ($5.00)

and the fee for filing a motion for judgment ($5.00). (Doc. #715, p. 1, and Exh. 6.) These are taxable costs, 28 U.S.C. § 1920(1), and the $10.00 will be taxed.

The Bill of Costs also seeks the cost of the $505 appellate filing fee paid on May 20, 2016, in conjunction with defendant's interlocutory Notice of Appeal (Doc. #383) from the Opinion and Order (Doc. #368) denying defendant's Motion to Dissolve the Temporary Restraining Order. (Doc. #715, p. 1, and Exh. 1.) This appeal was later voluntarily dismissed by defendant. (Doc. #601.) Since defendant was not the prevailing party in this appellate proceeding, the Court will not allow the appellate filing fee as a taxable cost.

(2) Service of Process and Subpoena Costs

The Bill of Costs seeks a total of $715.00 for service of process fees by four private process servers. (Doc. #715, p. 1, and Exh. 5.) Private process server fees, including travel, service, and other expenses, are taxable under 28 U.S.C. § 1920(1), and may be taxed to the limits allowed in 28 U.S.C. § 1921. EEOC v. W & O, Inc., 213 F.3d at 624. Under § 1921(b), the Attorney General sets the amounts of the fees by regulation. In 28 C.F.R. § 0.114(a)(3), the fee for personal service of process is $65 per hour or portion thereof, plus travel costs and other out-of-pocket expenses. Defendant has not provided any information establishing the time it took to serve process, or the travel costs or expenses. Accordingly, the Court will tax **$260** ($65 for each of the four process servers).

(3) Transcripts of Court Hearings and Depositions

The Bill of Costs seeks to tax the costs of court hearing transcripts and deposition transcripts in the total amount of $16,532.74. (Doc. #715, p. 1 and Exh. 2.) These Costs include transcripts of four court status conferences and deposition costs related to eleven witnesses.

"Expenses for 'the stenographic transcript necessarily obtained for use in the case' are permitted by § 1920[2]." Maris Distrib. Co. v. Anheuser-Busch, Inc., 302 F.3d 1207, 1225 (11th Cir. 2002). This may include depositions of witnesses identified for discovery purposes. Maris Distrib. Co., 302 F.3d at 1225. But "[w]here the deposition costs were merely incurred for convenience, to aid in thorough preparation, or for purposes of investigation only, the costs are not recoverable." W&O, Inc., 213 F.3d at 620 (citation omitted). The costs of transcripts of court proceedings may be taxed under the same standard.

(a) Court Proceedings

Defendant seeks the costs of transcripts of four status conferences, totaling $715.05. (Doc. #715, Exhibit 2.) Plaintiffs seek to exclude the costs of three of the four status conferences because the conferences were primarily about scheduling and not substantive matters. (Doc. #732, p. 32.) The July 20, 2015, status conference included discussions about hammering out a protective order for review by the Magistrate Judge, jurisdictional issues that may be raised, and scheduling. (Doc. #39.) The Court agrees this transcript was not necessary for use in the case and the costs will be denied. The July 28, 2015, status conference was extensive and discussed the financials of defendant and

her need for a release of funds for living expenses. (Doc. #57.) The Court concludes that this transcript was necessarily obtained for use in the case, and therefore the cost of this transcript ($355.25) will be taxed. Plaintiffs do not challenge the cost of the July 30, 2015, status conference, and therefore $173.70 will be taxed. The transcript of a short status conference conducted on October 1, 2015 was not necessarily obtained for use in the case, but rather was for the convenience of counsel. This cost will not be taxed.

In sum, the Court will tax **$495.95** ($322.25 plus $173.70) for the costs of the necessary transcripts of the court proceedings.

(b) Deposition Costs

Defendant seeks to tax costs of $15,817.69 for deposition transcripts and/or associated costs for the depositions of eleven witnesses. (Doc. #715, Exh. 2.) Plaintiffs seek to eliminate the deposition costs associated with rough drafts, litigation packages, Optical Character Recognition (OCR) costs, processing, shipping, delivery, handling, color exhibits, translation synchronization, and expedited transcripts. (Doc. #732, pp. 32-33.)

Defendant must submit a request which enables the Court to determine which costs are properly taxed. Loranger v. Stierheim, 10 F.3d 776, 784 (11th Cir. 1994). Taxing the costs of expedited transcripts is generally frowned upon, but may be permissible under the proper circumstances if necessary for use in the case. Maris Distrib. Co., 302 F.3d at 1226. Where additional expenses such as condensed transcripts, electronic transcripts, CD copies, exhibits, and shipping

"are only for the convenience of counsel, they are not reimbursable." Woods v. Deangelo Marine Exhaust Inc., No. 08-81579-CIV, 2010 WL 4116571, at *8 (S.D. Fla. Sept. 27, 2010), report and recommendation adopted, No. 08-81579-CIV-HURLEY, 2010 WL 4102939 (S.D. Fla. Oct. 18, 2010) (collecting cases). "[W]hen a party notices a deposition to be recorded by nonstenographic means, or by both stenographic and nonstenographic means, and no objection is raised at that time by the other party to the method of recordation", costs may be taxed (citing Fed. R. Civ. P. 30(b))). Morrison v. Reichhold Chems., Inc., 97 F.3d 460, 464-65 (11th Cir. 1996). Video must still be "necessarily obtained" for use in the case in order to be taxable. Morrison, 97 F.3d at 465.

The Court finds that defendant has not shown that the costs of expedited transcripts were necessary for the witnesses identified in this case. The Court also finds that defendant has not justified the extraneous costs associated with the individual depositions. Therefore, the litigation packages, rough drafts, shipping and handling costs, and other miscellaneous deposition costs will be eliminated.

Plaintiffs argue that defendant cannot recover costs for both a transcript and a video of the same deposition, as requested for Glenn E. Kennedy, Karen Neptune, and her own deposition, without justifying the need for both. (Doc. #732, p. 33.) Plaintiffs do not point to any contemporary objection to the video at the time of these depositions, however, both versions were not necessary. Therefore, the cost of one or the other will be permitted as to Kennedy and Neptune, but not

both. The Court will allow the higher amount of the two options.

Plaintiffs argue that the cost of exhibits used for a deposition taken by defendant cannot be taxed. (Doc. #732, p. 33.) The Court finds that exhibits associated with plaintiff's corporate designees should be permitted, however the remaining exhibits are deemed to have been for the convenience of counsel. Plaintiffs further argue that defendant noticed depositions that were improper and intended to circumvent a pending motion for protective order, knowing full well that plaintiff entities would not appear. (Id., p. 32.) As discussed below in relation to the request for attorney fees and expenses under Rule 37(d), the Court disagrees with the position of plaintiffs. The following deposition costs will be allowed:

Witness	**Deposition Job Date**	**Description of Costs Allowed**	**Amount**
Karen Neptune	1/29/16	Certified Transcript, and minimal Exhibits,	$197.60
Karen Neptune	1/29/16	Video -DVD	$ 00.00
Brian Escalante	3/14/16	Pages	$505.05
Guillermo	5/25/16	Virtual	$195.00
Ronald Tompkins	5/22/17	Transcript	$172.35
Ronald Tompkins	5/23/17	Transcript	$914.95
Isabella Devine	7/19/16	Certified	$280.00
Rep., AAVMFL	1/24/18	Videography	$360.00

Rep., Absolute India	1/26/18	Transcript services	$125.00
Rep., Absolute VMFL	1/24/18	Certificate appearance, on record, and handling	$207.00
Rep., Absolute Ger.	1/25/18	Certificate appearance	$155.00
Susan Devine	7/25/17	Transcript	$2,529.25
Susan Devine	7/29/15	Certified	$1,042.80
Susan Devine	7/29/15	Video	$ 00.00
Glen Kennedy	12/1/17	Transcript	$1,990.00
Glen Kennedy	12/1/17	Videography	$ 00.00
TOTAL:			**$8,674.00**

The Court will allow a total of **$8,674.00** for depositions after reductions.

(4) Witnesses Fees

The Bill of Costs seeks $180.00 in witness fees for four witnesses. (Doc. #715, p. 1 and Exh. 5.) Witness fess may be taxed as costs under 28 U.S.C. § 1920(3). Under 28 U.S.C. § 1821, a witness attending court or a deposition shall be paid an attendance fee of $40 per day, plus other allowed travel expenses, including mileage. 28 U.S.C. § 1821(b). The Court may not tax an amount in excess of that allowed by § 1821. Morrison, 97 F.3d at 463. No travel expenses or mileage is identified, and two of the requested witness fees exceed the rate of $40 per day. Therefore, the total will be lowered from the requested $180 to **$160.00** ($40 per witness).

(5) Document Copying

The Bill of Costs seeks $86,782.63 for copying documents necessarily obtained for use in the case. (Doc. #715, p. 1 and Exhibit 3.) Supporting documentation is contained in Exhibits 24 of the Bill of Costs.

Copying costs are taxable when "the costs of making copies of any materials where the copies are necessarily obtained for use in the case." 28 U.S.C. 1920(4). "[I]n evaluating copying costs, the court should consider whether the prevailing party could have reasonably believed that it was necessary to copy the papers at issue." W&O, Inc., 213 F.3d at 623.

The Bill of Costs divides the copying costs into two categories: traditional paper copying and e-discovery copying.

(a) Traditional Paper Copying

Defendant requests $5,584.49 in paper copying costs. (Doc. #715, Exhibit 3.) Plaintiffs argue that none of these copying costs should be allowed because no explanation has been provided as to why the costs were necessary for use in the case. (Doc. #732, p. 33.) Defendant did not discuss these costs in the Reply. Exhibit 2 to the Bill of Costs contains a list of vendors, dates, and the costs of copying totaling $16,532.74. "[B]illing records which merely list "copies" or "photocopies" without any description of the nature or purpose of the photocopying was insufficient." United States ex rel. Christiansen v. Everglades Coll., Inc., No. 1260185-CIV-DIMITROULE, 2014 WL 11531631, at *4 (S.D. Fla. Nov. 13, 2014), report and recommendation adopted,

No. 12-60185-CIV, 2014 WL 11531632 (S.D. Fla. Dec. 5, 2014). This costs will not be allowed.

Plaintiffs argue that defendant cannot recover costs for copies of exhibits used in the deposition of Mr. Kennedy because it was defendant who took the deposition. The Court has not allowed the request for "exhibit management" expenses associated with the deposition of Glenn E. Kennedy, therefore this issue is moot.

The billing records for the date of the reproduction of documents shows "Park Evaluations and Translations of Swiss Prosecution Letter and Mallorca Property Declaration." It is unclear if the request is for copies of the translations, and to what end. Therefore, the entire amount will be denied.

(b) E-Discovery Copying

Plaintiffs argue that the $81,198.14 in e-discovery costs should be disallowed entirely under Wiand v. Wells Fargo Bank, N.A., No. 8:12-CV-557-T-27EAJ, 2015 WL 12839237, at *10 (M.D. Fla. June 10, 2015), report and recommendation adopted, No. 8:12-CV-557-T-27EAJ, 2016 WL 355490 (M.D. Fla. Jan. 29, 2016) (citing Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp., 2 F. Supp. 3d 1306, 1318 (N.D. Ga. 2014)). In reply, defendant argues that e-discovery costs are often awarded, and the amount sought is not "unreasonably large." (Doc. #750, p. 16.)

With regard to the prior version of § 1920(4), the Eleventh Circuit stated that section 1920(4) "allows recovery only for the reasonable costs of actually duplicating documents, not for the cost of gathering those documents as a prelude to duplication." Allen v. U.S. Steel Corp., 665 F.2d 689,

697 n.5 (5th Cir. Unit B 1982). The United States Supreme Court recently and clearly stated that e-discovery expenses are not authorized under § 1920. Rimini St., Inc. v. Oracle USA, Inc., 139 S. Ct. 873, 878 (Mar. 4, 2019). Following the principle that only copying costs are permitted under § 1920(4), the Federal Circuit concluded that:

> recoverable costs under section 1920(4) are those costs necessary to duplicate an electronic document in as faithful and complete a manner as required by rule, by court order, by agreement of the parties, or otherwise. To the extent that a party is obligated to produce (or obligated to accept) electronic documents in a particular format or with particular characteristics intact (such as metadata, color, motion, or manipulability), the costs to make duplicates in such a format or with such characteristics preserved are recoverable as "the costs of making copies...necessarily obtained for use in the case." 28 U.S.C. § 1920(4). But only the costs of creating the produced duplicates are included, not a number of preparatory or ancillary costs commonly incurred leading up to, in conjunction with, or after duplication.

CBT Flint Partners, LLC v. Return Path, Inc., 737 F.3d 1320, 1326 (Fed. Cir. 2013). As Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp., 2 F. Supp. 3d 1306, 1318 (N.D. Ga. 2014) stated:

> The Federal Circuit divided e-discovery costs into three categories: (1) the cost of "imaging" hard drives containing ESI and processing that

> single-file "image" to extract individual documents with their original properties and metadata intact; (2) the cost of organizing the extracted documents into a database and then indexing, decrypting, de-duplicating, filtering, analyzing, searching and reviewing those documents to determine which are responsive; and (3) the cost of copying responsive documents onto DVDs or the like for delivery to the requesting party.

Akanthos, 2 F. Supp. 3d at 1314 (citing CBT Flint Partners, LLC v. Return Path, Inc., 737 F.3d 1320 (Fed. Cir. 2013)). The first category is "mostly" taxable, the second category is "mostly" nontaxable, and the third category is taxable. Id. See also Deere & Co. v. Duroc LLC, 650 F. App'x 779, 782 (Fed. Cir. 2016) (e-discovery costs incurred in procedures required by a ESI Agreement can come within the scope of § 1920). Generally speaking, "while the costs of digitizing paper documents and making duplicates of electronic documents are recoverable, many of the other costs associated with e-discovery (such as creating and maintaining a dynamic, indexed, and searchable database) are not recoverable." HRCC, Ltd. v. Hard Rock Cafe Int'l (USA), Inc., No. 6:14-CV-2004-ORL-40KRS, 2018 WL 1863778, at *10 (M.D. Fla. Mar. 26, 2018), report and recommendation adopted, No. 6:14-CV-2004-ORL-40KRS, 2018 WL 1863779 (M.D. Fla. Apr. 13, 2018).

In this case, defendant argues that there are several categories of allowable electronic discovery costs, including formatting, extraction while preserving all associated metadata, the creation of load files. (Doc.

#741, p. 11 n.9) (citing Procaps v. Patheon Inc., No. 12-24356-CIV, 2016 WL 411017, at *12-13 (S.D. Fla. Feb. 2, 2016)). In the September 21, 2015 Case Management Report (Doc. #86, ¶ IV.G), the parties indicated that they would be entering into an agreement to govern the production of electronically stored information. The e-discovery costs are listed by date and amount. (Doc. #715, Exh. 4, p. 51.) The following e-discovery costs, billed at a rate of $275.00 an hour or at a unit price by DTI[2], are sought:

Invoice Date	**Description**	**Amount Sought**
10/31/2015	Data Collection at Client Site, Remote Email Collection, Mobile/Tablet Collection, and Data Collection at DTI Site	$24,600.00
11/30/2015	Data Ingestion, Scanning E-work – Glass work, Scan B/W 8.5x11, OCR, Project Management	$7,504.04
12/31/2015	Project Management, Data Ingestion, Technical Time, Data Collection at Client Site, Project Management	$2,417.00
2/16/2016	Hard Drive (Pictera Solutions)	$159.00

[2] The 2/16/2016 Invoice is from Pictera Solutions as identified in the Chart. (Doc. #715, p. 69.)

2/29/2016	Monthly Storage Fee, Loading Fee, Image Endorsement, OCR Conversion, PDF Conversion, Native Document Export, Native Production Export, Project Management, Data Extraction, CD Media	$5,218.76
3/31/2016	Loading Fee, Image Endorsement, OCR Conversion, Hard Drive Media, Native Production/Export, Project Management, Data Extraction	$6,311.90
4/30/2016	Loading Fee, Project Management	$3,162.20
5/31/2016	Loading Fee, Project Management, OCR Conversion, Hard Drive Media, Native Production/Export, Drive Imaging at Client Site, Hard Drive Media, Data Extraction, Scanning BW, OCR	$6,092.19
6/30/2016	Loading Fee, Project Management, PDF conversion Hard Drive Media, Data Ingestion, Data Extraction	$20,420.06
9/30/2016	Loading Fee, Project Management	$757.40
10/31/2016	Loading Fee, Image Endorsement, Native Exports, OCR Conversion, PDF Conversion, Subset/TIFF Conv, Project Management	$4,555.59
TOTAL:		$81,198.14

(Id., pp. 52-69.)

Defendant submits that her costs follow the amounts allowable, however most of the detailed costs are for the convenience of counsel, i.e., conversions, or management by the hired company for review by counsel. The actual electronic copies must be limited to data ingestion or extraction as a substitute for physical copying. Therefore, the only allowable "copying" costs are those for data ingestion on 11/30/2015 ($3,190.00), data ingestion on 12/31/2015 ($740.00), the native document export and production export ($946.22) and CD Media ($225.00) on 2/29/2016, the hard drive media and native production/export on 3/31/2016 ($1,690.00), the hard drive media and native production/export on 5/31/2016 ($1,770.00), hard drive media and data ingestion on 6/30/2016 ($3,750.00), native exports on 10/31/2016 ($129.50), and the hard drive invoiced by Pictera Solutions ($159.00). This provides for a sum total of **$12,599.72**.

A total of **$22,199.67 in costs** will be taxed in favor of defendant pursuant to Rule 54(d).

III. Attorney's Fees and Expenses

A. Rule 37(d)

Defendant seeks attorney's fees and expenses as a sanction pursuant to Fed. R. Civ. P. 37(d) for the failure of plaintiff's counsel to attend properly noticed depositions.

The depositions of Glenn Kennedy and Absolute East West Fund were noticed and scheduled by defendant. (Doc. #692, ¶ 57.) A motion for protective order was filed by plaintiffs, and the Magistrate Judge cancelled the deposition of Absolute East West Fund

pending resolution of the motion. (Id., ¶¶ 61-62.) The parties reached an agreement to reschedule Mr. Kennedy's deposition for a later date. (Id., ¶¶ 64-65.)

Thereafter, while the motion for protective order remained pending, defendant served notices of depositions for the Absolute Activist Value Master Fund, the Absolute Germany Fund, and the Absolute India Fund. (Id., ¶ 71.) Plaintiffs notified counsel for defendant that "No witness will appear." (Id., ¶ 72.) Plaintiffs wrote a letter objection to defendant's counsel asking that the improper notices be withdrawn, but did not file a second motion for protective order with the Court. (Id., ¶ 75.) Despite actual notice of an intent not to appear, "an associate from the Fox Rothschild firm in Philadelphia prepared for the depositions; sent two boxes of materials by express mail to Ft. Myers; flew to Florida on January 23; stayed overnight at a hotel; traveled locally; appeared at the January 24 'deposition'" of one of the Funds, ready to go, but only to note on the record the nonappearance of the Fund before returning. (Doc. #738, p. 27.)

Defendant seeks her costs and attorney fees associated with the failure of plaintiffs to attend the depositions. The pertinent portion of Rule 37 provides:

> (d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.
>
> (1) In General.

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4)--fails, after being served with proper notice, to appear for that person's deposition; or

. . .

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) Unacceptable Excuse for Failing to Act. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other

> circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(d).

The amount that plaintiffs may be ordered to pay for failure to attend their own deposition is "reasonable expenses, including attorney's fees". Taylor v. Taylor, 133 F. App'x 707, 709 (11th Cir. 2005). "Substantially justified means that reasonable people could differ as to the appropriateness of the contested action." Maddow v. P&G Co., 107 F.3d 846, 853 (11th Cir. 1997) (citing Pierce v. Underwood, 487 U.S. 552, 565 (1988)).

Plaintiffs' motion for protective order regarding the cancelled depositions was granted in part, and Absolute East West Fund Limited was required to designate in writing an individual to testify on the permitted topics. (Doc. #679.) Exactly one week later, plaintiffs moved to dismiss the last remaining count without prejudice. Based on these facts, plaintiffs argued that there was not a reasonable basis for the failure to appear. While plaintiffs did not file a second motion for protective order, defendant also did not file a motion for sanctions after plaintiffs failed to appear at the scheduled depositions. Of course, the voluntary dismissal intervened before defendant had an opportunity to pursue the matter.

Defendant argues that even if a motion for a protective order had been pending, this does not relieve the duty to appear for other noticed depositions, and plaintiffs did not even try to get a protective order. Plaintiffs argue that refusing to appear at improperly noticed depositions does not warrant sanctions.

Defendant incurred costs in the amount of $28,200.86 as a result of plaintiffs' failure to attend the depositions. (Doc. #742, ¶ 28.) If plaintiffs were planning to dismiss the action, an effort should have been taken to avoid the unnecessary cost to defendant. Travel-related expenses for the depositions that were not attended by plaintiffs are listed as $4,018.51, however the numbers do not add up to explain the discrepancy in the amount of legal fees ($22,729) plus expenses, and the total provided. (Doc. #714-17, Exh. Q.) Counsel charged hourly rates ranging from $390 an hour to $595 an hour, and billing records were not provided. (Doc. #714-29, ¶ 6.)

Plaintiffs argue that the amounts should be denied as they are unsupported, and much of the fees are for preparation and not as a result of the failure to appear. (Doc. #738, pp. 29-30.) Defendant declined to provide billing records to verify the sums until such time as the Court requested the unredacted billing records for an in camera review. (Doc. #714, ¶ 27 n.2.) The Court is not inclined to carry the burden to aid defendant's collection efforts for an amount that greatly exceeds any reasonable attorney's fees that would have been incurred for the failure to appear. The Court will allow the messenger services, the air travel, the taxi/Uber expenses, and the hotel. The Court will also allow a portion of the meals for a total of $80. (Doc. #714-17, Exh. Q.) The Court declines to award the translation fees that were unrelated to the appearance of the deponents. Therefore, the Court will award **$886.60** in expenses for the failure to appear.

B. Inherent Authority

Defendant argues that attorney fees and costs should be imposed as a sanction pursuant to the Court's inherent authority to do so. Absent statutory authority or an enforceable contract, recovery of attorney fees by even a "prevailing party" is ordinarily not permitted under the "American Rule." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 602 (2001).

Defendant alleges bad faith conduct on the part of plaintiffs justifying an award of attorney fees and expenses on top of taxable costs. "As document discovery and motion practice continued in this Action, Ms. Devine learned that Plaintiffs' collaboration with the Swiss government continued throughout this litigation and even after the dismissal of Plaintiffs' suit." (Doc. #741, p. 5.) Defendant argues that even if some merit existed, the case was about harassment and that the Court is "well within its authority to impose sanctions, including attorneys' fees" for plaintiffs' conduct. (Doc. #741, p. 21.)

> Courts have the inherent power to police those appearing before them. Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991). A court's inherent power is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Id. at 43 (citing Link v. Wabash R.R., 370 U.S. 626, 630–31 (1962)). This

> power "must be exercised with restraint and discretion" and used "to fashion an appropriate sanction for conduct which abuses the judicial process." Id. at 44–45. A court may exercise this power "to sanction the willful disobedience of a court order, and to sanction a party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Marx v. Gen. Revenue Corp., 568 U.S. 371, 382 (2013) (citing Chambers, 501 U.S. at 45–46). The dual purpose of this power is to vindicate judicial authority without resorting to a contempt of court sanction and to make the prevailing party whole. See Chambers, 501 U.S. at 46. The key to unlocking a court's inherent power is a finding of bad faith. See Sciarretta [v. Lincoln Nat. Life Ins. Co., 778 F.3d 1205, 1212 (11th Cir. 2015)].

Purchasing Power, LLC v. Bluestem Brands, Inc., 851 F.3d 1218, 1223 (11th Cir. 2017). As noted by plaintiffs, defendant cites to an objective standard applied under 28 U.S.C. § 1927 and Rule 11, however a different standard is applied for inherent power sanctions, i.e., a subjective bad-faith standard. Id. at 1223.

Although defendant continually raises this theory of bad faith and collusion, there is insufficient information to support the imposition of sanctions, even if plaintiffs were working with the Swiss government or collecting data for discovery in related cases. The high standard of finding bad faith cannot

be met in the absence of fraud on the Court, proof of forum shopping, unreasonable and vexatious multiplying of proceedings, pursuing a case barred by the statute of limitations, or purposely vexatious behavior as exhibited in Purchasing Power and the several cases cited by defendant. (Doc. #741, p. 21.) This case did not arise to this level by any stretch of the imagination, and the Court will decline to impose such extraordinary sanctions in this case.

C. Florida RICO

Defendant seeks to have the Court impose all reasonable attorney's fees and court costs under the statute, and not only those associated with Florida's RICO claim. (Doc. #741, p. 34, n.34.) A party is entitled to reasonable attorney's fees and court costs if it "proves by clear and convincing evidence that he or she has been injured by reason of any violation of" the Civil Remedies for Criminal Practices Act, commonly referred to as Florida's RICO statute. Fla. Stat. § 772.104(1) (2006). "The defendant shall be entitled to recover reasonable attorney's fees and court costs in the trial and appellate courts upon a finding that the claimant raised a claim which was without substantial fact or legal support." Fla. Stat. § 772.104(3) (2006)[3]. "The intent of the Florida legislature in adopting this less stringent standard was 'to discourage frivolous RICO claims or claims brought for the purpose of intimidation because the stigma and burden of defending such claims is so great.'" Johnson

[3] The previous version of this statute placed this language in the first paragraph. See Fla. Stat. § 772.104 (1997). This language was simply moved to a separate paragraph in the current version of the statute.

Enters. of Jacksonville, Inc. v. FPL Grp., Inc., 162 F.3d 1290, 1330–31 (11th Cir. 1998) (citation omitted). "[A]n action is 'substantially justified' for the purpose of attorney's fees where it advances in good faith a novel but credible extension or interpretation of the law." Beck v. Olstein, 588 So. 2d 317, 318 (Fla. 3d DCA 1991) (citation omitted).

In the Opinion and Order granting a temporary restraining order, the Court found that the evidence showed a common purpose to conceal the Penny Stock Scheme proceeds for the benefit of their children, bank records showed that defendant ordered certain transfers for the same purpose, and that plaintiffs "are substantially likely to establish an association-in-fact enterprise." (Doc. #10, p. 53.) The Court noted it was "likely that the transactions involved the proceeds of statutorily specified unlawful activity", and that it was "also likely that Devine knew the proceeds were derived from some form of illegal activity." (Id., p. 55) (citations omitted).The Court found that defendant "likely knew that a purpose of the transactions was to conceal or disguise the nature, location, source, ownership, or control of the proceeds." (Id., p. 56.) The Court concluded that plaintiffs could establish that defendant conducted numerous money laundering transactions, and could demonstrate a substantial likelihood of success on the merits of the RICO claims. (Id., pp. 58-59.) The Court continued to find that the claims were viable in denying defendant's Motion to Dissolve Temporary Restraining Order. (Doc. #368.)

On July 19, 2016, the Magistrate Judge set a briefing schedule to address the effect of RJR Nabisco,

Inc. v. European Cmty., 136 S. Ct. 2090 (2016) on the pending motions. (Doc. #424.) In deciding the Motion to Dismiss, the Court noted that many acts of misconduct were alleged to have taken "place entirely outside the United States and therefore cannot form the basis of RICO recovery." (Doc. #521, pp. 56, 60.) "Given the intervening decision in RJR Nabisco Inc.", the Court allowed plaintiffs to file a second amended complaint "to state plausible RICO claims", and declined to address the remaining arguments. The federal and Florida RICO claims were dismissed without prejudice. (Id.) A Second Amended Complaint (Doc. #560) was filed on May 15, 2017, only seeking relief for unjust enrichment. As a result, the temporary restraining order was dissolved.(Doc. #575.) The Court granted partial judgment in favor of defendants on the abandoned claims deeming them dismissed with prejudice. (Doc. #707.)

The Court cannot find that defendants raised a claim without substantial fact or legal support. It appeared that the injury to plaintiffs was only extraterritorial but even with the intervening case of RJR Nabisco Inc., the Court provided an opportunity to amend. Plaintiffs advanced a theory for a violation of Florida's RICO in good faith. This was not a directed verdict, summary judgment, or even a dismissal on the merits even if it was ultimately a dismissal with prejudice. The motion for attorney's fees will be denied.

D. Damages on Temporary Restraining Order Bond

Defendant argues that the decision to abandon this case only after causing her to incur millions in

legal fees "reveals" that plaintiffs acted in bad faith. Defendant further argues that the temporary restraining order "foisted serious financial" hardships on her. (Doc. #741, p. 17.) Defendant argues that the bond amount was considerably less than the costs and fees that she incurred, and she should be awarded damages on the bond amount. Plaintiffs respond that the injunction was only dissolved after an intervening change in the law resulted in the dismissal of the RICO claims, and not because it should not have been issued in the first place.

An injunction may issue only if the movant gives security "in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). "[A] prevailing defendant is entitled to damages on the injunction bond unless there is a good reason for not requiring the plaintiff to pay in the particular case." State of Ala. ex rel. Siegelman v. United States EPA, 925 F.2d 385, 390 (11th Cir. 1991) (citing Coyne– Delany Co. v. Capital Dev. Bd. of Illinois, 717 F.2d 385, 391 (7th Cir. 1983)).

On April 19, 2016, the Court issued an Opinion and Order (Doc. #368) denying requests to dissolve the temporary restraining order. A year later, on July 25, 2017, after dismissal of all the federal claims, the Court dissolved the temporary restraining order. (Doc. #575.) Even without records of the damages incurred by defendant as a result of the bond, the Court finds good reason to not require the payment of damages by plaintiffs on the bond. The injunction was properly

granted, and it was timely dissolved after it was no longer appropriate. The motion will be denied.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Defendant's Motion for Award of Costs and Fees (Doc. #713 and Doc. #741) is **GRANTED in part and DENIED in part.** Defendant is awarded a total of **$22,199.67** in taxable costs ($10.00 in docketing fees, $260 in service fees, $495.95 for transcripts, $8,674.00 for depositions, $160 for witness fees, and $12,599.72 for electronic copying), and **$886.60** in non-taxable expenses. The motion is otherwise denied.

2. Defendant shall submit a revised Bill of Costs to the Clerk of Court.

3. The Clerk shall tax costs pursuant to the revised Bill of Costs upon receipt, and also enter judgment awarding in favor of defendants for the $886.60 in expenses under Fed. R. Civ. P. 37(d).

DONE and ORDERED at Fort Myers, Florida, this 1st day of August, 2019.

_____

JOHN E. STEELE
SENIOR UNITED
STATES DISTRICT
JUDGE

Copies: Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

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, Plaintiffs, v. SUSAN ELAINE DEVINE, Defendant, and LAIRD LILE, CONRAD HOMM, and ORION CORPORATE & TRUST SERVICES, LTD., Intervenor-Defendants.	Case No. 2:15-cv-328-FtM-29MRM **DISPOSITIVE MOTION** **ORAL ARGUMENT REQUESTED**

DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

SCHOEPPL LAW, P.A.
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Dated: July 19, 2017 *Attorneys for Defendant*

* * * * *

[14]

2006 and 2007 that now form the basis for their unjust enrichment count.

Plaintiffs remained silent for nearly two years after Ms. Devine's divorce from Homm was publicized, waiting until October 2009 to file the SDNY Action against Homm and others in connection with the "Penny Stock Scheme." (Ex. 2.) Then, the pleadings filed by Plaintiffs in the SDNY

Action named "Doe" defendants intended to capture unidentified or unnamed wrongdoers. (See Exs. 2, 11 (SDNY pleadings).) In fact, the assignment agreement by which Plaintiffs purchased, in 2009, the rights to bring this litigation specifically referenced potential "claims . . . arising from . . . the activities of" Ms. Devine. Plaintiffs also hired an investigator who contacted Ms. Devine in December 2009 at her home in Florida, informed her about the allegations made by Plaintiffs in the SDNY Action, and gave Ms. Devine a copy of the complaint filed in that case. Plaintiffs' counsel contacted Ms. Devine again in February 2010. (SAC at ¶ 151(a), (b).)

IV. PLAINTIFFS' EXCUSES FOR THEIR INORDINATE DELAY IN BRINGING THE INSTANT FOLLOW-ON SUIT

Cognizant of the time-barred nature of their claim against Ms. Devine, Plaintiffs have littered the SAC with attempts to pre-empt Ms. Devine's statute of limitations defense and to withstand the instant motion to dismiss. In a futile effort to justify their delay in bringing suit against Ms. Devine, Plaintiffs assert, for instance, that they were effectively duped by Ms. Devine's "fil[ing of] a fraudulent affidavit in a Florida court on August 7, 2006" that listed "just $1,640,000" in assets and thereby "omitted tens of millions of dollars in assets." (SAC at ¶¶ 105, 221.) Plaintiffs knew that Ms. Devine received at least some assets and, in any

* * * * *

[18]

inapplicable to legal conclusions,'" *Cigna*, 605 F.3d at 1290 (quoting *Iqbal*, 129 S.Ct. at 1949), and courts are "'not required to admit as true [any] unwarranted deduction of fact.'" *Cigna*, 605 F.3d at 1294 (quoting *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1268 (11th Cir. 2009).)

The scope of the Court's review includes "other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (citation omitted); *Sewell v. D'Alessandro & Woodyard, Inc.*, No. 2:07-cv-343-FtM-29SPC, 2008 WL 4459260, at *4 (M.D. Fla. Sept. 29, 2008) (Steele, J.); FED. R. CIV. P. 10(c); FED. R. EVID. 201; *see also* Dkt. Entry 521 at 31-33. A complaint may be dismissed "when the existence of an affirmative defense 'clearly appears on the face of the complaint.'" Dkt. Entry 521 at 61 (quoting *Quiller v. Barclays Am./Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir. 1984), *aff'd on reh'g,* 764 F.2d 1400 (11th Cir. 1985)); *see also La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (same) (citing *Omar v. Lindsey*, 334 F.3d 1246, 1247 (11th Cir. 2003).)

II. PLAINTIFFS' CLAIM FOR UNJUST ENRICHMENT IS TIME-BARRED

Plaintiffs assert that the first transfer of funds from the alleged "Penny Stock Scheme" to Ms. Devine occurred in 2006 and the last in 2007. (*See* SAC at ¶¶ 104-123, 129, 153-159.) The four-year statute of limitations applicable to Plaintiffs' sole remaining claim "accrues or begins to run when the last element of the cause of action occurs." *Davis v. Monahan*, 832 So.2d 708, 709 (2002). Under Florida law, the statute of limitations begins to run when any benefit was conferred. Merle Wood & Assocs., Inc. v. Trinity Yachts, LLC, 714 F.3d 1234, 1237 (11th Cir. 2013), affirming 857 F.Supp. 2d 1295, 1312 (S.D.Fla. 2012) (rejecting argument that subsequent payments reopen accrual date for unjust enrichment statute of limitations purposes); see also In re Burton Wiand Receivership Cases Pending in the Tampa Div. of the Middle Dist. of Fla., No. 8:05-cv-1856-T-27MSS, 2008 WL 818504, at *8 (M.D. Fla. Mar. 26, 2008) ("Under Florida law, however, an unjust enrichment claim accrues when the benefit is conferred.") (citations omitted).

Here, the limitations period began to run in 2006, when Ms. Devine and Homm filed documents in connection with their divorce that listed certain assets Ms. Devine received. Plaintiffs were aware of 2007 transfers as well. Plaintiffs do not allege any transfers after 2007 as opposed to what is termed concealment activity. As a result, the limitations period expired in 2010 (or, at the latest, no later than 2011). Because Plaintiffs waited until June 1, 2015 to commence this case, their claim for unjust enrichment is time-barred. Plaintiffs nonetheless

allege in the SAC or have previously briefed (e.g., Dkt. Entry 543 at 9-10; Dkt. Entry 553 at 3-9; Dkt. Entry 554 at 4-8) a number of purported explanations as to why the statute of limitations applicable to their sole remaining claim has not run. These arguments fail, and Ms. Devine below considers each in turn.

A. The Delayed Discovery Doctrine Is Inapplicable to Plaintiffs' Unjust Enrichment Claim

Florida's "delayed discovery" doctrine does not apply to claims for unjust enrichment. Davis, 832 So.2d at 709. Thus, the accrual of the statute of limitations

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

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, Plaintiffs, v. SUSAN ELAINE DEVINE, Defendant, and LAIRD LILE, CONRAD HOMM, and ORION	Case No. 2:15-cv-328-FtM-29MRM

CORPORATE & TRUST SERVICES, LTD.,

Intervenor-Defendants.

DEFENDANT'S MOTION FOR ENTRY OF PARTIAL FINAL JUDGMENT

* * * * *

[4]

Defendant Susan Elaine Devine ("Ms. Devine"), by and through her undersigned counsel, respectfully moves, pursuant to Rule 58 of the Federal Rules of Civil Procedure (the "Federal Rules"), for entry of a final judgment in favor of Ms. Devine and against Plaintiffs with respect to the counts of Plaintiffs' Amended Complaint that were dismissed by the Court on February 8, 2017.

PRELIMINARY STATEMENT

On June 1, 2015, Plaintiffs began the instant litigation ("the Action") with the filing of a 112-page complaint and an *ex parte* motion for a temporary restraining order freezing bank accounts and real property across the globe. In that *ex parte* motion, Plaintiffs assured the Court that they were "substantially likely to prevail on the merits" and claimed to have "unequivocal evidence of [Ms.] Devine's criminal money laundering and unjust

enrichment." The *ex parte* motion was granted by this Court based upon Plaintiffs' submissions. The parties then engaged in intense and contentious litigation that resulted, first, in the dismissal of Plaintiffs' RICO counts on February 8, 2017, leaving the Plaintiffs with only a common law unjust enrichment claim. That ruling was followed on July 25, 2017 by an Order dissolving the temporary restraining order. Finally, two-and-a-half years after the filing of the Action, with a motion to dismiss their Second Amended Complaint pending, Plaintiffs voluntarily dismissed what remained of their case and walked away without a cent.

In the interim, Ms. Devine learned that the legal ambush that upended her life was the product of a years-long collaboration between Plaintiffs—whose investment manager, Absolute Capital Management Holdings, Ltd., once employed her ex-husband—and the Office of the Attorney General of Switzerland ("OAG"). As document discovery and motion practice continued, pushing her legal bills into the stratosphere, Ms. Devine learned that Plaintiffs' collaboration with the Swiss government had not ended and, indeed, continues to this day.

It has now become clear that Plaintiffs worked hand-in-glove with the OAG throughout this case and, in Ms. Devine's view, abused the U.S. legal system to aid a foreign investigation. When Plaintiffs obtained account statements, asset lists, and deposition testimony from Ms. Devine and others in this Action, they continuously funneled those

materials to the OAG. In turn, the OAG made requests of the U.S. government on Plaintiffs' behalf. Those efforts included asking the U.S. government *just last fall* to refreeze assets that had been released by this Court. The OAG also shared with Plaintiffs documents that it had received from the U.S. government, including FBI work-product created in connection with a U.S. grand jury investigation. Plaintiffs, in turn, used that work-product to create the Estera expert report that they served on Ms. Devine last summer and then turned over to the OAG for use in *its* investigation. Indeed, within just the last few weeks, the OAG issued *another* investigative report that repeatedly cites the Estera report and deposition testimony that Plaintiffs obtained in this Action.

As severe as this list of abuses of the U.S. legal system appears, that is not the extent of Plaintiffs' misconduct. The full scope of Plaintiffs' bad-faith conduct became clear only as they persistently refused to provide deposition testimony in this Action, in clear contravention of their obligations under the Federal Rules. In fact, while Ms. Devine was deposed twice during the pendency of this case, not even one of the *nine* Plaintiffs provided so much as a minute of deposition testimony. Rather, they resisted every deposition notice Ms. Devine issued, whether through motion practice or a brazen and inexcusable refusal to appear. When the Court eventually ordered the first of the Plaintiff funds to submit to a deposition, Plaintiffs voluntarily

dismissed their last cause of action instead and disappeared without explanation.

In short, the facts admit only one conclusion: Plaintiffs acted in bad faith and used this Action as a mere discovery device in support of their Swiss legal campaign. They commenced this case only after secretly requesting that the OAG pursue criminal charges against Ms. Devine (which the Swiss to date have declined to do), and concealed that fact from Ms. Devine when they negotiated a protective order with a provision permitting them to send information offshore. Plaintiffs then abused the liberal discovery permitted under U.S. law to obtain reams of financial information and sworn deposition testimony that they could not otherwise have acquired. As they funneled that material back to the OAG—and as they successfully campaigned to have the OAG make requests to the U.S. government on their behalf—Plaintiffs steadfastly refused to provide even one word of sworn deposition testimony themselves. Finally, when the Court ordered them to submit to a deposition after more than two years of scorched-Earth litigation, they chose to drop their claim and vanish.

The instant Motion begins the process of seeking redress for this misconduct by requesting entry of a partial final judgment in Ms. Devine's favor as to the claims dismissed by the Court on February 8, 2017.

BACKGROUND[2]

I. Plaintiffs' Close Relationship with the Swiss Attorney General

Since at least 2011, the OAG has been engaged in an investigation relating to "fraud allegedly committed by Florian H[omm]"—*i.e.*, Ms. Devine's former spouse—and others. *See* Exhibit A, Sept. 14, 2017 letter from OAG to U.S. Department of Justice at 3. For years, Plaintiffs, who have conceded that their business consists of nothing other than asset collection, *i.e.*, litigation, have worked closely with the OAG in an effort to steer that investigation to their benefit.

A. The OAG's Historical Use of Formal MLAT Requests

In the course of its investigation, the OAG has made a series of formal "request[s] for mutual legal assistance" to the Office of International Affairs at the United States Department of Justice (the "DOJ"). *Id*. at 2. Those formal requests—the first of which were issued in September and December of 2011—are made pursuant to a mutual legal assistance treaty, or "MLAT," between the U.S. government and

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[2] This litigation and the facts underlying it have been described at length in the parties' prior submissions to this Court. Accordingly, Ms. Devine summarizes herein only the facts most relevant to the instant Motion. For a fuller account of the background of this matter, Ms. Devine respectfully refers the Court to her Motion to Dismiss Plaintiffs' Second Amended Complaint. *See* Dkt. Entry 569.

the Swiss. *Id.* at 2; *see also* Exhibit B, Feb. 11, 2016 Declaration of Bruce Zagaris, at ¶ 3. The U.S.-Swiss MLAT requires that each request sent by one country to the other be "handled by a Central Authority." Ex. B at ¶ 24. When the DOJ receives an MLAT request from the Swiss, the receiving attorney is obligated to "discuss such request[] with the Office of International Affairs before providing any assistance," *id.* at ¶ 25, and any documents produced to the Swiss government in response are subject to "strict[]" use limitations. *Id.* at ¶ 29.

B. The Relationship Between Plaintiffs and the OAG

In or around January 2013, Plaintiffs, acting through their Swiss counsel, petitioned the OAG "to be recognized as claimants" in connection with the OAG's investigation. *See* Exhibit C, Feb. 19, 2016 Declaration of Linda Imes, at ¶ 3. On May 31, 2013, the OAG granted Plaintiffs' request. *Id.* at ¶ 4. As a result, Plaintiffs were granted "access to the investigative file of the Swiss prosecutor." *Id.* at ¶ 5.

Thereafter, Plaintiffs analyzed documents in the OAG's investigative file, provided strategic advice to the OAG, and, among other interactions, sent to the OAG color-coded lists of "procedural acts" to perform in connection with the investigation. *See, e.g.*, Exhibit D, Jan. 22, 2014 letter from Plaintiffs' Swiss counsel, Jean-Marc Carnice to Graziella de Falco Haldemann at 1-2, and Exhibit E, Feb. 18, 2014 letter from Jean-Marc Carnice to Graziella de Falco Haldemann with excerpted annex, at 1. In fact,

at least as early as February 18, 2014, Plaintiffs sent to the OAG written instructions listing particular bank accounts and real property owned by Ms. Devine that Plaintiffs urged the OAG to seize. *Id.* at 2.

Plaintiffs often sought to keep their dealings with the OAG hidden from public view. For instance, on at least two occasions, Plaintiffs went so far as to ask the OAG to "take all the measures in accordance with the law to avoid communicating something to the other parties regarding" Plaintiffs' written requests to the OAG. *See* Ex. D at 2; Exhibit F, April 29, 2014 letter from Jean-Marc Carnice to Graziella De Falco Haldemann with excerpted annex, at 1.

C. Plaintiffs' Legal Ambush Against Ms. Devine

On May 29, 2015, Plaintiffs filed with the OAG a private "[c]riminal complaint" against Ms. Devine. *See* Exhibit G, private Swiss criminal complaint, at 1; *see also* Dkt. Entry 268 at 9. In their private Swiss criminal complaint, Plaintiffs alleged that Ms. Devine "is guilty of aggravated money laundering and document forgery" and asserted that the Absolute Funds had "suffered damages of USD 215,851,031, EUR 43,842,800, and JPY 734,184." *Id.*

at 42. Ms. Devine is the only putative defendant named in the private Swiss criminal complaint.[3]

Significantly, Plaintiffs' private Swiss criminal complaint was not filed publicly. In fact, Plaintiffs did not reveal to Ms. Devine that they had filed a private Swiss criminal complaint against her until February 2016, when Plaintiffs' U.S. counsel filed with this Court a declaration attaching a copy of that complaint and a redacted copy of an index to the OAG's file. *See* Exhibits I and J to Feb. 19, 2016 Declaration of Linda Imes in Support of Plaintiffs' Memorandum in Opposition to Defendant's Emergency Motion for Protective Order (Dkt. Entries 269-9 and 269-10).[4]

On June 1, 2015, just six days after they filed their private criminal complaint in Switzerland, Plaintiffs filed their six-count, 313-paragraph complaint against Ms. Devine alleging that she engaged in a money laundering enterprise with her ex-husband to conceal the proceeds of his and others'

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[2] Almost three years after its submission, the OAG has neither adopted the private criminal complaint filed by Plaintiffs nor filed any charges against Ms. Devine.

[3] The OAG maintained a docket of filings and submissions related to various proceedings but certain of the entries therein were redacted. The entry relating to the private criminal complaint was redacted. While Ms. Devine's Swiss counsel had access to the docket, Ms. Devine did not learn that Plaintiffs had filed a private criminal complaint against her until February of 2016. *See* Dkt. Entry 305 at 2.

alleged "Penny Stock Scheme."[5] *See* Dkt. Entry 2 (the "Complaint") at ¶¶ 1-2. [6] Plaintiffs have since conceded that "their allegations about [Ms.] Devine's [purported] money laundering activities[ ] rel[y] entirely on materials they had received from the Swiss File." *See* Dkt. Entry 345, Plaintiffs' Emergency Motion to Confirm Dates of Hearing Scheduled for April 25 and 26, 2016 with Certain Clarifications and to Quash Deposition Subpoenas Issued to Plaintiffs' Experts, at 7.

Contemporaneously, Plaintiffs filed with this Court a request for an *ex parte* temporary restraining order and preliminary injunction, limited expedited discovery, and delayed service. *See* Dkt. Entry 3 (the "*Ex Parte* TRO Motion"). In the *Ex Parte* TRO Motion, Plaintiffs asserted that they were "substantially likely to prevail on the merits of their claims" and that a bond of "no more than $10,000" was justified "[i]n light of the unequivocal evidence of Devine's criminal money laundering and unjust enrichment." *See id.* at 11-19, 25. This Court granted

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[4] It is noteworthy that even Plaintiffs conceded early on in the Action that Ms. "Devine is not alleged to have participated in th[e Penny Stock S]cheme." Dkt. Entry 124 at 3.

[5] The Complaint included causes of action for violations of 18 U.S.C. § 1962(c) (the "Federal RICO Claim"); violations of 18 U.S.C. § 1962(d) (the "Federal RICO Conspiracy Claim"); violations of Fla. Stats. §§ 772.103(3) and 895.03(3) (the "Florida RICO Claim"); violations of Fla. Stats. §§ 772.103(4) and 895.03(4) (the "Florida RICO Conspiracy Claim"); common law unjust enrichment (the "Unjust Enrichment Claim"); and what Plaintiffs styled as "Constructive Trust – Common Law" (the "Constructive Trust Claim"). *See* Complaint at ¶¶ 233-312.

the *Ex Parte* TRO Motion in an Opinion and Order issued on July 1, 2015. *See* Dkt. Entry 10 (the "*Ex Parte* TRO").

D. Plaintiffs' Concealment of Facts and Use of the Protective Order as an End-Run Around the U.S.-Swiss MLAT

Ms. Devine learned of the *Ex Parte* TRO and of the Complaint on July 9, 2015. *See* Exhibit H, July 9, 2015 email from Linda Imes to Carl Schoeppl. Twenty-one days later, the Court entered a Stipulation and Protective Order governing the use of discovery material produced or created in connection with the instant action. *See* Dkt. Entry 64 (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 . . . ." *Id.* at ¶ 8. However, the Protective Order—which the parties negotiated months *before* Ms. Devine became aware that Plaintiffs had filed a private Swiss criminal complaint against her[7]— further provided

[7] That Ms. Devine was unaware that Plaintiffs had filed a private Swiss criminal complaint against her—and that she was unaware of Plaintiffs' close collaboration with the OAG more broadly—when she was negotiating the terms of the Protective Order was made evident by what followed: On February 11, 2016, shortly *after* she learned of Plaintiffs' intention to produce certain documents to the OAG, Ms. Devine filed an emergency motion for a protective order and a stay of the contemplated

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." *Id.* at ¶ 14 (the "International Request Clause" or "IRC").[8]

The IRC plainly was drafted to provide the OAG and Plaintiffs with a backdoor to the formal MLAT process. While the latter requires the involvement of the DOJ and places restrictions on the use of any documents produced, the IRC does neither of those things. Plaintiffs did indeed exploit the IRC to funnel documents and other information obtained in this case to the OAG. In fact, the OAG made the first such request to Plaintiffs on January 13, 2016, *without first attempting to obtain the documents at issue via the U.S. Swiss-MLAT. See* Exhibit I, Jan. 13, 2016 letter from Graziella de Falco Haldemann to Jean-Marc Carnice.

In its January 13, 2016 letter to Plaintiffs, the OAG requested an asset listing produced in this case, a transcript of a hearing conducted before this Court, and other documents related to the *Ex Parte* TRO. *Id.*

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production. *See* Dkt. Entries 248, 305. Had Ms. Devine been aware of Plaintiffs' designs from the outset, that emergency motion practice would not have been necessary.

[8] The Protective Order also sets forth limitations on Ms. Devine's retention of material designated "Confidential" that become operative after the instant Action has concluded. *Id.* at ¶ 18. Ms. Devine seeks relief from that provision in a separate motion being filed simultaneously herewith.

The OAG letter also requested "documentation in connection with the transactions set forth on pages 22 to 34 of the criminal complaint"— *i.e.*, the private Swiss criminal complaint that Ms. Devine later learned had been filed by Plaintiffs against her. *Id*. Plaintiffs used the IRC to funnel back to the OAG not only confidential documents and deposition testimony that Plaintiffs had obtained directly from Ms. Devine, but also documents produced by third-parties in response to subpoenas that Plaintiffs had issued in the U.S. *See* Exhibit J, Feb. 8, 2016 letter from Linda Imes to Matthew Lee, at 2 ("In addition, the Funds plan to produce [to the OAG] certain documents provided by third parties pursuant to subpoenas in this action . . . ."). Moreover, certain of the documents requested by the OAG and produced by Plaintiffs appear to have been sought for the *sole purpose* of attempting to substantiate allegations made in Plaintiffs' private Swiss criminal complaint against Ms. Devine. Had Ms. Devine known that Plaintiffs had filed a private Swiss criminal complaint against her even *before* they commenced this Action, she would not have assented to the inclusion of the IRC in the Protective Order.[9]

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[9] While Ms. Devine filed motions with the Court seeking an order barring Plaintiffs from sharing certain documents with the OAG, the Court denied those motions, concluding that Ms. Devine had presented insufficient evidence of unlawful collusion between Plaintiffs and the OAG. *See* Dkt. Entry 502 at 36; Dkt. Entry 535 at 6-7. As set forth more fully below, Ms. Devine has since obtained substantial new evidence showing that Plaintiffs and the OAG have colluded improperly. For instance, barely two weeks after the Court issued an Opinion and Order granting Ms.

II. In the Face of Adverse Rulings, Plaintiffs Continue to Send U.S. Discovery to the OAG While Evading Their Own Discovery Obligations

Starting in early 2017, the Court granted several of Ms. Devine's key motions. As Plaintiffs' legal defeats mounted, they continued to funnel material to the OAG while stonewalling Ms. Devine's legitimate effort to depose one of their own.

A. After the Court Dismisses All But One of Their Claims, Plaintiffs Share Transcripts from U.S. Depositions with the OAG

Ms. Devine moved to dismiss Plaintiffs' Amended Complaint and Demand for Jury Trial[10] on

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Devine's previously filed motion to dissolve the *Ex Parte* TRO on July 25, 2017, Plaintiffs quietly urged the OAG to seize nine categories of Ms. Devine's assets, including certain of the assets that had been encumbered by the *Ex Parte* TRO. *See* Dkt. Entry 575; *see al*so Ex. S, August 10, 2017 letter from Jean-Marc Carnice to Graziella de Falco Haldemann, at 4-5. In their letter to the OAG requesting that the Swiss re-impose the asset freeze that this Court had just dissolved, Plaintiffs specifically requested that the Swiss "avoid . . . communications among the other parties." *Id*. The following month, the OAG did Plaintiffs' bidding and issued a new, "VERY URGENT" request to the DOJ requesting that the DOJ seize the very same U.S. assets that Plaintiffs had identified in their August 10 letter. *See* Ex. A, at 1.

[10] Ms. Devine moved to dismiss Plaintiffs' initial complaint on September 29, 2015. *See* Dkt. Entry 94 (the "First Motion to Dismiss"). On January 5, 2016, after the First Motion to Dismiss had been fully briefed (*see* Dkt. Entries 124, 144, 162), the Court issued an Opinion and Order requiring Plaintiffs to

February 12, 2016. *See* Dkt. Entry 252 (the "Second Motion to Dismiss"). After extensive briefing from the parties, the Court issued an Opinion and Order on February 8, 2017, granting in part and denying in part the Second Motion to Dismiss. *See* Dkt. Entry 521 (the "Order on the Second Motion to Dismiss"). In the Order on the Second Motion to Dismiss, the Court dismissed without prejudice Plaintiffs' federal RICO, federal RICO conspiracy, Florida RICO, and Florida RICO conspiracy claims. *Id.* at 56, 60. The Court dismissed with prejudice Plaintiffs' constructive trust claim. *Id.* at 62. Only one claim survived the Second Motion to Dismiss: Plaintiffs' unjust enrichment claim. *Id.* at 63.[11]

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file an amended pleading as a result of filing a pleading with "shotgun allegations" and denying as moot the First Motion to Dismiss. *See* Dkt. Entry 183. Plaintiffs' 313-paragraph Amended Complaint contained the same causes of action and the same operative facts that were included in their initial complaint. *See* Dkt. Entry 196.

[10] The Order on the Second Motion to Dismiss granted Plaintiffs twenty-one days to file a Second Amended Complaint. *Id*. at 63-5. However, on February 28, 2017, Plaintiffs filed a notice stating that they had "elected not to file a second amended complaint." Dkt. Entry 527 at 2 (the "Notice"). On May 8, 2017, the Court issued an Order directing Plaintiffs "to file a Second Amended Complaint including only their remaining state law claim of unjust enrichment and the factual allegations relating to that claim." Dkt. Entry 559 at 2. Though it sets forth just one cause of action, the ninety-nine-page, 237-paragraph Second Amended Complaint (the "SAC) that Plaintiffs filed on May 15, 2017 nonetheless includes "factual" allegations every bit as topically, geographically, and temporally broad as those set forth in Plaintiffs' prior pleadings. *See* Dkt. Entry 560 at ¶¶ 1-7, 32-41.

Just over three months later, on May 10, 2017, Plaintiffs' Swiss counsel sent to the OAG—apparently unsolicited—the transcripts of the depositions of Brian Escalante, Guillermo Hernandez Sampere, and Darius Parsi. *See* Exhibit K, May 10, 2017 letter from Jean-Marc Carnice to Graziella de Falco Haldemann, at 1-3. All three depositions were taken in this Action. In the May 10 letter, Plaintiffs' Swiss counsel described purportedly damaging portions of each transcript and argued that the testimony "clearly demonstrate[s] that [Ms. Devine] knew the criminal origin of Florian Homm's assets." *Id.* at 3. Plaintiffs' Swiss counsel concluded the letter by "respectfully request[ing] that [the OAG] quickly take [Ms. Devine] into custody." *Id.*

B. As Party Depositions Are Noticed, Plaintiffs Move for a Protective Order

On May 17, 2017, Plaintiffs noticed the deposition of Ms. Devine. *See* Exhibit L, Notice of Deposition of Defendant Susan Devine. On July 5, 2017, Ms. Devine noticed the depositions of Plaintiff Absolute East West Fund Limited ("AEWFL")—just one of the nine former hedge funds that sued her in this Action—and Glenn Kennedy, the general counsel of ACMH Limited. *See* Exhibit M, Notice of Videotaped Deposition of AEWFL (the "AEWFL Notice") and Exhibit N, Notice of Videotaped Deposition of Glenn Kennedy.

Ms. Devine complied with the notice that Plaintiffs served on her and appeared for her

deposition on July 25.[12] Plaintiffs, however, were less forthcoming. Mr. Kennedy did not appear for his deposition until December 1, 2017, and AEWFL did not appear at all. Rather, on July 17, 2017, Plaintiffs moved for a protective order as to the AEWFL Notice, arguing that it was overbroad and "plainly drafted both to maximize the burden on the Funds and to give Devine's counsel free rein at the deposition." Dkt. Entry 567 ("Plaintiffs' PO Motion") at 2. On July 18, 2017, the Court canceled the deposition of AEWFL pending resolution of Plaintiffs' PO Motion. *See* Dkt. Entry 568.

Meanwhile, Plaintiffs produced two expert reports to Ms. Devine on July 7, 2017. *See* Exhibit O, July 7, 2017 letter from David Spears. One of those reports was prepared by Estera Fund Services (Isle of Man) Limited. See *id*.; Exhibit P, excerpted Expert Report dated June 29, 2017 (the "Estera Report"). Thereafter, Ms. Devine learned that the Estera Report was based, in part, on a tracing analysis performed by Tonya Pinkerton, a forensic accountant employed *by the FBI*. *See* Exhibit Q, January 6, 2017 Affidavit of Tonya Pinkerton with attachment (the "Pinkerton Affidavit"). Ms. Pinkerton stated in her affidavit that she prepared the attached tracing analysis "[i]n response to a request from Switzerland pursuant to the Mutual Legal Assistance Treaty." *Id.* at 1-2. The DOJ turned over that work product to the

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[11] In fact, and to be precise, Ms. Devine submitted to seven hours and seventeen minutes of questioning notwithstanding that the Federal Rules require her to submit to only seven hours. Fed. R. Civ. P. 30(d)(1).

OAG, which provided it to Plaintiffs, who in turn used it to create the Estera Report produced in the Action.[13]

On July 19, 2017, Ms. Devine filed a motion to dismiss Plaintiffs' SAC. *See* Dkt. Entry 569 (the "Third Motion to Dismiss"). In the Third Motion to Dismiss, Ms. Devine argued, *inter alia*, that Plaintiffs' surviving claim was time-barred and should never have been brought, was inadequately pleaded, and was barred by the prohibition against claim-splitting. *See id. passim*.

C. The Court Dissolves the *Ex Parte* TRO, Plaintiffs Urge the OAG to Re-Freeze the Unencumbered Assets, and the OAG Attempts to Do So

Plaintiffs suffered another serious defeat just a week later on July 25, 2017, when the Court issued an Opinion and Order granting Ms. Devine's previously filed motion to dissolve the *Ex Parte* TRO. *See* Dkt. Entry 575 (the "Dissolution Order").[14] In

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[13] Plaintiffs eventually funneled the Estera Report back to the OAG, who cited it in an investigative report that the OAG published *just last month*. *See* Background Section III(E), *infra*.

[14] Ms. Devine moved to Dissolve the *Ex Parte* TRO on March 6, 2017. *See* Dkt. Entry 530 (the "Motion to Dissolve"). In the Dissolution Order, the Court held, *inter alia*, that "Florida law does not allow for preliminary injunctive relief" where the only cause of action brought is for common law unjust enrichment (*id.* at 11), that the Funds could have sought to employ a Florida prejudgment garnishment statute and its procedures for the restraint of assets prejudgment but failed to do so (*id.* at 11-12), that under Florida law, "unjust enrichment is an action at

response, Plaintiffs inundated this Court and Ms. Devine with a slew of filings.

The following day, Plaintiffs filed a notice of appeal regarding the Dissolution Order (*see* Dkt. Entry 576), and an emergency motion for a stay of the Dissolution Order. *See* Dkt. Entry 577 (the "Stay Motion"). In the Stay Motion, Plaintiffs argued, *inter alia*, that "they are likely to succeed on the appeal of the [Dissolution] Order." *Id.* at 3. Ms. Devine filed a response in opposition to the Stay Motion on August 9, 2017. *See* Dkt. Entry 596.

Plaintiffs also petitioned the Court of Appeals for a stay, filing an emergency motion with the Eleventh Circuit on July 28, 2017. *See* Appellants' Emergency Motion to Stay District Court's Order Pending Appeal, *Absolute Activist Value Master Fund Limited, et al. v. Devine*, No. 17-13364 (11th Cir. dismissed Feb. 20, 2018) (the "Appellate Stay Motion"). In the Appellate Stay Motion, Plaintiffs again argued that they "are likely to succeed on their appeal of the [Dissolution] Order." *Id.* at 11. Ms. Devine filed a response in opposition to the Appellate Stay Motion on August 2, 2017. *See* Exhibit R, Appellees' Response in Opposition to Appellants'

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law" (*id.* at 14), and that "[d]espite the equitable titles affixed to the relief requested, plaintiffs are essentially seeking one thing – money." *Id.* at 15. The Court further concluded that "[d]ue to the commingling of [the] funds" at issue and "the admitted difficulty in tracing the assets," there was not a "substantial likelihood that plaintiffs will be able to ultimately establish their entitlement to the imposition of a constructive trust" over Ms. Devine's assets. *Id.* at 17-18 (footnote omitted).

Emergency Motion to Stay District Court's Order Pending Appeal.

Even as Plaintiffs assured both this Court and the Eleventh Circuit that they were likely to succeed on their appeal, Plaintiffs quietly urged the OAG to ask the U.S. to seize nine categories of Ms. Devine's assets. *See* Exhibit S, August 10, 2017 letter from Jean-Marc Carnice to Graziella de Falco Haldemann, at 4-5. Those assets included property that had been encumbered by the since-dissolved *Ex Parte* TRO, such as Ms. Devine's home in Naples, Florida and certain of her U.S. bank accounts. *Id*.

On August 30, 2017, Plaintiffs wrote again to the OAG to urge it to "take[Ms. Devine] into custody." *See* Exhibit T, August 30, 2017 letter from Jean-Marc Carnice to Graziella de Falco Haldemann, at 4. In their August 30 letter to the OAG, Plaintiffs cited the deposition testimony of Mr. Sampere—testimony that Plaintiffs obtained in this Action and shared with the OAG apparently unprompted—as purported proof of Ms. Devine's alleged misconduct. *Id*. at 1-2.

Just two weeks later, the OAG followed Plaintiffs' lead and issued a new, "VERY URGENT" request to the DOJ pursuant to the U.S.-Swiss MLAT on September 14, 2017. *See* Ex. A, at 1. In the September 14 letter, the OAG requested that the DOJ seize the very same U.S. assets that Plaintiffs had identified in their August 10 letter—Ms. Devine's home in Naples, Florida and her accounts at certain U.S. Banks. *Id.* at 6.

D. The Parties Brief Plaintiffs' Appeal and the Stay Motions Are Denied

On September 5, 2017, Plaintiffs filed their opening brief with the Court of Appeals. *See* Brief for Plaintiffs-Appellants, *Absolute Activist Value Master Fund Limited, et al. v. Devine*, No. 17-13364 (11th Cir. dismissed Feb. 20, 2018). Ms. Devine filed her appellate brief on October 19, 2017. *See* Brief for Defendant-Appellee, *Absolute Activist Value Master Fund Limited, et al. v. Devine*, No. 17-13364 (11th Cir. dismissed Feb. 20, 2018). Plaintiffs filed their reply brief on November 16, 2017. *See* Reply Brief for Plaintiffs-Appellants, *Absolute Activist Value Master Fund Limited, et al. v. Devine*, No. 17-3364 (11th Cir. dismissed Feb. 20, 2018).

Just one day later, on November 17, 2017, this Court issued an Opinion and Order denying Plaintiffs' Stay Motion. *See* Dkt. Entry 675.[15] The Court of Appeals followed suit on December 28, 2017, when it issued an Order denying the Appellate Stay Motion. *Absolute Activist Value Master Fund Limited, et al. v. Devine*, No. 17-13364 (11th Cir. Dec.

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[15] In the Stay Motion, Plaintiffs requested both a stay pending appeal and a stay pending the Court's decision on Plaintiffs' request for a stay pending appeal. *See* Stay Motion at 1-2. On July 26, 2017, this Court issued an Order denying the Stay Motion in part, rejecting Plaintiffs' request for a stay pending the Court's decision on Plaintiffs' request for a stay pending appeal. *See* Dkt. Entry 582 at 3. This Court's November 17, 2017 decision denied the remainder of the Stay Motion.

28, 2017).[16] As a result, the assets that had been restrained by the *Ex Parte* TRO were fully unencumbered as of December 28, 2017.

III. Plaintiffs Refuse to Be Deposed, and Ultimately Abandon the Action After the Court Orders Them to Testify

After the denial of their stay motions, Plaintiffs' dilatory and abusive litigation tactics grew more brazen. Without moving for a protective order, Plaintiffs simply refused to attend the additional party depositions that Ms. Devine noticed. When the Court ordered Plaintiffs to submit to depositions, they instead dismissed their remaining claim.

A. Ms. Devine's Notices Directed to AAVMFL, AGFL, and AIFL

On January 3, 2018, while Plaintiffs' motion challenging the AEWFL Notice was pending, Ms. Devine served notices of deposition on three other Plaintiff funds: Absolute Activist Value Master Fund Limited ("AAVMFL"), Absolute Germany Fund Limited ("AGFL"), and Absolute India Fund Limited

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[16] The Court of Appeals issued a temporary stay of the Dissolution Order on July 28, 2017. *Absolute Activist Value Master Fund Limited, et al. v. Devine*, No. 17-13364 (11th Cir. July 28, 2017). On October 3, 2017, the Court of Appeals continued the temporary stay of the Dissolution Order pending this Court's ruling on the Stay Motion. *Absolute Activist Value Master Fund Limited, et al. v. Devine*, No. 17-13364 (11th Cir. Oct. 3, 2017). The December 28, 2017 Order issued by the Court of Appeals explicitly lifted that temporary stay and denied the Appellate Stay Motion. *Absolute Activist Value Master Fund Limited, et al. v. Devine*, No. 17-13364 (11th Cir. Dec. 28, 2017).

("AIFL," and collectively, the "January Notices," attached hereto as Exhibit U). The January Notices, which scheduled the noticed depositions for January 24, 25, and 26, 2018, respectively, were narrower in their scope than the AEWFL Notice.[17]

B. Plaintiffs' Response to the January Notices and Bad-Faith Refusal to Attend the Noticed Depositions

On January 4, 2018, Plaintiffs' counsel responded to the January Notices via email. Plaintiffs' counsel's response read as follows:

> We object to your notices of deposition, which are patently improper. They are overreaching and unduly burdensome in many of the same ways as your July 5, 2017 notice of Absolute East West Fund Limited's deposition, a deposition the Court canceled pending its ruling on the Funds' motion for a protective order. *The notices are also improper for other reasons that we won't go into here. No witness will appear.*

See Exhibit V, Jan. 4, 2018 email from David Spears to Nathan Huddell (emphasis added).

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[17] Though Ms. Devine considered that reduction in scope unnecessary, she nonetheless reduced the topical breadth of the January Notices as an accommodation to Plaintiffs and in hopes of obtaining deposition testimony from at least one of the Plaintiffs without resort to motion practice.

Ms. Devine's counsel responded to the email from Plaintiffs' counsel on January 8, 2018. *See* Exhibit W, Jan. 8, 2018 email from Matthew Lee to David Spears. In their response, co-counsel to Ms. Devine contested Plaintiffs' assertions about the propriety of the January Notices and communicated their "willing[ness] to engage in good faith discussions regarding the January Notices." *Id*.

On January 18, 2018, counsel to Ms. Devine conferred with Plaintiffs' counsel telephonically regarding the January Notices. The parties were not able to resolve their disagreements during that conference. In a subsequent email to Ms. Devine's counsel, Plaintiffs' counsel argued again that the January Notices "are in large part substantively identical to" the AEWFL Notice and asserted that until the Court rules on Plaintiffs' motion for a protective order as to the AEWFL Notice, "there is no reasonable justification for noticing additional depositions that cover nearly identical topics." *See* Exhibit X, Jan. 18, 2018 email form Christopher Dysard to Matthew Lee. Plaintiffs' counsel also stated in his email that no witness would appear at the noticed depositions of AAVMFL, AGFL, and AIFL. *Id*. Plaintiffs never moved for a protective order regarding any of the January Notices.

On January 23, 2018, co-counsel to Ms. Devine flew to Fort Myers, Florida for the noticed depositions of AAVMFL, AGFL, and AIFL. On January 24, 2018, co-counsel for Ms. Devine appeared at the noticed deposition of AAVMFL in

Fort Myers. *See* Exhibit Y, Jan. 24, 2018 Record Statement by Counsel, at 3:3-12. Neither a witness nor Plaintiffs' counsel appeared. *Id.* at 3:13-20. Witnesses for AGFL and AIFL, along with Plaintiffs' counsel, likewise failed to appear at the depositions scheduled for January 25 and January 26. *See* Exhibit Z, Jan. 25, 2018 Certificate of Nonappearance, and Exhibit AA, Jan. 26, 2018 Certificate of Nonappearance.

C. The Court Rejects Nearly All of Plaintiffs' Challenges to Ms. Devine's Deposition Notice

On February 7, 2018, the Court issued an Order granting in part and denying in part Plaintiffs' PO Motion. (Dkt. Entry 679) (the "Deposition Order"). In the Deposition Order, the Court rejected Plaintiffs' argument that the AEWFL Notice was improper insofar as it is "duplicative of Defendant's previously served document requests." *Id.* at 4-5. Rather, the Court concluded, "it is not surprising in the least that a Rule 30(b)(6) deposition notice would refer to or align in some fashion with previously propounded document discovery." *Id.* at 5. The Court also rejected nearly all of Plaintiffs' other objections. *Id. passim*. In fact, as to the "more than 120" topics and subtopics listed in the AEWFL Notice (*id.* at 2), the Court sustained Plaintiffs' objections as to only five.[18] The Deposition Order directed AEWFL to

[18] Plaintiffs' argument that "Topics 1, 3-4, 13-14, 18-19, 26, 29, 32-35, 44, 49-50, and 54" in the AEWFL Notice were improper to the extent that they include the phrase "including, but not

designate, by February 21, 2018, one or more persons to testify as to each of the permitted topics and to complete the deposition of AEWFL within thirty days. *Id.* at 17.

D. Faced with the Court's Order, Plaintiffs Abandon Their Remaining Claim and Their Appeal and Flee the Middle District

As of the date on which the Court issued the Deposition Order, not even one of the Plaintiff funds

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limited to," was rejected. *Id.* at 6. Similarly, the Court rejected Plaintiffs' argument that "Topics 5-6, 15, 20-23, 25, 36-37, 40, 44-48, 52, 5556, and 58" were improper insofar as they lack "reasonable substantive limitations." *Id.* at 8. The Court also rejected Plaintiffs' argument that Topics 1, 3-4, 6-10, 16-18, 28, 32, 38, 41-43, and 59 in the AEWFL Notice were improper in [17] that they "seek[] irrelevant information." *Id.* at 9-10. Additionally, the Court rejected Plaintiffs' arguments based on, *inter alia*, (a) the "temporal scope" of the topics at issue (*id.* at 11), (b) Plaintiffs' characterization of the relevant topics as "discovery on discovery" (*id.* at 13), (c) the attorney-client privilege and the work product doctrine (*id.* at 14-15), (d) Plaintiffs' assertion that the relevant topics "are better suited for expert discovery" (*id.* at 16), and (e) Plaintiffs' claim that the relevant topic encompassed "confidential settlement information." *Id.* at 16-17. Although the Court also concluded that "Topic 2, as currently written, failed to describe the matters for examination with reasonable particularity as required by Fed. R. Civ. P. 30(b)(6)," the Court also found "that subparts 2(a) through 2(qq) are sufficiently particularized" and on that basis "reasonably interpret[ed] and modif[ied] Topic 2 as seeking testimony only as to the allegations specified in subparts 2(a) through 2(qq)" and permitted Ms. Devine to depose AEWFL "as to the allegations of the Second Amended Complaint that are referenced or quoted in subparts 2(a) through 2(qq) of the" AEWFL Notice. *Id.* at 7-8.

had testified on the record in this Action. Faced with the prospect of being forced—finally—to make good on their obligation to be deposed, Plaintiffs instead opted to abandon their case, and on February 14, 2018, filed with the Court a Notice of Voluntary Dismissal, without Prejudice, Pursuant to Rule 41(a)(1)(A)(i). *See* Dkt. Entry 680. On February 21, 2018, the Court issued an Order dismissing this Action without prejudice. *See* Dkt. Entry 682.

Plaintiffs likewise moved to dismiss their appeal—the same appeal that they had claimed they were likely to win just a few months prior—and filed a motion to that effect with the Court of Appeals on February 14, 2018. *See* Appellants' Motion for Voluntary Dismissal of Appeal, *Absolute Activist Value Master Fund Limited, et al. v. Devine*, No. 17-13364 (11th Cir. dismissed Feb. 20, 2018). The Eleventh Circuit dismissed Plaintiffs' pending appeal on February 20, 2018. *Absolute Activist Value Master Fund Limited, et al. v. Devine*, No. 17-13364 (11th Cir. July 28, 2017).

In short, after more than two-and-a-half years of litigation but just weeks before they were to be deposed for the first time, Plaintiffs voluntarily dismissed their sole surviving cause of action and walked away.

E. The OAG Continues to Rely on U.S. Discovery That Plaintiffs Obtained in This Action

Despite Plaintiffs' withdrawal from this case, the OAG has continued to rely on U.S. discovery that Plaintiffs obtained in this Action and funneled abroad. For instance, on March 16, 2018, the OAG published a 281-page report that purports to describe the "fraud" perpetrated by Florian Homm. *See* Exhibit BB, *Rapport FFA Stratagéme de fraude reproché à Florian HOMM et ses repercussions* (selected translated and untranslated excerpts). The March 16, 2018 report includes numerous references to the Estera Report and to Ms. Devine and cites, at length, the transcript of the U.S. deposition of Mr. Sampere. *Id. passim*.

ARGUMENT

I. The Court Should Enter Judgment in Favor of Ms. Devine on Plaintiffs' Constructive Trust, Federal RICO, Federal RICO Conspiracy, Florida RICO, and Florida RICO Conspiracy Claims

In the Order on the Second Motion to Dismiss, the Court dismissed with prejudice Plaintiffs' claim for "constructive trust" (the "Constructive Trust Claim"). Dkt. Entry 521 at 65. In the same Order, the Court dismissed without prejudice Plaintiffs' claims for violations of 18 U.S.C. § 1962(c) (the "Federal RICO Claim"); violations of 18 U.S.C. § 1962(d) (the "Federal RICO Conspiracy Claim"); violations of Fla. Stats. §§ 772.103(3) and 895.03(3) (the "Florida RICO Claim"); and violations of Fla. Stats. §§ 772.103(4) and 895.03(4) (the "Florida RICO Conspiracy Claim") (collectively with the Federal RICO Claim, the

Federal RICO Conspiracy Claim, and the Florida RICO Claim, the "RICO Claims"). *Id*. Ms. Devine