APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10237

D.C. Docket No. 2:15-cv-328-JES-MRM

ABSOLUTE ACTIVIST VALUE MASTER FUND LIMITED, ABSOLUTE EAST WEST FUND LIMITED, et al.,

Plaintiffs-Appellees,

versus

SUSAN ELAINE DEVINE,

Defendant-Appellant.

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

(May 28, 2021)

Before WILSON, GRANT, and TJOFLAT, Circuit Judges.

TJOFLAT, Circuit Judge:

Susan Devine, who was sued for her alleged involvement in money laundering and market

manipulation schemes, appeals the District Court's denial of her motion to modify a protective order.[1] To briefly summarize, Devine sought to modify a joint, stipulated protective order so that she could use certain confidential materials obtained from the plaintiffs—a group of hedge funds ("the Funds")—to defend herself against a possible Swiss prosecution for her role in the schemes. But before Devine could file her motion to modify, the Funds voluntarily dismissed their case under Federal Rule of Civil Procedure 41(a)(1)(A)(i). Because the Funds' voluntary dismissal stripped the District Court of jurisdiction to consider Devine's post-dismissal motion to modify, we must vacate the District Court's order.

I.

The events giving rise to this case stretch back to 2002 and wind from the Cayman Islands, to Switzerland, to Naples, Florida. So, for simplicity's sake, we outline only the most relevant facts here.

Absolute Activist and the other Plaintiffs-Appellees are a group of hedge funds registered as limited liability corporations in the Cayman Islands. In 2002, Florian Homm, Susan Devine's then-husband, founded a company—Fortune Management Limited—in the

[1] In reality, the District Court overruled Devine's objections to a magistrate judge's order denying her motion to modify a protective order. But because that procedural posture is a mouthful, and because the effect is ultimately the same, we state throughout this opinion that the District Court "denied" Devine's motion to modify.

Cayman Islands. In 2005, Fortune Management merged into Absolute Capital Management Holdings Limited ("ACM"), which served as the Funds' investment manager. Homm served as ACM's Chief Investment Officer, and as a result, was responsible for the Funds' investments. But on September 18, 2007, Homm suddenly resigned from ACM and allegedly went into hiding for five years.

Homm's abrupt exit from ACM was apparently triggered by his participation in a massive market manipulation scam, which the Funds have dubbed the "Penny Stock Scheme." From at least September 2004 through September 2007, Homm invested the Funds' money in the securities of thinly capitalized companies. These securities, sometimes referred to as "pink sheet" securities or "penny stocks," were cheap and infrequently traded, and thus they were allegedly very susceptible to price manipulation. To capitalize on the opportunity for price manipulation, Homm and his conspirators would raise money for the Funds to obtain control of a dormant or near-dormant Penny Stock Company. Once Homm had control of the Penny Stock Company, he would use the Funds' money to purchase shares of the Company through private offerings. Critically, at the time Homm made these purchases for the Funds, he and his conspirators also held shares of their own—or received shares in exchange for investing—in the Penny Stock Companies.

While holding their personal shares, Homm and the conspirators would artificially inflate the prices of the Penny Stocks by trading the Funds' shares

amongst the Funds and with outside investors. After the prices of the Penny Stock Companies' securities were sufficiently inflated by the massive influx of trades, Homm would use the Funds to purchase the Penny Stock shares that he and the other conspirators held in their own names. Homm allegedly made more than $115 million from the Penny Stock Scheme, and the Funds estimate that they lost more than $200 million.

But presumably recognizing that his ill-gotten gains might eventually be exposed, Homm enlisted his then-wife, Devine, to conceal the fruits of the Penny Stock Scheme. This second plot—the "Money Laundering Enterprise"—began with a series of "fraudulent loan agreement[s]" in which Devine purported to rent over $2 million of furniture and art from New York Art Trading, even though she and Homm owned the pieces. In essence, this agreement (1) made Homm and Devine's assets harder to trace and (2) gave the appearance that the couple was less wealthy than they actually were.

Then, in 2006, Devine and Homm "strategic[ally]" divorced. In the Funds' telling, this divorce allowed Devine to obtain control of some of the proceeds of the Penny Stock Scheme while simultaneously distancing herself from any criminal activity. Despite the divorce, Devine and Homm allegedly "continued to interact as spouses" by "sending each other personal and intimate emails, purchasing a home together, living together, traveling together, and moving money between each other." The Funds also allege that the Homm-Devine

divorce petition identified only "a small fraction" of the couple's actual assets, omitted numerous real estate holdings, and hid "tens of millions of dollars" in ACM shares.

As part of their divorce, Homm and Devine were able to repeatedly alter the beneficiary structure of CSI Asset Management Establishment ("CSI"), a legal entity established in Liechtenstein that holds ACM shares on behalf of Devine, Homm, and their children. Essentially, the couple made retroactive some beneficiary arrangements in their divorce settlement to give the appearance that Devine—and not Homm—was the primary beneficiary of CSI. This beneficiary structure allowed Homm to circumvent a deed that prohibited him—but not his wife or his children—from selling ACM shares without prior agreement from the ACM board of directors. After the beneficiary structure was altered, Devine claimed she was designated the primary beneficiary so that she could receive future profits from the ACM shares, but the Funds claim this explanation is inconsistent with, among other things, the designation of Homm as CSI's economic beneficiary just one month before the divorce petition.

Following the couple's divorce, Homm sent two "revelatory" emails to Devine regarding the family's financial situation. On August 28, 2007, Homm wrote that if he "c[ould] succeed [in his plan,] the children and [Devine] will sit on a multigenerational fortune," and if he could not, Devine was "fantastically protected already, the optimal outcome has been achieved in that regard." Later that same day, Homm wrote to Devine

to tell her that he had "sold a good part of [his] soul and health to protect [Devine] and [their] children under the most extreme business and lifestyle duress for 18 months." Homm resigned from ACM and went into hiding less than one month later.

Ultimately, as a result of the Penny Stock Scheme, the Money Laundering Scheme, and her allegedly fraudulent divorce, Devine was able to amass assets exceeding $63,000,000. To make this money difficult to trace, she purchased a waterfront property in Naples, Florida; a seaside villa in Marabella, Spain; real estate in Mallorca, Spain; and millions of dollars' worth of gold coins. The remaining proceeds of the pre- and post-divorce schemes are, according to the Funds, spread throughout at least 20 different bank accounts around the world.

But easy come, easy go. Since 2009, the Office of the Attorney General of Switzerland has been conducting a criminal investigation into Homm's money laundering activities. As part of that investigation, Swiss prosecutors have frozen five bank accounts that were either in Devine's name or of which she was the beneficiary. Devine has given testimony and produced documents for the Swiss prosecutor, and a May 2015 indictment of another individual involved in the Penny Stock and Money Laundering Schemes makes clear that the Swiss Attorney General's investigation extends to Devine's own conduct.

Simultaneously, in the United States, Devine was under investigation by the Department of Justice,

which froze one of Devine's bank accounts containing $1,000,000 and issued a grand jury subpoena for her holdings. An arrest warrant was also issued for Homm in the Central District of California after he was charged with one count of conspiracy to commit securities and wire fraud, eight counts of securities fraud, and one count of wire fraud. In March 2013, Homm was arrested in Italy on a provisional arrest warrant, but while extradition proceedings were pending, he was released and fled to Germany. As a result, Homm landed on the FBI's "Most Wanted" list.

On May 29, 2015, the Funds filed a criminal complaint with the Swiss Attorney General against Devine. Devine was not given notice of the Swiss complaint.

The Funds then filed this action on June 1, 2015, alleging that Devine committed numerous acts of money laundering and other criminal offenses in violation of the federal RICO statute, the Florida RICO statute, and the Florida Civil Remedies for Civil Practices Act. The Funds also alleged that Devine was unjustly enriched, and that her conduct resulted in the creation of a constructive trust of the assets belonging to the funds.

As part of a temporary restraining order entered by the District Court in July 2015, Devine was required to produce documents identifying "all" of her assets from "anywhere in the world." Anticipating that this process would involve the release of personal financial information, Devine moved for a protective order to prevent the public disclosure of certain financial

information that the parties designated as "confidential." The parties negotiated the terms of the protective order before jointly submitting it to the District Court for approval. The proposed order provided that, "[a]t the conclusion of this litigation (including any appeals) all material designated Confidential pursuant to the terms of this Protective Order shall either be destroyed or returned to the designating Party, within sixty (60) days after the conclusion of the litigation." The proposed order also permitted the parties to disclose confidential documents pursuant to a request for information from federal, state, or international criminal authorities. The District Court adopted the parties' proposed protective order on July 30, 2015.

The parties then engaged in extensive discovery: the Funds produced 624,291 documents and designated 5,456 of those documents as "Confidential." For her part, Devine produced 14,441 documents and designated 8,808 of those documents as "Confidential." And after a few motions to dismiss, the Funds' case was ultimately pared down to a single unjust enrichment claim contained in their Second Amended Complaint.[2] Then, on February 14, 2018, the Funds voluntarily dismissed their case under Federal Rule of Civil Procedure 41(a)(1)(A)(i).

In April 2018, Devine, now aware of the Swiss criminal complaint the Funds filed against her, moved to modify the joint, stipulated protective order. In

[2] Devine did not file an answer or a motion for summary judgment in response to the Funds' Complaints.

essence, Devine sought to alter the protective order so that she could (1) use the Funds' confidential documents to "defend[] herself against [the Funds'] legal offensives in Switzerland and the United States," and (2) retain copies of the Funds' confidential documents. Devine claimed that the Funds' case in the District Court was little more than a scheme to "abuse[] the liberal discovery permitted under U.S. law" and funnel her confidential documents to the Swiss Attorney General, with whom the Funds had filed the private criminal complaint. And by negotiating the protective order without notifying her of the Swiss complaint, the Funds fraudulently induced her to agree to its terms. Modification of the protective order, Devine asserted, was simply a matter of "basic fairness."

The Funds responded that they were already in the process of complying with the protective order's destroy-or-return mandate, and Devine should not be permitted to "retroactively rewrite the terms of [the] protective order." The Funds also denied funneling documents to any government authority without the District Court's express permission.

A Magistrate Judge denied Devine's motion to modify the protective order, and Devine subsequently objected to the Magistrate's order. The District Court, on Devine's objections to the order, assumed jurisdiction over the proceedings but denied Devine her requested relief. The Court reasoned that Devine was not fraudulently induced to agree to the protective order because the Funds were under no duty to disclose the Swiss criminal complaint. Moreover, the Court

emphasized that Devine knew that she was under Swiss investigation long before she negotiated the protective order, so the nondisclosure of the Funds' private Swiss complaint was not a material omission.

Devine now appeals. The parties' briefing retreads many of the arguments made below, though neither party addresses the impact of the Funds' Rule 41(a)(1)(A)(i) voluntary dismissal on the District Court's jurisdiction over Devine's post-dismissal motion. Nevertheless, we conclude that the Funds' voluntary dismissal of the action stripped the District Court of jurisdiction to consider Devine's motion to modify the protective order, and, as a result, we vacate the District Court's order.

II.

We review questions regarding a district court's subject matter jurisdiction *de novo*. *United States v. Wilson*, 979 F.3d 889, 902 n.6 (11th Cir. 2020). "[P]arties cannot waive subject matter jurisdiction," *Scarfo v. Ginsberg*, 175 F.3d 957, 960 (11th Cir. 1999), and we are "obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking." *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999). Further, "[a]n appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S. Ct. 162, 165 (1934).

III.

Below, we begin with overviews of Federal Rule of Civil Procedure 41(a) and our case law interpreting that Rule. Then, we turn to their application to this appeal.

A.

Voluntary dismissal of an action is governed by Federal Rule of Civil Procedure 41(a). Pursuant to this rule, voluntary dismissal may occur with or without a court order:

> (1) *By the Plaintiff*.
>
> > (A) *Without a Court Order*. . . . [A] plaintiff may dismiss an action without a court order by filing:
> >
> > > (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
> > >
> > > (ii) a stipulation of dismissal signed by all parties who have appeared.
> >
> > (B) *Effect*. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

> (2) *By Court Order; Effect*. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

Fed. R. Civ. P. 41(a).

Relevant here is Rule 41(a)(1)(A)(i), which "means precisely what it says." *Pilot Freight Carriers, Inc. v. Int'l Bhd. of Teamsters*, 506 F.2d 914, 916 (5th Cir. 1975).[3] The Rule's text plainly grants a plaintiff the right to dismiss—without a court order—"an action" prior to a defendant serving "either an answer or a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(A). The dismissal is, barring a few exceptions, "without prejudice." Fed R. Civ P. 41(a)(1)(B).

This Court has made abundantly clear that a Rule 41(a)(1) voluntary dismissal disposes of the *entire* action, not just some of the plaintiff's claims. *See PTA-FLA, Inc. v. ZTE USA, Inc.*, 844 F.3d 1299, 1307 (11th Cir. 2016) ("Rule 41 'speaks of voluntary dismissal of

---

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

an action, not a claim.'" (quoting *State Treasurer of Michigan v. Barry*, 168 F.3d 8, 19 n.9 (11th Cir. 1999) (Cox, J., specially concurring) (internal quotation marks omitted)). We have further stated that a plaintiff's voluntary dismissal under Rule 41(a)(1)(A)(i) "is effective immediately upon [] filing," and thus no further court order is necessary to effectuate the dismissal. *Matthews v. Gaither*, 902 F.2d 877, 880 (11th Cir. 1990). It follows from these two propositions that, upon a plaintiff's notice of a Rule 41(a)(1)(A)(i) voluntary dismissal, the "action is no longer pending," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395, 110 S. Ct. 2447, 2455 (1990), and the district court is immediately deprived of jurisdiction over the merits of the case, *Anago Franchising, Inc. v. Shaz, LLC*, 677 F.3d 1272, 1279 (11th Cir. 2012) ("A district court loses all power over determinations of the merits of a case when it is voluntarily dismissed.").

The district court does retain jurisdiction, however, to consider a limited set of issues after the action is voluntarily dismissed. *Cooter & Gell*, 496 U.S. at 395, 110 S. Ct. at 2455. In *Cooter & Gell*, the United States Supreme Court considered a challenge to an order imposing sanctions pursuant to Federal Rule of Civil Procedure 11 for filing a frivolous complaint, entered after the plaintiff voluntarily dismissed the case under the predecessor to Rule 41(a)(1)(A)(i). *Id.* at 388–90, 110 S. Ct. at 2451–53. The Court noted that, although the plaintiff's voluntary dismissal disposed of the underlying action, the district court nevertheless retained jurisdiction to decide "collateral issues"—"independent

proceeding[s] supplemental to the original proceeding and not request[s] for a modification of the original decree." *Id.* at 395, 110 S. Ct. at 2455 (first alteration in original). Among the collateral issues the Supreme Court identified were: (1) the imposition of costs, (2) the imposition of attorney's fees, (3) the imposition of contempt sanctions, and (4) the imposition of Rule 11 sanctions. *Id.* at 395–96, 110 S. Ct. at 2455–56. The Court explained that, because determinations regarding costs, sanctions, and fees do "not signify a district court's assessment of the legal merits of the complaint," a voluntary dismissal does not operate to divest the district court of jurisdiction over those issues. *Id.* at 396–98, 110 S. Ct. 2456–57.

The Supreme Court's conclusion was consistent with the purposes of Rule 11 and Rule 41(a)(1), both of which "are aimed at curbing abuses of the judicial system." *Id.* at 397, 110 S. Ct. at 2457. Noting that a voluntary dismissal "does not eliminate [a] Rule 11 violation," the Court expressed concern that stripping jurisdiction from the district court over certain collateral issues would allow a litigant to "purge his violation of Rule 11 merely by taking a dismissal." *Id.* at 398, 110 S. Ct. at 2457. In turn, this would eliminate "all incentive [for attorneys] to stop, think and investigate more carefully before serving and filing papers." *Id.* (internal quotation mark omitted). Rule 41(a), the Court concluded, "does not codify any policy that the plaintiff's right to one free dismissal also secures the right to file baseless papers." *Id.* at 397–98, 110 S. Ct. at 2457.

Consistent with *Cooter & Gell*, this Circuit has permitted the post-voluntary-dismissal imposition of sanctions, *see Matthews*, 902 F.2d at 880–81 (imposing sanctions relating to a false *in forma pauperis* affidavit),[4] and motions for costs, *see Mathews v. Crosby*, 480 F.3d 1265, 1276–77 (11th Cir. 2007) (granting costs to the defendants who were voluntarily dismissed because they were prevailing parties under Rule 54(d)(1)); *cf. Sargeant v. Hall*, 951 F.3d 1280, 1287 n.4 (11th Cir. 2020) (discussing motion for costs pursuant to Federal Rule of Civil Procedure 41(d)).

We have also extended *Cooter & Gell* slightly beyond the categories of collateral issues (costs, fees, contempt sanctions, and Rule 11 sanctions) the Supreme Court identified. In *PTA-FLA, Inc. v. ZTE USA, Inc.*, we considered whether a voluntary dismissal stripped a district court of jurisdiction to consider a pre-dismissal motion to confirm an arbitral award. 844 F.3d 1299 (11th Cir. 2016). There, an arbitrator issued an award, the defendant moved to confirm the award, and the plaintiff then voluntarily dismissed its case pursuant to Rule 41(a)(1)(A)(i). *Id.* at 1303. Relying on *Cooter & Gell*, we concluded that the motion to confirm was a "collateral proceeding," and thus the district court

---

[4] Although *Matthews* predated the *Cooter & Gell* decision by a week, it relied on many of the same circuit court decisions and largely the same reasoning. *Compare Matthews*, 902 F.2d at 880 (citing *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603–04 (1st Cir. 1988); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (7th Cir. 1987); and *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir. 1987)), *with Cooter & Gell*, 496 U.S. at 395, 110 S. Ct. at 2455 (citing the same).

retained jurisdiction to consider the motion. *Id.* at 1308–09. Although we recognized that the plaintiff's voluntary dismissal disposed of the entire case, *id.* at 1307, we reasoned that the motion to confirm was collateral because it "did not seek a 'judgment on the merits of [the] action,' nor did it request a modification of the arbitrator's final decree." *Id.* at 1309 (alteration in original) (citation omitted) (quoting *Cooter & Gell*, 496 U.S. at 396, 110 S. Ct. at 2456). We likewise expressed concern that, had we stripped the district court of jurisdiction to consider the motion, the unconfirmed arbitral award would not be "protected against challenges in other courts." *Id.*

Reading Federal Rule of Civil Procedure 41(a), *Cooter & Gell*, and our case law together, it is clear that even when a voluntary dismissal disposes of an entire action, district courts retain jurisdiction to consider at least five different types of collateral issues: costs, fees, contempt sanctions, Rule 11 sanctions, and motions to confirm arbitral awards.

B.

Of course, the question in this case is whether a district court's post-voluntary-dismissal jurisdiction further extends to a motion to modify a protective order. We conclude it does not.

As an initial matter, a motion to modify a protective order does not fit neatly into the types of "collateral issues" the Supreme Court and this Court have identified. Rule 41(a)(1) was "designed to limit a

plaintiff's ability to dismiss an action," and the collateral issues over which a district court retains jurisdiction are tethered to that purpose. *Cooter & Gell*, 496 U.S. at 397, 110 S. Ct. at 2456. Motions for costs, fees, and sanctions each implicate "the power to enforce compliance with the rules and standards that keep the judiciary running smoothly." *Hyde v. Irish*, 962 F.3d 1306, 1309 (11th Cir. 2020). If we divested the district court of jurisdiction over those motions, an enterprising plaintiff could abuse the judicial system but nevertheless get off scot free by voluntarily dismissing its case under Rule 41(a)(1)(A)(i).[5] Likewise, if the district court did not have jurisdiction over a motion to confirm an arbitral award, a clever plaintiff could—after an unfavorable arbitral ruling—voluntarily dismiss its case, divest the district court of jurisdiction over the motion, and challenge the unconfirmed award in another court. *See PTA-FLA*, 844 F.3d at 1309 ("ZTE USA merely sought confirmation of the arbitral award—exactly as it was issued by the arbitrator—so that the award would be finalized and protected against challenges in other courts.").

A motion to modify a joint, stipulated protective order does not present the same concerns.[6] Here, the

---

[5] As the Supreme Court put it, "violation of Rule 11 is *complete* when the paper is filed," and thus "a voluntary dismissal does not expunge the Rule 11 violation." *Cooter & Gell*, 496 U.S. at 395, 110 S. Ct. at 2455 (emphasis added) (quotation marks omitted).

[6] The dissent insists that we should conduct our "collateral issue" analysis under "the two factors we set out in" *Hyde v. Irish*, 962 F.3d 1306 (11th Cir. 2020)—that is, whether considering the

parties negotiated the terms of the protective order more than five years ago and submitted the order for the District Court's approval. Devine knew at the time the order was negotiated that she was under investigation by Swiss authorities, and she could have pushed for a stipulation allowing her to use the Funds' confidential documents in her Swiss defense. Simply put, by voluntarily dismissing their case, the Funds did not somehow abuse the judicial process,[7] manipulate the protective order, or place Devine at any strategic disadvantage. To the contrary, the Fund's Rule

---

motion to modify is both "constitutionally permissible" and "practically important." Dissenting Op. at 3–5. *Hyde* very loosely pulls these two "factors" from *Willy v. Coastal Corp.*, 503 U.S. 131, 112 S. Ct. 1076 (1992), which in turn relies on *Cooter & Gell*. But neither *Willy* nor *Cooter & Gell* state that determining whether an issue is collateral hinges on any two-step framework, nor does *Hyde* definitively state that we must always analyze "constitutional permissibility" and "practical importance" to decide the issue. *See Hyde*, 962 F.3d at 1309. Thus, it is unclear that we are required to walk through the two factors.

But assuming that we must follow *Hyde*'s analysis, we would still conclude that a motion to modify a protective order is not a "collateral issue." For the reasons described on pages 19 through 23 of this opinion, permitting post-voluntary-dismissal consideration of a motion to modify a protective order does not curb abuses of the judicial system—the policy behind Rule 41(a)(1)—and thus it is not practically important for the district court to hear the motion. *See Cooter & Gell*, 496 U.S. at 397, 110 S. Ct. at 2457.

[7] Devine contends that the Funds "funneled" her confidential documents to Swiss authorities during this case. The Funds deny that they funneled documents to any government authority without the District Court's express permission, and we see no evidence to support Devine's contention.

41(a)(1)(A)(i) dismissal frees up Devine's resources to fight legal battles on other fronts.

The District Court's lack of jurisdiction to consider the motion to modify does not harm the Funds, either. When denying Devine's efforts to modify the protective order, the District Court ordered Devine to comply with the terms of the protective order—that is, destroy or return the Funds' confidential documents—and ordered the Funds to retain copies of their documents "until the conclusion of the Swiss proceedings so that those materials will be available should the Swiss seek to obtain them." As a result, the Funds' confidential documents are no longer in Devine's possession and are instead being held by the clerk of court. This alleviates any concern that, by divesting the District Court of jurisdiction and vacating the Court's order, we would somehow allow Devine to simply run off with the Funds' confidential documents to defend herself in the Swiss proceedings.

But what if the District Court had correctly concluded, prior to enforcing the destroy-or-return requirement, that it no longer had jurisdiction over the matter? In that case, it is possible that Devine—still in possession of the Funds' confidential documents—could have used the documents she received pursuant to the protective order for her Swiss defense. There are a few solutions to this problem.

First, the Funds could have dismissed under Federal Rule of Civil Procedure 41(a)(2), rather than Rule 41(a)(1). Rule 41(a)(2) provides that "an action may be

dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). Pursuant to that Rule, "the court has discretion to dismiss the case through an order and to specify the terms of that dismissal." *Anago Franchising*, 677 F.3d at 1276. It is clear, then, that the District Court could have conditioned a Rule 41(a)(2) voluntary dismissal on the parties' compliance with the protective order's destroy-or-return requirement.

Second, in the event a party attempts to use a voluntary dismissal as an opportunity to violate a protective order—here, the hypothetical in which Devine runs off with the Funds' documents following a Rule 41(a)(1)(A)(i) dismissal—the other party still has a remedy in the district court in which the protective order was filed. To state the obvious, protective orders are court orders, and district courts have the inherent power to impose sanctions for failure to comply with their orders. *See Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1209 (11th Cir. 1985) (stating that sanctions pursuant to court's inherent power are appropriate where attorney advises client to disregard a court order). Willful violation of a court order also raises the possibility of contempt sanctions. *See, e.g.*, *In re Se. Banking Corp.*, 204 F.3d 1322, 1332 (11th Cir. 2000) (stating that contempt sanctions are appropriate where an order with clear and specific terms is willfully violated). And as discussed above, both species[8] of

[8] As a reminder, "[s]anctions imposed for contempt of court are not . . . the same thing as sanctions imposed under the court's inherent power to police against bad faith conduct before it.

sanctions can be considered when a district court lacks jurisdiction over the underlying case. *See Cooter & Gell*, 496 U.S. at 396, 110 S. Ct. at 2456 (discussing contempt sanctions); *Hyde*, 962 F.3d at 1310 (stating that sanctions can be considered pursuant to district court's inherent authority even when the court lacks subject matter jurisdiction from the outset). So, even if a district court is divested of jurisdiction over *some* issues following a Rule 41(a)(1)(A)(i) voluntary dismissal, litigants will not be free to run off and violate protective orders without facing the threat of sanctions.

Finally, in the context of a joint, stipulated protective order, there may be a third solution. For the purposes of enforcement, we treat a stipulated order as though it is a contract. *See United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 238, 95 S. Ct. 926, 935 (1975) ("[A] consent decree or order is to be construed for enforcement purposes basically as a contract."). Consequently, if a party wishes to enforce the terms of a stipulated protective order following a Rule 41(a)(1)(A)(i) dismissal in federal court, the party can take the stipulated protective order to a state court[9] of general jurisdiction and file a run-of-the-mill breach of contract claim.

* * *

Different rules apply to each." *Sciarretta v. Lincoln Nat'l. Life Ins. Co.*, 778 F.3d 1205, 1213 n.7 (11th Cir. 2015).

[9] Assuming the parties are of diverse citizenship and the amount in controversy exceeds $75,000, this hypothetical breach of contract claim could also be filed in federal court. *See* 28 U.S.C. § 1332(a).

In sum, the law provides that a district court has jurisdiction to consider only a small set of "collateral issues" following a plaintiff's voluntary dismissal of its case. Those issues are, by this Court's read, narrowly tailored to prevent "abuses of the judicial system" that would otherwise "burden[] courts and individuals alike with needless expense and delay." *Cooter & Gell*, 496 U.S. at 397–98, 110 S. Ct. at 2457. Motions to modify protective orders do not serve those same ends, and thus we decline to expand the set of "collateral issues" to cover them.[10]

---

[10] The dissent states that our conclusion "puts this Court out of step with our sister circuits" because "[e]very other circuit to consider this issue has approved of district courts exercising jurisdiction over motions like these, even after the underlying case had been resolved." Dissenting Op. at 4. But none of the cases the dissent cites for that proposition involve a Rule 41(a)(1)(A)(i) dismissal—the issue in *this case*. *See Poliquin v. Garden Way, Inc.*, 989 F.2d 527 (1st Cir. 1993) (case settled); *Gambale v. Deutsche Bank AG*, 377 F.3d 133 (2d Cir. 2004) (case settled and then dismissed pursuant to a Rule 41(a)(1)(A)(ii) stipulated dismissal); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) (case settled); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990) (case settled); *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998) (motion for permissive intervention into settled action "for the limited purpose of obtaining access to documents protected by a confidentiality order"). Instead, they discuss a district court's involvement after the parties have settled the case. *See, e.g.*, *Gambale*, 377 F.3d at 139–42 (analyzing a stipulated dismissal pursuant to settlement). This is an important distinction, as district courts are often required to approve of—and may retain jurisdiction to enforce—settlement agreements.

IV.

Because the Funds' Federal Rule of Civil Procedure 41(a)(1)(A)(i) voluntary dismissal deprived the District Court of jurisdiction over Devine's motion to modify the protective order, we vacate the District Court's order denying it.

VACATED.

GRANT, Circuit Judge, dissenting:

I agree that Susan Devine cannot prevail in her attempt to modify the protective order. But while the majority reaches that result by concluding that the district court lacked jurisdiction over her motion, I think that a motion to modify a protective order is exactly the sort of collateral issue that a district court may consider after voluntary dismissal. Because I believe the district court had jurisdiction over Devine's motion, I respectfully dissent.

I.

As the majority explains, a motion to dismiss under Federal Rule of Civil Procedure 41(a)(1) "strips the court of jurisdiction and leaves it without power to make legal determinations on the merits." *Anago Franchising, Inc. v. Shaz, LLC*, 677 F.3d 1272, 1275 (11th Cir. 2012). So when the hedge funds voluntarily dismissed their suit against Devine in February 2018, the district court lost jurisdiction to decide whether Devine

was liable under the theories in their complaint—money laundering, unjust enrichment, RICO, and the like.

But even though the district court lost jurisdiction to consider the merits of this case, it retained the power to "decide certain 'collateral' issues related to the case." *Hyde v. Irish*, 962 F.3d 1306, 1309 (11th Cir. 2020) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990)). The Supreme Court recognized that principle in *Cooter & Gell v. Hartmarx Corp.*, when it found post-dismissal jurisdiction to impose Rule 11 sanctions. *See* 496 U.S. at 395. And it reaffirmed that holding two years later in *Willy v. Coastal Corp.*, 503 U.S. 131, 137–38 (1992). In the years since, this Circuit has applied those two cases and found continuing jurisdiction over a variety of issues. *See, e.g.*, *Hyde*, 962 F.3d at 1310 (motion for 28 U.S.C. § 1927 sanctions); *PTA-FLA, Inc. v. ZTE USA, Inc.*, 844 F.3d 1299, 1308–09 (11th Cir. 2016) (motion to confirm an arbitral award); *United States v. Straub*, 508 F.3d 1003, 1008 (11th Cir. 2007) (charge of criminal contempt).

To decide whether a district court has continuing jurisdiction over an issue, we consider two criteria. First, we ask whether exercising jurisdiction over the issue is "constitutionally permissible." *Hyde*, 962 F.3d at 1309. And second, we ask whether it is "practically important." *Id.* Starting with "constitutionally permissible," we have said that deciding the issue must "not signify a district court's assessment" of the legal merits of the case. *Id.* (quoting *Willy*, 503 U.S. at 138). That's because doing so would mean that a court was

considering a case or controversy, even when it lacked jurisdiction to do so. *Id.* But when a district court considers questions that are completely separate from the merits, it does not violate that constitutional limit.

As for practical importance, a key marker has been whether the ability (or inability) to consider a matter would have a serious impact outside the contours of a particular case. *Id.* at 1309–10. The "interest in having rules of procedure obeyed," for example, "outlives the merits of a case." *Id.* (quoting *Willy*, 503 U.S. at 139); *see also Straub*, 508 F.3d at 1009 ("The interest of the court in imposing punitive sanctions under Rule 11 does not disappear if the court lacks subject matter jurisdiction, because the court retains an interest in parties' obedience to its authority."). This point recognizes the institutional interests of courts, which cannot be left to the mercy of enterprising litigants.

A post-dismissal motion to modify a protective order satisfies both factors; it is both "constitutionally permissible" and "practically important" for district courts to hear that kind of motion. *First*, it is "constitutionally permissible" because these motions typically present only collateral issues—that is, they have nothing to do with the merits. *Hyde*, 962 F.3d at 1309. The parties' arguments here illustrate that point. In their extensive briefing, neither party relies—at all—on whether Devine is liable under the allegations in the Funds' complaint. So the district court's power to consider a motion like this one does not involve it in the substantive issues of the case.

Second, practical importance. It goes without saying that parties share sensitive information in reliance on both the protective order and the court's power to modify that order as necessary. The federal courts' interest in maintaining control over discovery materials produced under protective orders extends far beyond any single action. Similarly, the need to foster confidence that these orders will be appropriately enforced or modified "does not rise or fall with any particular case." *Id.* And though district courts have—at least—an indirect power to enforce protective orders after dismissal, that power must go hand in hand with the power to modify them. After all, the scope of a protective order may lead to unanticipated consequences years after it was negotiated or entered. Likewise, the district court may need to close a loophole that escaped its attention at the time the order was entered. Modification, then, can sometimes be necessary to facilitate an open discovery process and to serve the interests of confidentiality or fairness. Given all that, motions to modify protective orders fit neatly into the category of collateral issues that qualify for continuing jurisdiction under our analysis in *Hyde*.

The majority's contrary conclusion puts this Court out of step with our sister circuits. Every other circuit to consider this issue has approved of district courts exercising jurisdiction over motions like these, even after the underlying case had been resolved. Their reasoning has largely focused on a district court's inherent powers over this sort of continuing order—and those inherent powers are yet another reason we should

tread carefully. The First Circuit explained that "a protective order, like any ongoing injunction, is always subject to the inherent power of the district court to relax or terminate the order, *even after judgment*." *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993) (emphasis added). Along similar lines, the Second Circuit found that a district court may modify a protective order even after a Rule 41 stipulation of dismissal was filed. *See Gambale v. Deutsche Bank AG*, 377 F.3d 133, 139–42 (2d Cir. 2004). The Third, Tenth, and D.C. Circuits have also found continuing jurisdiction to modify protective orders. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 780 (3d Cir. 1994) (third parties can intervene to modify a protective order even after the underlying dispute has been settled); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (1 0th Cir. 1990) ("As long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed."); *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998) (same).

The majority's analysis does not persuade me to break with the other circuits. To begin, I am not sure that the majority considers the two factors we set out in *Hyde*. And to the extent that it does, it condenses the "practically important" question down to whether divesting the district court of jurisdiction would allow opportunistic litigants to "abuse the judicial process." Maj. Op. at 19. That is more limited than what I read our precedents to support. But even if "practically important" were completely coextensive with "allows

abuse of the judicial process," motions to modify protective orders would fit within that category. After all, the "enterprising plaintiff" who would Rule-41 his way out of sanctions could use the same move to quickly (and, apparently, permanently) lock in an advantageous protective order—perhaps one that allowed him to misuse documents in ways that were not obvious when the order was first issued.

Additionally, most of the majority's analysis centers on the facts of this case, rather than on whether exercising jurisdiction over motions to modify protective orders—as a general matter—satisfies *Hyde*'s two-factor framework. But the Supreme Court in *Cooter & Gell* did not focus on whether Cooter & Gell deserved Rule 11 sanctions. And in *Hyde*, we did not base our analysis on whether § 1927 sanctions were merited for George Hyde. The reasoning in those cases instead rested on whether exercising jurisdiction over such motions was constitutionally permissible and practically important as a general matter. That is the mode of analysis that we should undertake here.

The majority itself recognizes that its holding presents practical problems. Maj Op. at 20. For example, it observes that its holding could open the door for Devine to use the documents she obtained under the protective order "for her Swiss defense" in violation of the protective order. Maj. Op. at 20. It offers several potential solutions, ranging from a different type of dismissal to state-court enforcement of the protective order. But those workarounds do not remedy the defects in its holding. *Id.* For starters, a jurisdictional

rule that both ossifies protective orders and renders them only marginally enforceable—even while the parties still maintain copies of each other's documents—is in serious conflict with the judiciary's interest in maintaining a robust and fair discovery process in which litigants can rely on the court's supervision. But even on their own terms, the majority's case-by-case solutions offer only one-sided relief; they fail to protect the party that did *not* voluntarily dismiss the case.

For instance, the majority says that the dismissing party could choose to obtain an order of dismissal under Rule 41(a)(2), which allows the district court to retain control over its protective order. But this suggestion only aids the dismissing party—and it effectively gives that party complete control over whether the district court can modify its protective order, or perhaps even whether it can enforce it. A party seeking to lock in an advantageous protective order through dismissal would not take that route. Far from foreclosing abusive behavior, then, this proposed solution seems to *invite* it. And though a party that wishes to enforce a protective order may be able to do so by seeking contempt sanctions, today's holding leaves a party who discovers unanticipated consequences of the court's order but who is also unwilling to defy that order without any recourse.

The majority also points out that a party could enforce a protective order in state court as a contract. Maj. Op. at 22. That solution is incomplete at best. As the majority concedes, protective orders do not always represent an agreement between the parties—which

means that the contract-enforcement solution will not always be available. But there is a larger issue: whatever else *state* courts can do, they cannot modify a *federal* protective order, no matter how necessary it becomes. So whatever limited ability litigants have to enforce a protective order under the majority's holding, they are completely barred from seeking modification.

In sum, a motion to modify a protective order is a collateral issue. It also implicates judicial interests apart from a single case. That means retaining jurisdiction over these orders after dismissal is both "constitutionally permissible" and "practically important." *Hyde*, 962 F.3d at 1309. I would hold that the district court has jurisdiction to consider Devine's request to modify.

II.

While I disagree with the majority's jurisdictional holding, I agree that Devine should not be able to modify the protective order at this point. Devine needed to show the district court "good cause" to modify the protective order. *Carrizosa v. Chiquita Brands Int'l, Inc.*, 965 F.3d 1238, 1250 (11th Cir. 2020). And we review the district court's decision on that issue for an abuse of discretion. *Id.* at 1249. After all, "[d]istrict courts are in a superior position to decide whether to enter or modify protective orders, and it is well established that 'the decision as to access is one best left to the sound discretion of the trial court.'" *FTC v. Abb Vie Prods.*

LLC, 713 F.3d 54, 61 (11th Cir. 2013) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1978)).

To show that the district court abused its discretion when it denied her motion to modify, Devine raises her need for the Funds' documents, her alleged ignorance of the Swiss authorities' involvement in this case, and the classic umbrella of "equitable arguments." But the district court didn't ignore these arguments—it just did not think they added up to good cause for modification. I see no abuse of discretion in that decision.

Devine also asserts that she was fraudulently induced to enter the protective order, but this argument fares no better.[1] As the majority notes, Devine knew that she was under investigation by the Swiss authorities when she negotiated the protective order; she could have asked then for the relief she seeks now. And in any event, I see no evidence that the Funds made any false statements or otherwise misled Devine. She has not shown an abuse of discretion on this point either.

On these facts, it was always going to be difficult for Devine to show that the district court abused its considerable discretion. If we had reached the question, I would have found that Devine failed to do so.

---

[1] It is not entirely clear how Devine's fraudulent inducement claim fits into our good cause framework. But because she has not shown fraudulent inducement anyway, I leave that issue for another day.

* * *

It is important for courts to act with restraint when it comes to subject matter jurisdiction. We are courts of limited jurisdiction, and I admire the majority's commitment to that principle. But I do not believe our jurisdiction is limited in the way the majority suggests. I respectfully dissent.

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. SUSAN ELAINE DEVINE, Defendant.	Case No: 2:15-cv-328-FtM-29MRM

OPINION AND ORDER

(Filed Jan. 10, 2020)

This matter comes before the Court on defendant's Objection to Order Denying Defendant's Motion for

Modification of Stipulation and Protective Order (Doc. #744) filed on September 10, 2018. Defendant seeks to vacate an order of the magistrate judge, or to recommit the matter to the magistrate judge for further consideration. Plaintiffs filed a Response (Doc. #749) in opposition on September 27, 2018.

With the permission of the Court (Doc. #758), on February 15, 2019, defendant was allowed to amend her Objection by withdrawing one of the requested alternative forms of relief. (Doc. #759.) With the permission of the Court (Doc. #766), on August 19, 2019, defendant filed a Reply (Doc. #767) to plaintiffs' Response. With the permission of the Court (Doc. #769), plaintiff then filed a Sur-Reply (Doc. #773) on September 9, 2019. With the permission of the Court (Doc. #789), on November 18, 2019, defendant filed a Supplement (Doc. #790) to her Objection.

On December 5, 2019, defendant filed a Motion for Leave to Submit Confidential Materials for *In Camera* Review (Doc. #791) to explain why plaintiffs' Confidential documents are relevant and material to legal proceedings in Switzerland, a keystone of defendant's Objection. On December 10, 2019, defendant filed a Supplement (Doc. # 792) to her motion for leave to file *in camera* materials.[1] Plaintiffs' Opposition (Doc. #793) to the motion for leave was filed on December 19, 2019.

For the reasons set forth below, defendant's Objection (Doc. #744) is overruled and the Motion for Leave

[1] As defendant notes, with understatement, there has been "[s]ignificant briefing" of the issues. (Doc. #790, p. 3.)

to Submit Confidential Materials for *In Camera* Review (Doc. #791) is denied. After *de novo* consideration of the new information submitted by defendant, her requests for relief are denied.

I.

A far-reaching, 144-page Complaint[2] (Doc. #2) was filed against defendant Susan Elaine Devine (defendant or Devine) on June 1, 2015, and a Temporary Restraining Order (TRO) (Doc. #10) freezing bank accounts and real property was entered on July 1, 2015. Defendant learned of the Complaint and TRO on July 9, 2015 (Doc. #744, p. 6), and was served with both on July 14, 2015. (Doc. #17.) Two law firms entered Notices of Appearance (Docs. #19, #20) on defendant's behalf the next day.

On July 17, 2015, defendant, through counsel, filed a Motion for Entry of a Protective Order (Doc. #26) regarding discovery matters. On July 24, 2015, counsel for the respective parties filed a negotiated Stipulation and [Proposed] Protective Order. (Doc. #42.) In a July 30, 2015 Order (Doc. #63), the Court granted the Motion for Entry of a Protective Order (Doc. #26) and adopted the Stipulation and Proposed Protective Order (Doc. #42). The Court made the following findings:

> Based upon the pleadings and submissions of the parties, the Court finds that: (1) this case involves the disclosure of confidential

[2] See the Court's Opinion and Order (Doc. #10, pp. 1-49) for a summary of the Complaint allegations.

> financial information; (2) a protective order is needed to expedite the flow of discovery material, preserve the integrity of truly confidential information, promote the prompt resolution of disputes over confidentiality, and facilitate the preservation of material worthy of protection; (3) an "umbrella" protective order is necessary because a document-by-document review of discovery materials in such a case is not feasible if the case is to proceed in an orderly, timely manner; and (4) much of the discovery materials which will be relevant to issues raised in this case will be confidential in nature and not otherwise available to anyone other than the producing party. The sensitive nature of such information requires a protective order to adequately protect the legitimate interests of the party producing the information.
>
> The Court therefore finds that good cause has been shown for the entry of a protective order and that the order to be entered strikes the proper balance between the legitimate needs of the parties and the need for confidentiality as well as the need for disclosure to nonparties.

(Doc. #63, pp. 2-3.) The Stipulation and Protective Order (Doc. #64) was docketed on July 30, 2015. Among other things, this Protective Order allowed the parties to label certain material as "Confidential" and restricted the use, disclosure, and disposal of such Confidential material. The parties exchanged discovery

materials pursuant to this Protective Order for the next two and one-half years of litigation.

The TRO was extended at the request of the parties (Doc. #67), and the Court thereafter granted the parties' joint request to consolidate the preliminary injunction hearing with the trial of the merits. (Doc. #83.) The TRO was modified on multiple occasions at defendant's request (Docs. ## 68, 76, 230, 271, 275, 333, 445, 556), but defendant never sought the modifications currently requested. Indeed, defendant invoked the provisions of the Protective Order when she learned on February 9, 2016, that plaintiffs intended to provide certain discovery materials to a Swiss prosecutor. (Doc. #248.) Defendant's motion to prevent such disclosure was ultimately denied by the Magistrate Judge, who found that such disclosure was permitted by the Protective Order. (Doc. #502.) Defendant's Objection to the Magistrate Judge's Order (Doc. #535) was overruled. On April 19, 2016, the Court denied defendant's motion to dissolve the TRO. (Doc. #368.)

On January 5, 2016, the Court dismissed the Complaint as a shotgun pleading, with leave to file an amended complaint. (Doc. #183.) An Amended Complaint (Doc. #196) was filed on January 14, 2016. On February 8, 2017, the Court entered an Opinion and Order (Doc. #521) dismissing five of the six counts in the Amended Complaint, with leave to file another amended complaint. Plaintiffs chose to forego further amendment, and instead proceeded on their sole remaining claim of unjust enrichment. (Doc. #527.) As directed by the Court (Doc. #559), on May 15, 2017,

plaintiffs filed a Second Amended Complaint (Doc. #560), which contained that single count.

On July 25, 2017, the Court dissolved the TRO/preliminary injunction, finding it was not supported by the remaining unjust enrichment claim. (Doc. #575.) Plaintiffs filed an interlocutory appeal, but on February 14, 2018, plaintiffs voluntarily dismissed the remainder of the case. (Doc. #680.)An order of dismissal was docketed on February 21, 2018. (Doc. #682.)

The conclusion of the litigation triggered a provision in the Protective Order requiring each party to return or destroy the other parties' Confidential discovery documents. (Doc. #64, ¶ 18.) On April 20, 2018, a few days before the return-or-destroy obligation was to be completed, defendant sought to modify the Protective Order. (Doc. #686.) Defendant sought modifications which would allow her to use 'Confidential' materials provided by plaintiffs to defend herself against what she characterizes as plaintiffs' continuing efforts to persuade the Swiss government to commence legal proceedings against her and seize certain of her assets. (Doc. #686, pp. 6, 8.) The requested modifications were opposed by plaintiffs. (Doc. #690.)

On August 27, 2018, the Magistrate Judge issued an Order (Doc. #743) denying defendant's request to modify the Protective Order in all respects except one.[3]

---

[3] The Magistrate Judge permitted the parties to retain copies of all discovery material designated as "Confidential" until 60 days after the Court resolved the then-pending Motion for Award of Costs and Fees, and to thereafter comply with the

Defendant has filed an Objection (Doc. #744) to this Order, which is currently before the Court.

II.

In brief, defendant asserts that on May 29, 2015, plaintiffs filed a private criminal complaint against her with the Office of the Attorney General in Switzerland (OAG). Defendant further asserts that plaintiffs wrongfully concealed the existence of the private criminal complaint while negotiating the terms of the Protective Order in this case. Defendant states that during the negotiations she was unaware that a private criminal complaint had been filed, and did not learn of its existence until February 2016. (Doc. #744, pp. 4-6.) Defendant asserts that plaintiffs exploited the Protective Order to funnel evidence obtained from defendant to the Swiss government, and that she needs to use the Confidential materials received from plaintiffs to defend herself in Switzerland. Defendant asserts that the Magistrate Judge erred in refusing her the right to do so.

III.

For material to be designated as "Confidential," the Protective Order required "that the producing Party reasonably and in good faith believes [the Discovery Material] contains information that is protected

---

destroy-or-return requirement. Since that motion has been resolved, the Magistrate Judge has extended compliance until twenty days after resolution of the Objection. (Doc. #780.)

from disclosure by statute or that should be protected from disclosure as confidential personal information, financial information, trade secrets, personnel records, or commercial information." (Doc. #64. ¶4.) With certain specific exceptions, "Confidential" materials "shall not be used or disclosed . . . for any purposes whatsoever other than preparing for and conducting the litigation in this lawsuit (including any appeals)." (Id., ¶¶8-9.) One of the disclosure exceptions was set forth in Paragraph 14, which allowed disclosure of Confidential discovery material pursuant to a subpoena, court order, or any other form of legal process. Written notice to the opposing party was required prior to the disclosure pursuant to the legal process. (Id., ¶ 14.) Defendant's requested modifications would allow use and disclosure of the Confidential material for purposes other than preparing for and conducting the current litigation (which is now concluded); allow voluntary disclosure of Confidential material to the Swiss government in the absence of a subpoena, court order, or other legal process; and allow such disclosure without prior notice to plaintiffs.

Paragraph 18 provided that Confidential material must either be destroyed or returned within sixty days of the conclusion of the litigation. The requested modification would allow defendant to retain the Confidential documents until the resolution of investigations

and other legal proceedings involving her or her assets in Switzerland. (Doc. #743, p. 2.)[4]

With the one exception noted above, the Magistrate Judge rejected the proposed modifications. The Magistrate Judge found the Objection was not appropriate or warranted for at least four reasons: (1) Plaintiffs had properly relied upon the protections of the Protective Order, and modification would unfairly prejudice them, as well as threaten the integrity of the discovery process and the confidence of litigants in the reliability of such stipulated protective orders; (2) defendant's allegations of fraud in the inducement were without merit and lacked credibility because (a) defendant had not shown any false statement of material fact made by plaintiffs, (b) defendant had not shown that plaintiffs owed any duty to defendant to disclose their pursuit of criminal proceedings in Switzerland when negotiating entry of the Protective Order, and (c) the precise nature of the criminal proceedings in Switzerland was of questionable materiality to the fraudulent inducement determination; (3) defendant's proposed modifications provided no real or meaningful time limit for compliance with the destroy-or-return obligation; and (4) defendant's asserted equitable reason – her inability to obtain the same documents or testimony in other proceedings – was "wholly unavailing."

---

[4] Defendant has amended her Objection to delete reference to a matter which had been pending in the Central District of California. (Docs. ## 756, 758, 759.)

IV.

One of the few things the parties agree upon is the standard of review in this matter. (Doc. #744, pp. 9-10; Doc. #749, p. 2.) Because the Order of the Magistrate Judge was not a dispositive order, the Court reviews the order to determine whether it is "clearly erroneous or contrary to law." 28 U.S.C. § 636 (b) (1) (A); Fed. R. Civ. P. 72(a); Jordan v. Comm'r, Mississippi Dep't of Corr., 908 F.3d 1259, 1263 (11th Cir. 2018). The Court declines to recommit the matter to the Magistrate Judge for consideration of the events which transpired after his Order, but will give *de novo* consideration to the requested modifications in light of the information not previously presented to the Magistrate Judge.

Because the Court found good cause to enter the Protective Order (Doc. #63, pp. 2-3), defendant bears the burden of showing good cause to modify it. F.T.C. v. AbbVie Products LLC, 713 F.3d 54, 66 (11th Cir. 2013). Whether to modify a protective order is left to the sound discretion of the trial court. Id. at 61. "A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous," or "when it misconstrues its proper role, ignores or misunderstands the relevant evidence, and bases its decision upon considerations having little factual support." Id. (citations omitted).

A. Reliance By And Prejudice To Plaintiffs

The Magistrate Judge found that plaintiffs had properly relied upon the protections of the Protective Order and that the modifications sought by defendant would unfairly prejudice them. The Magistrate Judge also found that the proposed modifications would threaten the integrity of the discovery process and the confidence of litigants in the reliability of such stipulated protective orders.

Defendant does not challenge these findings, and they are clearly supported by the record. The default position in a civil case is that a party may use any evidence she has lawfully obtained to prosecute or defend any lawsuit.

> As a general rule, in United States litigation, to help prosecute or defend their lawsuits, parties may use any evidence they lawfully possess. If, for example, a plaintiff obtains documents in discovery from a defendant in one case, nothing precludes her from using that evidence in a wholly separate lawsuit against the same defendant or a different party, even though she would not have had those documents to use in the second case had she not lawfully received them as discovery in the first case. The law does not require her to rediscover the documents in the second case. Nor must she apply to the court in either lawsuit before being able to, say, draft a complaint in the second case based on information contained in the documents discovered in the first case. This is so even though no rule or law

> expressly authorizes a party to use, in furtherance of litigation, evidence that it lawfully possesses, whether as a result of earlier litigation or other circumstances.
>
> Similarly, if a party lawfully possesses evidence that he would not be able to procure through discovery because, for example, the opposing party no longer had the records in its possession, nothing prevents him from using that evidence to further his lawsuit.

Glock v. Glock, Inc., 797 F.3d 1002, 1007–08 (11th Cir. 2015) (footnote omitted). But here the parties, through counsel, negotiated a Protective Order which lawfully changed these ground rules, and then exchanged discovery pursuant to the Protective Order for over two years. This discovery included material which was confidential, and not easily (if at all) available to the opposing party. Plaintiffs (and defendant) clearly relied on the provisions of the Protective Order, and to change the rules after the case has concluded would be fundamentally unfair to plaintiffs. More generally, it would give all litigants pause in adopting protective orders in the future.

While plaintiffs' justifiable reliance and undue prejudice weigh heavily against allowing the requested modifications, a protective order may be modified upon a showing of good cause. There may be circumstances that justify modifications to a protective order despite such justifiable reliance and prejudice. For the reasons set forth below, the Court finds that this case does not contain such circumstances.

B. Fraud in the Inducement

The Magistrate Judge found that defendant's allegation of fraud in the inducement was without merit and lacked credibility. The Court agrees.

(1) False Statement

The Magistrate Judge first found that defendant had not shown that plaintiffs made any false statement of material fact. Defendant does not object to this finding, and has not identified any material false statement made by plaintiffs during the negotiation of the Protective Order.

(2) Omission

What defendant does argue, however, is that plaintiffs fraudulently induced her to agree to the Protective Order by concealing the fact that they had filed a private criminal complaint against her in Switzerland just weeks before the negotiations, and were actively seeking her indictment in Switzerland. Defendant also asserts that plaintiffs made changes to the draft version of the protective order, which they knew (but which defendant did not know) would be of assistance in providing information to the Swiss government.[5] Defendant argues that this omission mandated a

[5] The Court, as did the Magistrate Judge, takes as a given defendant's assertions that she did not know about the private criminal complaint filed in Switzerland at the time the Protective Order was negotiated.

finding of fraudulent inducement, and that the Magistrate Judge's finding to the contrary was clear error and an abuse of discretion. The Court disagrees.

As the Magistrate Judge correctly stated, defendant has never provided any basis to find that plaintiffs owed defendant any type of duty of disclosure while negotiating the Protective Order. The Court concludes there was no such duty in this case.

When the Protective Order was being negotiated, defendant knew that in 2009 the Swiss government had opened a criminal proceeding against her former husband and others involving allegations of wide-scale fraud; in 2012, defendant was identified by the Swiss government as a "third party" in the criminal investigation, not a target; and despite her non-target status, in 2012, some of defendant's assets were restrained by the Swiss government as a result of this criminal proceeding. Additionally, plaintiffs were defendant's known adversary in a far-reaching civil action which had already resulted in a TRO which impacted defendant's assets in Switzerland, among other places. Defendant could hardly have been in the dark about plaintiffs' belief she was involved in criminal activity. The very first numbered-paragraph of the original Complaint states:

> Newly available information demonstrates that since at least 2006 and continuing to this day (the "Relevant Period"), Defendant Susan Elaine Devine ("Devine"), a longtime resident of Naples, Florida, has been engaged in a criminal enterprise with her notorious former

> husband and father of her two children, Florian Wilhelm Jürgen Homm ("Homm"), knowingly concealing, transferring, and using for her own benefit tens of millions of dollars fraudulently taken from the Plaintiff Funds.

(Doc. #2, ¶1.) Plaintiffs accused defendant of directing, controlling and participating in a money laundering enterprise from Naples, Florida. (Id., ¶3.) Plaintiffs alleged that "[u]ntil recently, Devine successfully concealed her criminal activities from the[m]," and made reference to documents provided from the Swiss criminal investigation. (Id., ¶¶ 5, 26-27.) Plaintiffs stated that a May 20, 2015 Swiss indictment of Urs Meisterhans "details certain aspects of Devine's involvement in the Money Laundering Enterprise. . . ." (Id., ¶6.)

The Court concludes that plaintiffs were under no duty to disclose to defendant that two days prior to the filing of the Complaint in this case they had filed a private criminal complaint against defendant in Switzerland.

(3) Materiality

The Magistrate Judge also was not clearly erroneous in concluding that the materiality of the omission was "highly questionable." The Court accepts, for purposes of this motion, defendant's description of the legal proceedings in Switzerland and their effect. But the precise nature of the criminal proceedings in Switzerland was not material to the issue of whether the Protective Order should be modified. Whatever the

precise legal characterization in Switzerland, defendant's conduct has been under investigation by the Swiss since at least 2012 when her property was frozen. While there have been recent legal developments and maneuvering in Switzerland, the impact on defendant has remained basically the same: She has not been charged with any crime in Switzerland but is still being investigated. The Court concludes that plaintiffs' filing of the private criminal complaint with the Swiss Attorney General two days before filing the Complaint in this case was not material to the negotiating of the Protective Order.

Because there was no false statement by plaintiffs, no duty to disclose, and no materiality to the omission, the Court finds that the findings of the Magistrate Judge on these issues were not clearly erroneous or contrary to law. After *de novo* review of the new information provided by defendant, the Court concludes that there was no fraudulent inducement in connection with the negotiation of the Protective Order.

C. Necessity of Documents/Inability to Obtain

Defendant argues that the Magistrate Judge committed clear error by finding the Confidential documents "are potentially useful or beneficial to her defense in other legal proceedings" when in fact they are "critically important to Ms. Devine's defense" and "pressing." (Doc. #744, p. 16.) More specifically, defendant asserts she intends to use the

Confidential materials to show that plaintiffs' claims are time-barred, plaintiffs lack standing to pursue any claims against her, that any claims are barred by the doctrines of unclean hands and *in pari delicto*, and that plaintiffs commenced legal proceedings against her in bad faith. (Doc. #744, p. 17.) Additionally, defendant asserts that the only evidence available to her regarding some of these issues is in the Confidential material, and the Magistrate Judge committed clear error by effectively ignoring the argument regarding defendant's inability to obtain the evidence from any other source given the Cayman Islands citizenship of plaintiffs and the legal system in Switzerland. (Id., pp. 17-19.)

The Court finds no error or abuse of discretion in the finding that the Confidential mater was "potentially useful or beneficial to her defense in other legal proceedings." Even accepting defendant's characterizations, there is no basis to grant the modifications she seeks. It is hardly surprising that the confidential information of an opposing party is useful, beneficial, critically important, or pressing. But the Protective Order is not subject to modification simply because defendant needs the Confidential information. The Magistrate Judge did not ignore defendant's arguments, but simply found them unconvincing. Confidential information by its very nature may be difficult to obtain, but that does not justify modifying a long-standing protective order to do an end-run around legal processes. The Court finds that the Magistrate Judge's findings were neither clearly erroneous or contrary to law. Additionally, considering the newly

presented information, the Court finds that defendant has not shown good cause to obtain the modifications of the Protective Order she seeks.

D. Equitable Arguments

Defendant argues that the Magistrate Judge abused his discretion by effectively ignoring defendant's equitable arguments, i.e., the concealment of the private Swiss criminal complaint, her need to disclose Confidential information to the Swiss OAG, and plaintiffs' refusal to be deposed in this case. (Doc. #744, pp. 20-21.) Once again, the Magistrate Judge did not ignore these arguments; he simply found them unconvincing. This objection is overruled.

E. New Matters

In the Objection, defendant "amends" her motion to modify the Protective Order to request that the destroy-or-return requirement be suspended until the date that the Swiss asset freeze is lifted or otherwise resolved by judicial or administrative adjudication. (Doc. #744, p. 22.) Defendant also "amends" her motion to clarify that she will comply with the notice requirements set forth in Paragraph 14 of the Protective Order before disclosing the Confidential materials. (Id., pp. 22-23.) While the Court accepts both amendments, neither change the result.

Plaintiffs also state that they are willing to retain their copy of the Confidential information until the

conclusion of the Swiss proceedings so that those materials will be available should the Swiss seek to obtain them through an MLAT proceeding. (Doc. #773, p. 15.) The Court accepts this offer.

F. Submission of Confidential Information

On December 5, 2019, defendant filed a Motion for Leave to Submit Confidential Materials for *In Camera* Review (Doc. #791), and on December 10, 2019, defendant filed a Supplement (Doc. #792) to her motion for leave to file *in camera* materials. Defendant asserts that the *in camera* material would explain why plaintiffs' Confidential documents are relevant and critical to legal proceedings in Switzerland, a keystone of defendant's Objection.

The Court accepts defendant's characterization that the Confidential material is relevant and critical to defendant in the Switzerland proceedings. But such characterizations do not change the good cause calculus; assuming the information is as important as defendant states, she has still not shown good cause to modify the Protective Order. Therefore this motion is denied.

Accordingly, it is now

ORDERED:

1. Defendant's Objection to Order Denying Defendant's Motion for Modification of Stipulation and Protective Order (Doc. #744) is **OVERRULED**.

2. Defendant's Motion for Leave to Submit Confidential Materials for *In Camera* Review (Doc. #791) is **DENIED**.

3. Defendant shall comply with the terms of the Protective Order within **FOURTEEN (14) DAYS** of this Opinion and Order. Plaintiffs shall retain their copy of the Confidential information until the conclusion of the Swiss proceedings so that those materials will be available should the Swiss seek to obtain them.

DONE and ORDERED at Fort Myers, Florida, this 10th day of January, 2020.

/s/ John E. Steele
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.

SUSAN ELAINE DEVINE,

Defendant.
_____/

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

ORDER

(Filed Aug. 27, 2018)

Pending before the Court are Defendant's Motion for Modification of Stipulation and Protective Order (Doc. 686), Plaintiffs' opposition thereto (Doc. 690) and related Declaration of David Spears (Doc. 692),

Defendant's reply (Doc. 697) and related sealed exhibit (Doc. 702), and Plaintiffs' sur-reply (Doc. 703).

Defendant requests that the Court modify the July 30, 2015 Stipulation and Protective Order (Doc. 64) entered in this case to permit her:

> (1) to retain copies of all Discovery Material[1] designated "Confidential"[2] by Plaintiffs pending the Court's ruling on [Defendant's] forthcoming motion for an award of costs and attorney's fees[3];
>
> (2) to retain copies of all Discovery Material designated "Confidential" by Plaintiffs pending the resolution of the investigations and other legal proceedings involving [Defendant] and/or any of [Defendant's] assets in Switzerland and/or the United States; and
>
> (3) to disclose to the Swiss government and the Office of the U.S. Attorney for the Central District of California certain Discovery Material designated "Confidential" by Plaintiffs.

(Doc. 686 at 14).

---

[1] The term "Discovery Material" is defined in Paragraph 2 of the Stipulation and Protective Order (Doc. 64 at 2 ¶ 2).

[2] The scope of the "Confidential" designation is defined in Paragraph 4 of the Stipulation and Protective Order (Doc. 64 at 2 ¶ 4).

[3] Defendant's Motion for Award of Costs and Fees was filed on July 25, 2018. (*See* Docs. 713-715).

In effect, Defendant's requests would necessitate modifications to Paragraphs 14 and 18 of the existing Stipulation and Protective Order. (*Id.*; *see also* Doc. 64 at 6 ¶ 14 and at 8 ¶ 18).[4]

Paragraph 14 provides:

> Notwithstanding any provision of this Protective Order, the Parties may disclose Discovery Material marked as Confidential *if necessary to comply with a subpoena or court order*, whether or not originating with the Court in this captioned Protective Order; *pursuant to any other form of legal process from any court, any international, federal or state regulatory or administrative body*, any international, federal or state agency, any legislative body, or any other person or entity; or *pursuant to a request for information from any international, federal or state criminal authority*. In the event a Party receives *a request for production* of Discovery Material marked as Confidential pursuant to (1) *subpoena or court order*, (2) *any form of legal process*, or (3) *request from any criminal authority* seeking disclosure, such Party must provide written notice of such request to the Party that produced such Discovery Material before the

[4] The parties do not appear to address directly the implications of Defendant's Motion under Paragraph 14 of the Stipulation and Protective Order. The implications are, nevertheless, clear to the Court insofar as Defendant seeks to modify the Stipulation and Protective Order to permit disclosure to certain domestic and foreign authorities without specific regard to any demand or request from those authorities for the documents.

> Party receiving such request complies with such request.

(Doc. 64 at 6 ¶ 14 (emphasis added)). Defendant's request would require modifying this provision to permit Defendant to *voluntarily and without notice* disclose documents designated by Plaintiffs as "Confidential" to the Swiss government and the Office of the United States Attorney for the Central District of California in the absence of a subpoena, a court order, any legal process, or a request for information or production. (Doc. 686 at 14).

Paragraph 18 provides:

> *At the conclusion of this litigation (including any appeals)* all material designated Confidential pursuant to the terms of this Protective Order *shall either be destroyed or returned to the designating Party, within sixty (60) days after the conclusion of the litigation.*

(Doc. 64 at 8 ¶ 18 (emphasis added)).[5] Defendant's request would require modifying this provision to allow her to retain copies of Plaintiffs' "Confidential" Discovery Materials beyond the conclusion of the litigation "until the latter of (i) the conclusion of Plaintiffs' global litigation campaign against [Defendant]; and (ii) the Court's ruling on [Defendant's] forthcoming motion for an award of costs and fees." (Doc. 686 at 7).

---

[5] The Stipulation and Protective Order (Doc. 64) does not separately define what constitutes "the conclusion of this litigation" under Paragraph 18. (Doc. 64 at 8 ¶ 18).

Plaintiffs object to any modification of the Stipulation and Protective Order for multiple reasons. (*See* Docs. 690, 692, 703).

After a careful and thorough review of the parties' voluminous filings directed at these issues, the Court finds that Defendant's Motion (Doc. 686) is due to be denied in all respects, except one: The Court hereby permits the parties to retain copies of all Discovery Material designated as "Confidential" pursuant to the Stipulation and Protective Order (Doc. 64) until sixty (60) days after the Court enters an order resolving Defendant's Motion for Award of Costs and Fees (Doc. 713). The Court finds good cause to permit this limited modification so the parties may submit and the Court may consider any Discovery Materials designated as Confidential that may be relevant to or beneficial to the resolution of Defendant's pending Motion.

To the extent Defendant's Motion (Doc. 686) seeks any different or greater relief, the Court agrees with Plaintiffs that further modification of the Stipulation and Protective Order (Doc. 64) is not appropriate or warranted for at least four (4) reasons.

First, the Court finds that it is beyond dispute that Plaintiffs have relied upon the protections afforded to them the under the Stipulation and Protective Order during the course of this litigation. To allow Defendant to withdraw from those protections at the last minute after years of heavily disputed litigation simply because it is beneficial to her to do so would (1) fundamentally threaten the integrity of the discovery

process in this case and others, (2) undermine the confidence that all litigants, third parties, and their counsel must have in the reliability of stipulated protective orders for such orders to be effective in facilitating discovery, and (3) unfairly prejudice Plaintiffs by depriving them of the protections they reasonably expected they would receive once this litigation concluded. It is beyond dispute that provisions requiring the destruction or return of confidential discovery material at the conclusion of litigation are commonplace—and for good reason. Indeed, a litigant would be hard-pressed to accept the utility or value of a stipulated protective order that did not contain such a provision. Leaving confidential materials in the hands of an adversary and/or an adversary's counsel indefinitely provides little, if any, practical protection against future abuse, misuse, or dissemination of confidential materials. The parties here negotiated the terms of the Stipulation and Protective Order and they agreed to be bound by those terms. In view of all of these considerations, the Court finds insufficient good cause – even under the most lenient and flexible standard Defendant encourages the Court to apply here – to modify the Stipulation and Protective Order beyond the very limited relief articulated *supra*.

Second, the Court finds Defendant's allegations of fraud in the inducement relating to the Stipulation and Protective Order are without merit and lack credibility. Defendant fails to point to any false statement of material fact allegedly made by Plaintiffs. *See Johnson Enters. of Jacksonville, Inc. v. FPL Grp., Inc.*, 162

F.3d 1290, 1315 (11th Cir. 1998). To the extent she relies on any omission(s), she has not demonstrated that Plaintiffs were under a duty to disclose their pursuit of other criminal proceedings in Switzerland when negotiating the Stipulation and Protective Order in this case. *See Cola v. Allstate Ins. Co.*, 131 F. App'x 134, 136 (11th Cir. 2005).

Moreover, the materiality of any purported omission is highly questionable. Defendant appears to concede that she was aware of a related investigation in Switzerland when the Stipulation and Protective Order was negotiated. (Doc. 697 at 5). Although she attempts to distinguish between her knowledge of the existence of Plaintiffs' "private criminal complaint" in Switzerland and her knowledge of the existence of the Swiss investigation (Doc. 697 at 6-7), that is a distinction without a difference. In this Court's view, what matters here is that Defendant knew at the time the Stipulation and Protective Order was negotiated and submitted to the Court for approval that at least one related proceeding other than this litigation existed. With that knowledge, Defendant and her counsel agreed to include a provision in the Stipulation and Protective Order that required "Confidential" Discovery Materials to be destroyed or returned after the conclusion of this litigation. Thus, Defendant and her counsel had to have known and understood that the destroy-or-return requirement in Paragraph 18 of the Stipulation and Protective Order would prevent Defendant from retaining copies of Plaintiffs' "Confidential" Discovery Materials for use in her defense in

connection with other proceedings of any kind. In this light, Defendant's suggestion that any omission was material because had she known more, she would not have agreed to the destroy-or-return provision lacks credibility.

Third, the Court agrees with Plaintiffs that Defendant's attempt to tie her destroy-or-return obligation to the latter of two future events – *i.e.*, "(1) the conclusion of Plaintiffs' global litigation campaign against [Defendant]; and (ii) the Court's ruling on [Defendant's] forthcoming motion for an award of costs and fees" (Doc. 686 at 7) – provides no real or meaningful time limit on Defendant's compliance. Plaintiffs' so-called "global litigation campaign against [Defendant]" is a patently ill-defined benchmark with no definite measure, duration, or conclusion. As a practical matter, therefore, granting a modification of the Stipulation and Protective Order along these lines would permit Defendant to retain Plaintiffs' "Confidential" Discovery Materials indefinitely, or until she and her counsel are satisfied that the alleged "global litigation campaign" against her is complete. Defendant has not demonstrated good cause to justify such an outcome where she and/or her counsel would essentially hold all the power to decide whether and when to return or destroy Plaintiffs' "Confidential" Discovery Materials.

Fourth, Defendant's insistence that modification of the Stipulation and Protective Order is necessary for equitable reasons because she will be unable to obtain the same documents or testimony in connection with other proceedings is wholly unavailing. As Plaintiffs

succinctly and correctly put it as to Paragraph 18, "[t]he very purpose of the destroy-or-return provision is to require the opposing party to return Confidential evidence at the close of the case." (Doc. 690 at 11). The parties and their counsel negotiated and ultimately agreed on the unambiguous language of a Stipulation and Protective Order that required (1) a subpoena, court order, legal process, or a request for information or production, and notice to the designating party before documents would be produced as permitted by Paragraph 14, and (2) the destruction or return of "Confidential" Discovery Material at the conclusion of the litigation as required by Paragraph 18. The parties reached this agreement knowing, as they must, that these obligations would apply equally to evidence that was helpful, harmful, or neutral to their respective positions. Defendant has not demonstrated good cause to justify modifying the parties' agreement merely because certain documents are potentially useful or beneficial to her defense in other legal proceedings.

For the foregoing reasons, the Court **ORDERS** that Defendant's Motion for Modification of Stipulation and Protective Order (Doc. 686) is **DENIED** in all respects, except that the Court hereby permits the parties to retain copies of all Discovery Material designated as "Confidential" pursuant to the Stipulation and Protective Order (Doc. 64) until sixty (60) days after the Court enters an order resolving Defendant's Motion for Award of Costs and Fees (Doc. 713). Thereafter, the parties shall comply with the destroy-or-return requirement of Paragraph 18 of the Stipulation

and Protective Order (Doc. 64 at 8 ¶ 18), if they have not already done so.

DONE AND ORDERED in Fort Myers, Florida on August 27, 2018.

/s/ Mac R. McCoy
MAC R. MCCOY
UNITED STATES
MAGISTRATE JUDGE

Copies furnished to:
Counsel of Record
Unrepresented Parties

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.
_____/

CASE NO. 2:15-cv-328-FtM-29DNF

STIPULATION AND PROTECTIVE ORDER

(Filed Jul. 30, 2015)

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and Rule 502 of the Federal Rules of Evidence, the parties to this litigation (each a "Party" and collectively, the "Parties") hereby enter into this Stipulation and Protective Order ("Protective Order") for the

purposes of expediting the flow of discovery material, facilitating the prompt resolution of disputes over confidentiality, protecting adequately material entitled to be kept confidential, and ensuring that protection is afforded only to material so entitled.

IT IS HEREBY STIPULATED AND AGREED, by and among the Parties, through their undersigned counsel, that:

1. This Protective Order shall apply to any agents, attorneys, accountants, consultants, parent companies, subsidiaries, officers, directors and employees of any Party.

2. The terms contained in this Protective Order shall apply to all documents (including but not limited to initial disclosures, transcripts, exhibits, interrogatory answers, and responses to requests for admissions), deposition testimony, and any other written, recorded, transcribed or graphic matter or data or anything else produced (including all copies, excerpts and summaries thereof), as between the Parties and through the third-party subpoenas served, in the course of discovery in connection with this litigation (collectively "Discovery Material"), or further documents derived or created in whole or in part from Discovery Material.

3. Notwithstanding Paragraph 2, the terms contained in this Protective Order shall not apply to any Discovery Material produced by a Party or a third party that is already in the possession of the Party receiving that material.

4. A Party may, subject to the provisions of this Protective Order, designate as "Confidential" any Discovery Material it produces to the opposing Party or Parties that the producing Party reasonably and in good faith believes contains information that is protected from disclosure by statute or that should be protected from disclosure as confidential personal information, financial information, trade secrets, personnel records, or commercial information. In addition, a Party may, subject to the provisions of this Protective Order, designate as "Confidential" any Discovery Material produced in this litigation by any third party that the Party reasonably and in good faith believes contains information that is protected from disclosure as set forth in this Paragraph. Information or documents that are publicly available may not be designated as Confidential.

5. Discovery Material designated as Confidential shall be subject to protections and restrictions regarding confidential documents within this Protective Order. Discovery Material that is deemed Confidential shall be stamped by the producing Party "CONFIDENTIAL." In the case of Discovery Material produced on CD, DVD or other electronic storage medium that is deemed Confidential, the producing Party shall affix the legend "CONFIDENTIAL" to such electronic storage medium and, to the extent practical, to each page or unit of material. The acceptance by the non-designating Party of materials designated as Confidential shall not be construed to waive the non-designating Party's

right later to object to the designation in accordance with the terms of this Protective Order.

6. All copies, duplicates, extracts, summaries, or descriptions (referred to herein collectively as "copies") of documents or information designated as Confidential under this Protective Order, or any portion thereof, must be immediately affixed with the word "CONFIDENTIAL."

7. If a document marked Confidential is introduced during a deposition, the portion of the deposition regarding the Confidential document may be designated Confidential, if such designation is made on the record at the time of the deposition or within fourteen (14) days after the transcript of the deposition has been delivered to the Parties ordering a copy by written notice and delineation. The portions of the transcript designated as Confidential shall be affixed with the word "CONFIDENTIAL."

8. Except as otherwise provided in this Protective Order, information or documents designated as Confidential by a Party under this Protective Order shall not be used or disclosed by any receiving Parties or their counsel or any persons or entities identified in Paragraph 1 or 9 of this Protective Order for any purposes whatsoever other than preparing for and conducting the litigation in this lawsuit (including any appeals).

9. The Parties and counsel for the Parties shall not disclose or permit the disclosure of any documents or information designated as Confidential under this

Protective Order to any other person or entity, except that disclosures may be made in the following circumstances:

(i) Disclosure may be made to any current or former agent, attorney, accountant, parent company, subsidiary, officer, director or employee of a Party who is assisting counsel in this litigation. Any such person or entity to whom counsel for a Party makes a disclosure must be advised of, and become subject to, the provisions of this Protective Order requiring that the documents and information be held in confidence;

(ii) Disclosure may be made to the Court and its employees;

(iii) Disclosure may be made to court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making copies of documents; and

(iv) Subject to the execution by the receiving person or entity of a Confidentiality Agreement in the form attached as Exhibit A and thereby agreeing to be bound by the terms of this Protective Order, disclosure may be made to:

(a) any independent outside experts or consultants retained by the Parties or their counsel for purposes of this litigation;

(b) employees and subcontractors of the independent outside experts or consultants retained by the Parties or by their counsel for purposes of this litigation in paraprofessional,

clerical, stenographic or ministerial positions; and

(c) any third-party fact witnesses or potential fact witnesses when a good faith determination is made that the documents would be relevant to their testimony or potential testimony and, if such witness is Florian Homm, Urs Meisterhans, Marcel Eichmann, Pascal Frei, Sammy Kapleta, Phillipe Meyer, Jürg Brand, Adam Kravitz, Todd Ficeto, Colin Heatherington, Tony Ahn, Craig Heatherington, or Sean Ewing, ten (10) days' prior written notice of disclosure is given to the Party who originally produced the Confidential documents and such Party does not object in writing within ten (10) days of receiving the notice.

10. Except as provided otherwise in this Protective Order, counsel for the Parties, and any person receiving Discovery Material designated as Confidential in accordance with Paragraph 9, shall keep all Discovery Material designated as Confidential secure within their possession and must place such documents in a secure area. The Parties shall retain all copies of the Confidentiality Agreements executed until this action is resolved.

11. Nothing in this Protective Order limits the right of any Party to seek any protection it deems necessary for any documents or information, in accordance with Rule 26 of the Federal Rules of Civil Procedure.

12. Any Party may at any time serve a written objection to any designation of confidentiality made by the designating Party. This notice shall specifically identify the material or information from which the objecting Party wishes to have the designation removed. Within seven (7) days of receipt of such objection, the designating Party (i) shall review the material to which the objection applies, (ii) notify the objecting Party in writing whether the designating Party will agree to remove the designation as requested, and (iii) if it will not agree to remove the designation, the designating Party will state with specificity its reasons for not agreeing. If an agreement cannot be reached, either Party may move for a ruling from the Court. The material at issue will be treated as Confidential until a Court order determines the material is not Confidential.

13. If Discovery Materials designated Confidential are to be filed with the Court, absent consent from the Party designating the Discovery Materials as Confidential to file them publicly, they shall be filed under seal or in a similar manner such that public access is prohibited.

14. Notwithstanding any provision of this Protective Order, the Parties may disclose Discovery Material marked as Confidential if necessary to comply with a subpoena or court order, whether or not originating with the Court in this captioned Protective Order; pursuant to any other form of legal process from any court, any international, federal or state regulatory or administrative body, any international,

federal or state agency, any legislative body, or any other person or entity; or pursuant to a request for information from any international, federal or state criminal authority. In the event a Party receives a request for production of Discovery Material marked as Confidential pursuant to (1) subpoena or court order, (2) any form of legal process, or (3) request from any criminal authority seeking disclosure, such Party must provide written notice of such request to the Party that produced such Discovery Material before the Party receiving such request complies with such request.

15. If a Party discovers that it produced Discovery Material that was inadvertently not designated as Confidential, that Party must promptly notify all Parties, in writing, of any error and identify (by production number) the affected Discovery Material and its designation. Thereafter, the Discovery Material so designated will be treated as Confidential in conformity with the new designation. Promptly after providing such notice, the Party shall provide relabeled copies of the relevant Discovery Material reflecting the change in designation. If corrected, an inadvertent failure to designate qualified information or items as Confidential does not waive the producing Party's right to secure protection under this Protective Order for such material.

16. Upon receipt of any written responses, documents and/or information produced in response to a subpoena *duces tecum* issued in this litigation by a Party pursuant to Federal Rule of Civil Procedure 45, the Party who issued the subpoena must promptly

make available copies, which may be in electronic format, of all written responses, documents, and/or information produced in response to such subpoena to the opposing Party or Parties.

17. Pursuant to Federal Rule of Evidence 502(d), disclosure of Discovery Material subject to the attorney-client privilege or work-product doctrine or any other applicable privilege or immunity from disclosure without the express intent to waive such privilege, protection or immunity from disclosure shall not be deemed a waiver in whole or in part of the privilege, work-product or other applicable immunity, either as to the specific information disclosed or as to the same or related subject matter. If a Party promptly notifies the opposing Party or Parties in writing by hand delivery, overnight delivery, or e-mail (which e-mail must be considered delivered when sent) of the inadvertent disclosure of documents or other information which that Party believes in good faith to be subject to a claim of privilege, including but not limited to attorney-client privilege or attorney work product, Federal Rule of Evidence 502 and Federal Rule of Civil Procedure 26(b)(5)(B) must apply. Such notice must include a privilege log that complies with Federal Rule of Civil Procedure 26(b)(5)(A).

18. At the conclusion of this litigation (including any appeals) all material designated Confidential pursuant to the terms of this Protective Order shall either be destroyed or returned to the designating Party, within sixty (60) days after the conclusion of the litigation.

19. This Protective Order may be modified or amended only by an order of this Court or by stipulation between the Parties.

IT IS SO ORDERED.

Dated: July 30, 2015

/s/ John E. Steele
John E. Steele
Senior United States District Judge

SO STIPULATED AND AGREED.

Dated: July 24, 2015

By: */s/ Linda Imes*
Linda Imes
Trial Counsel
SPEARS & IMES LLP
51 Madison Avenue
New York, New York 10010
Phone: (212) 213-6996
Fax: (212) 213-0849
limes@spearsimes.com

Attorneys for Plaintiffs

By: */s/ Carl F. Schoeppl*
Carl F. Schoeppl
Trial Counsel
Fla. Bar. No. 818518
SCHOEPPL & BURKE, P.A.
4651 North Federal Highway
Boca Raton, Florida 33431-5133
Phone: (561) 394-8301
Fax: (561) 394-3121
carl@schoepplburke.com

By: */s/ Ian M. Comisky*
Ian M. Comisky
Trial Counsel
Fla. Bar No. 225304
BLANK ROME LLP
One Logan Square, 130 North 18th Street
Philadelphia, Pennsylvania 19103
Phone: (215) 569-5646
Fax: (215) 832-5646
Comisky-im@blankrome.com

Attorneys for Defendant Susan Elaine Devine

EXHIBIT A

CONFIDENTIALITY AGREEMENT

I have received and read all the terms of the Protective Order in the action captioned *Absolute Activist Value Master Fund Limited, et al. v. Susan Elaine Devine*, Civil No. 2:15-cv-328-FtM-29DNF and understand and hereby agree to be bound by all the terms thereof with respect to the use and disclosure of information and materials designated as "CONFIDENTIAL." I further expressly agree that I will not in any way use, disclose, discuss, summarize, reveal or refer to any information or material designated "CONFIDENTIAL" for any purpose whatsoever other than as permitted in the terms of the Protective Order, unless the Court hereafter alters, or the Parties stipulate to the alteration of, the Protective Order or its applicability to me.

Dated: _____

Signature

Print Name

Print Name, Address, and Phone Number of Company or Firm

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10237-DD

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.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Jul. 28, 2021)

BEFORE: WILSON, GRANT, and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

APPENDIX F

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

DEFENDANT'S OBJECTION TO ORDER DENYING DEFENDANT'S MOTION FOR MODIFICATION OF STIPULATION AND PROTECTIVE ORDER

(Filed Sep. 10, 2018)

[ii] **TABLE OF CONTENTS**

[1] **PRELIMINARY STATEMENT**

Pursuant to 28 U.S.C. § 636(b)(1)(A) and Rule 72(a) of the Federal Rules of Civil Procedure, Defendant Susan Elaine Devine ("Ms. Devine"), by and through her undersigned counsel, hereby submits this objection (the "Objection") to the Court's Order, entered

on August 27, 2018 (Dkt. Entry 743) (the "Order"), denying in part Ms. Devine's Motion for Modification of Stipulation and Protective Order (Dkt. Entry 686) (the "Modification Motion").

Ms. Devine respectfully submits that the Order improperly protects foreign Plaintiffs who gamed the U.S. discovery system in an effort to promote their interests abroad and to prejudice Ms. Devine. If the Order is not reversed by this Court, Plaintiffs' abuse of the U.S. legal system will have been rewarded, and Ms. Devine will be left to fight Plaintiffs' continuing legal offensives in other forums without critical evidence she obtained before Plaintiffs abandoned this action. That evidence will be difficult, if not impossible, to obtain again. The arguments Plaintiffs have made in opposition to the Modification Motion ring hollow, particularly in light of their concealment of critical information from Ms. Devine and the other acts of misconduct in which they have engaged during this litigation. This Court should reverse the Order and grant the Modification Motion.

By way of background, Plaintiffs are defunct, foreign-owned, former hedge funds whose "only business activity [is] asset recovery."[1] Plaintiffs commenced this action on June 1, 2015 with the filing of a 112-page complaint ("the Action") and an *ex parte* motion for a temporary restraining order freezing bank accounts and real property across the globe. *See* [2] Motion for

[1] Second Amended Complaint (Injunctive Relief Sought) at ¶ 9 (Dkt. Entry 560) (the "Complaint").

Entry of Partial Final Judgment (Dkt. Entry 685) (the "Judgment Motion"), at 4.[2] More recently—and after years of litigation during which the Court dismissed five of Plaintiffs' six causes of action and dissolved the *Ex Parte* TRO—Plaintiffs voluntarily dismissed their sole remaining claim and abandoned their suit. *Id.* at 22; Dkt. Entry 680.

In the interim, Ms. Devine would learn that this Action is just one front in a multi-pronged, international legal offensive that Plaintiffs have waged against her for years. The purported aim of Plaintiffs' litigation campaign is to "recover" millions of dollars that they claim to have lost as a result of "a massive market manipulation scheme orchestrated" more than a decade ago by individuals other than Ms. Devine. Complaint at ¶ 2. Plaintiffs began another stage of that coordinated onslaught on May 29, 2015, when—unbeknownst to Ms. Devine—they filed a private criminal complaint against her with the Office of the Attorney General of Switzerland (the "OAG"). Judgment Motion at 9.[3] *Id*.

---

[2] This Court granted Plaintiffs' *ex parte* motion for a temporary restraining order on July 1, 2015. *See* Dkt. Entry 10 (the "*Ex Parte* TRO"). In the interest of economy, all capitalized terms used but not defined herein shall have the meanings set forth in the Judgment Motion.

[3] Though more than three years has passed since Plaintiffs filed the private Swiss criminal complaint, the OAG has neither adopted it nor filed any other charges of any sort against Ms. Devine.

The interplay between these different fronts in Plaintiffs' legal offensive necessitated the filing of the Modification Motion. As set forth in that Motion, Plaintiffs wrongfully concealed the existence of the private Swiss criminal complaint while they and Ms. Devine negotiated the terms of the protective order that would govern discovery in this case. *See* Modification Motion at 11-12; Judgment Motion at 9-12. Plaintiffs then exploited the terms of that protective order to funnel to the OAG evidence they obtained from Ms. Devine and [3] others in this proceeding. Judgment Motion at 11-14. All the while, Plaintiffs stonewalled Ms. Devine's own efforts to obtain deposition testimony from Plaintiffs. *Id.* at 14-15, 19-21. Finally, just days after the Court ordered them to submit to their first deposition, Plaintiffs—who already had obtained the discovery they sought and selectively shipped much of it overseas to the OAG—voluntarily terminated this Action and turned their attention back to the very same Swiss case they had been attempting to build for years. *Id.* at 22-23. In short, Plaintiffs gamed this Action and rules governing it in order to strengthen their hand in their Swiss proceeding. In the Modification Motion, Ms. Devine made what should have been a non-controversial request for leave to retain and disclose certain materials obtained from Plaintiffs during discovery so that she can defend herself, on both the Swiss and U.S. fronts, against Plaintiffs' attacks.

Ms. Devine respectfully submits that the Magistrate Judge committed error in denying portions of the

relief she sought in the Modification Motion. In particular, Ms. Devine respectfully submits that the Order should be vacated in light of the following errors made by the Magistrate Judge: (1) relying on clearly erroneous factual findings relating to Plaintiffs' concealment of the private criminal complaint they filed against Ms. Devine in Switzerland just days before they commenced this Action; (2) committing clear error by disregarding both the necessity of the discovery material at issue and Ms. Devine's inability to obtain that material from any other source; and (3) committing clear error by disregarding Ms. Devine's equitable arguments relating to Plaintiffs' misconduct.[4]

[4] **PROCEDURAL HISTORY**[5]

On May 29, 2015, Plaintiffs filed with the OAG a private "[c]riminal complaint" against Ms. Devine. *See* Exhibit A, private Swiss criminal complaint, at 1; *see also* Dkt. Entry 268 at ¶ 13. Ms. Devine is the only

---

[4] In the instant Objection, Ms. Devine also clarifies those portions of the Modification Motion that pertain to the duration of the relief she seeks and her willingness to provide notice to Plaintiffs consistent with the relevant provisions of the Stipulation and Protective Order.

[5] This litigation and the facts underlying it have been described at length in the parties' prior filings. The facts relevant to the instant Objection, specifically, are set forth in the "Background" section of the Judgment Motion and in the "Preliminary Statement" section of the Modification Motion. Judgment Motion at 7-23; Modification Motion at 3-6. In the interests of economy, Ms. Devine respectfully refers the Court to those sections of the Judgment Motion and the Modification Motion for a more comprehensive account of the salient underlying facts.

putative defendant named in the private Swiss criminal complaint, which was not filed publicly. 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* Dkt. Entries 269-9 and 269-10.

On June 1, 2015—*i.e.*, just days after they filed their private criminal complaint in Switzerland—Plaintiffs filed their six-count, 313-paragraph complaint against Ms. Devine in this Court, along with their *ex parte* motion for a temporary restraining order. *See* Dkt. Entries 2, 3. Ms. Devine learned of the *Ex Parte* TRO and of Plaintiffs' complaint on July 9, 2015. *See* Exhibit H to Judgment Motion, July 9, 2015 email from Linda Imes to Carl Schoeppl.

Twenty-one days later, on July 30, 2015, the Court entered a Stipulation and Protective Order governing the use of discovery material produced or created in connection with the Action. *See* Dkt. Entry 64 (the "Protective Order"). The Protective Order provides, in relevant part, that "[e]xcept as otherwise provided [therein], information or documents [5] 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[6]—further provides as follows:

> Notwithstanding any provision of this Protective Order, the Parties may disclose Discovery Material marked as Confidential if necessary to comply with a subpoena or court order . . . ; pursuant to any other form of legal process from any court, any international, federal or state regulatory or administrative body, any international, federal or state agency, any legislative body, or any other person or entity; or *pursuant to a request for information from any international, federal or state criminal authority*."

Id. at ¶ 14 (the "International Request Clause" or "IRC") (emphasis added). The Protective Order further provides that "[a]t the conclusion of this litigation (including any appeals) all material designated Confidential pursuant to the terms of this Protective Order shall either be destroyed or returned to the designating Party, with sixty (60) days after the conclusion of the litigation." *Id.* at ¶ 18.

---

[6] 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 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.

On February 14, 2018—well after the Court had dismissed five of Plaintiffs' six causes of action and granted Ms. Devine's motion to dissolve the *Ex Parte* TRO—Plaintiffs filed with the Court a Notice of Voluntary Dismissal, without Prejudice, Pursuant to Rule [6] 41(a)(1)(A)(i). *See* Dkt. Entry 680. A week later, on February 21, 2018, the Court issued an Order dismissing this Action without prejudice. *See* Dkt. Entry 682.

On April 20, 2018, Ms. Devine filed the Modification Motion. Dkt. Entry 686. In the Modification Motion, Ms. Devine described certain of the materials that Plaintiffs had designated "Confidential" and described the purposes for which she sought to retain and disclose those materials:

> Ms. Devine intends to rely on at least two of those deposition transcripts . . . and exhibits introduced during those depositions to defend herself against Plaintiffs' campaign to persuade the Swiss government to commence legal proceedings against her and/or to seize certain of her assets. Ms. Devine likewise intends to rely on those materials in connection with her forthcoming motion for an award of costs and attorney's fees. Additionally, Ms. Devine intends to use those materials while communicating with the DOJ regarding the restraint of one of Ms. Devine's U.S. bank accounts. . . .[7]

---

[7] As Ms. Devine explained in the Judgment Motion, Plaintiffs have used the OAG as a conduit to appeal to the U.S. Department of Justice, as well. *See* Judgment Motion at 12-13 n.8 (stating that just two weeks "after the Court dissolve[d] the *Ex*

Modification Motion at 8. To that end, the Modification Motion sought the following relief:

> [M]odif[ication of] the Protective Order so as to permit Ms. Devine (i) to retain copies of all Discovery Material designated "Confidential" by Plaintiffs pending the Court's ruling on Ms. Devine's forthcoming motion for an award of costs and attorney's fees; (ii) to retain copies of all Discovery Material designated "Confidential" by Plaintiffs pending the resolution of the investigations and other legal proceedings involving Ms. Devine and/or any of Ms. Devine's assets in Switzerland and/or the United States; and (iii) to disclose to the Swiss government and the Office of the U.S. Attorney for the Central District of California certain Discovery Material designated "Confidential" by Plaintiffs.

Id. at 14.

[7] Plaintiffs filed their Opposition to Defendant's Motion for Modification of Stipulation and Protective Order on May 18, 2018 (Dkt. Entry 690) (the "Opposition"). Ms. Devine filed a Reply in Further Support of Her Motion for Modification of Stipulation and Protective Order on June 18, 2018 (Dkt. Entry 697) (the

---

Parte TRO . . . 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. . . . 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" letter to the OAG.")

"Reply"). Plaintiffs filed a Sur-Reply to Defendant's Motion for Modification of Stipulation and Protective Order on July 3, 2018 (Dkt. Entry 703) (the "Sur-Reply").

On August 27, 2018, the Magistrate Judge issued the Order denying, in part, the Modification Motion. Order at 7. Specifically, the Order denied the Modification Motion "in all respects, except that the Court permits the parties to retain copies of all Discovery Material designated as 'Confidential' pursuant to the Stipulation and Protective Order . . . until sixty (60) days after the Court enters an order resolving Defendant's Motion for Award of Costs and Fees (Doc. 713)." *Id*. With this Objection, Ms. Devine respectfully requests that the Court vacate the Order and grant the Modification Motion or, in the alternative, remand the Modification Motion to Magistrate Judge McCoy for further proceedings.

STANDARD OF REVIEW

When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, Federal Rule of Civil Procedure 72(a) permits a party to serve and file objections to the magistrate judge's order within 14 days. The District Judge must consider timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law. *See*, *e.g.*, *Soliday v. 7-Eleven, Inc.*, No. 2:09-cv-807-FtM-29SPC, 2010 WL 4537903, at *1 (M.D. Fla. Nov. 3, 2010). A "'finding is "clearly erroneous" when

although there is evidence to support it, the reviewing court on the entire [8] evidence is left with the definite and firm conviction that a mistake has been committed.'" *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). "A magistrate judge's order is contrary to law [] when it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Bell v. Chambliss*, No. 3:13-CV-479-J-34JBT, 2015 WL 5997053, at *1 (M.D. Fla. Oct. 14, 2015) (citations and internal quotation marks omitted). "In the absence of a legal error, a district court may reverse only if there was an 'abuse of discretion' by the magistrate judge." *S.E.C. v. Merkin*, 283 F.R.D. 699, 700 (S.D. Fla. 2012) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990)). A court abuses its discretion where, *inter alia*, "it misconstrues its proper role, ignores or misunderstands the relevant evidence, and bases its decision upon considerations having little factual support." *Arlook for & on Behalf of N.L.R.B. v. S. Lichtenberg & Co.*, 952 F.2d 367, 374 (11th Cir. 1992) (citations omitted).

ARGUMENT

I. THE MAGISTRATE JUDGE ERRED BY RELYING ON CLEARLY ERRONEOUS FINDINGS RELATING TO PLAINTIFFS' CONCEALMENT OF THE PRIVATE CRIMINAL COMPLAINT THEY FILED IN SWITZERLAND JUST DAYS BEFORE THEY COMMENCED THIS CASE

The Magistrate Judge erred by relying on clearly erroneous findings in support of the Court's denial, in part, of the Modification Motion. These findings include the finding that "Defendant's allegations of fraud in the inducement relating to the Stipulation and Protective Order are without merit and lack credibility" and the finding that "the materiality of any purported omission [relating to Plaintiffs' concealment of their private Swiss criminal complaint] is highly questionable." Order at 5.

[9] **A. The Magistrate Judge Committed Clear Error in Finding That Ms. Devine's Allegations of Fraud in the Inducement Relating to the Stipulation and Protective Order Are Without Merit and Lack Credibility**

The Magistrate Judge's denial of certain of the relief requested in the Modification Motion rests in part on the Court's finding that "Defendant's allegations of fraud in the inducement relating to the Stipulation and Protective Order are without merit and lack credibility." *Id*. Ms. Devine respectfully submits that the

Magistrate Judge committed clear error in making and relying on that finding.

First, the *undisputed facts* regarding Plaintiffs' filing and concealment of their private Swiss criminal complaint and the negotiation of the Protective Order plainly show that Ms. Devine's inducement argument is meritorious.[8] As Ms. Devine noted in the Reply, even Plaintiffs do not dispute that "when the parties negotiated the Protective Order, Plaintiffs concealed from Ms. Devine the fact that they had filed a private criminal complaint against her in Switzerland just weeks before *and were actively seeking her indictment there*." Reply at 2 (emphasis added); *see also* Sur-Reply at 10 (conceding that "the Funds did not immediately disclose to Devine that they had submitted a criminal complaint against her to the Swiss Prosecutor").

Nor do Plaintiffs deny that during the parties' negotiations regarding the Protective Order, *Plaintiffs' counsel* revised the draft protective order that Ms. Devine's counsel had [10] prepared several days earlier so that it would permit disclosure of "Discovery Material marked as Confidential . . . pursuant to any other form of legal process *from any . . . international,*

---

[8] Ms. Devine does not dispute that she was not in a fiduciary relationship with Plaintiffs, *see Cola v. Allstate Ins. Co.*, 131 Fed. Appx. 134, 136 (11th Cir. 2005), and has not argued otherwise. Rather, Ms. Devine argued in the Modification Motion that as a matter of equity, the material omission made by Plaintiffs—and their other misconduct—should not be rewarded and that the Protective Order should be modified accordingly to redress that misconduct. *See infra* Section III.

federal, or state regulatory or administrative body, any international, federal or state agency . . . ; or pursuant to any request for information from any international, federal or state criminal authority." Protective Order at ¶ 14 (emphasis added); *see also* Declaration of David Spears in Support of Plaintiffs' Opposition and Response to Motions Filed by Susan Elaine Devine on April 20, 2018 (Dkt. Entry 692) (the "Spears Declaration"), at ¶¶ 18-23.

Though Ms. Devine could not have known it at the time, the significance of the change made by Plaintiffs' counsel was clear: it would permit Plaintiffs to forward confidential discovery they obtained from Ms. Devine to "any international, federal or state criminal authority"—such as, obviously, the OAG—in response to nothing more than an informal request. *Id*. By contrast, the draft protective order that Ms. Devine's counsel prepared and sent to Plaintiffs' counsel would *not* have permitted Plaintiffs to supply confidential discovery material to the OAG unless it first obtained a subpoena or court order. *See* Exhibit A to Spears Declaration (Dkt. Entry 692-1) at 7 (draft protective order prepared by Ms. Devine's counsel providing that "the parties may disclose confidential information or documents if necessary to comply with a subpoena or court order, whether or not originating with the Court in this captioned Protective Order.").

A side-by-side comparison of the language included in the draft protective order prepared by Ms. Devine's counsel, on the left, with the language included in the draft [11] protective order as subsequently revised by

Plaintiffs' counsel, on the right, leaves no room for doubt regarding Plaintiffs' deceptive intent:

Language in draft protective order prepared by Ms. Devine's counsel on July 16, 2015:	Language in revised draft protective order prepared by Plaintiffs' counsel on July 20, 2015:
12. Notwithstanding any provision of this Protective Order, the parties may disclose confidential information or documents if necessary to comply with a subpoena or court order, whether or not originating with the Court in this captioned Protective Order. Within seven days of when it is recognized that disclosure of confidential information or documents is required to comply with a subpoena or court order, the party shall give prompt written notice to the designating party of the impending disclosure, unless otherwise prohibited by law.	14. Notwithstanding any provision of this Protective Order, the Parties may disclose Discovery Material marked as Confidential if necessary to comply with a subpoena or court order, whether or not originating with the Court in this captioned Protective Order; pursuant to any other form of legal process from any court, any international, federal or state regulatory or administrative body, any international, federal or state agency, any legislative body, or any other person or entity; *or pursuant to a request for information from any international, federal or state criminal authority*.

Compare Exhibit A to Spears Declaration (Dkt. Entry 692-1) at 7 (emphasis added) *with* Exhibit B to Spears Declaration (Dkt. Entry 692-2) at 7-8 (emphasis added).

Simply put, Plaintiffs concealed the fact that just days before they commenced this Action, they filed a private criminal complaint against Ms. Devine in Switzerland and were seeking her indictment there. In the weeks that followed, they continued to conceal that fact and revised the draft protective order that would govern discovery in this case so that they would be permitted to funnel discovery to the OAG even in the absence of a subpoena or court order. These facts admit only one conclusion: Plaintiffs withheld highly material information from Ms. Devine while they inserted into the proposed protective order a [12] provision highly favorable to them and highly prejudicial to Ms. Devine—a provision whose import Ms. Devine could not possibly have appreciated at the time, given Plaintiffs' ongoing concealment of the filing of their private Swiss criminal complaint. In light of those facts, the Magistrate Judge's finding that Ms. Devine's fraudulent inducement argument is "without merit" is clear error and an abuse of discretion, and the Order should be vacated on those grounds. *See*, *e.g.*, *Pensacola Firefighters' Relief & Pension Fund Bd. of Directors v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 3:09CV53/MCR/MD, 2010 WL 4683935, at *1 (N.D. Fla. Nov. 10, 2010) ("set[ting] aside the magistrate judge's order as clearly erroneous and contrary to law"); *Matter of Application of O'Keeffe*, 184 F. Supp. 3d 1362, 1371 (S.D.

Fla. 2016) ("conclud[ing] that the Magistrate Judge's Order is clearly erroneous and contrary to law" and vacating same), *aff'd sub nom. In re O'Keeffe*, No. 16-12159, 2016 WL 4750213 (11th Cir. Sept. 13, 2016); *Arlook*, 952 F.2d at 374 (a court abuses its discretion where it "ignores or misunderstands the relevant evidence, and bases its decision upon considerations having little factual support.") (citations omitted).

Ms. Devine respectfully submits that the Magistrate Judge also committed clear error in making and relying on the finding that Ms. Devine's fraudulent inducement argument "lack[s] credibility." Order at 5. Indeed, Plaintiffs themselves conceded in the Sur-Reply that they "did not immediately disclose to Devine that they had submitted a criminal complaint against her to the Swiss Prosecutor." Sur-Reply at 10. The voluminous record in this Action also undercuts the Magistrate Judge's conclusion. 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 [13] 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. Nor, of course, would Ms. Devine have consented to the inclusion of the IRC in the Protective Order had she known at the time that Plaintiffs were actively seeking her indictment in Switzerland. Thus the Order and findings on which it is premised, which would effectively reward Plaintiffs' deceptive conduct, amount to clear error.

B. The Magistrate Judge Committed Clear Error in Finding That the Materiality of any Purported Omission Relating to Plaintiffs' Concealment of Their Private Swiss Criminal Complaint Is "Highly Questionable"

The Magistrate Judge's denial, in part, of the Modification Motion is also premised on the finding that "the materiality of any purported omission [relating to Plaintiffs' concealment of their private Swiss criminal complaint] is highly questionable." Order at 5. This finding, too, is clearly erroneous.

The Magistrate Judge elaborated on this finding as follows:

> *Although she attempts to distinguish between her knowledge of the existence of Plaintiffs' "private criminal complaint" in Switzerland and her knowledge of the existence of the Swiss investigation (Doc. 697 at 6-7), that is a distinction without a difference*. In this Court's view, what matters here is that Defendant knew at the time the Stipulation and Protective Order was negotiated and submitted to the Court for approval that at least one related proceeding other than this litigation existed. With that knowledge, Defendant and her counsel agreed to include a provision in the Stipulation and Protective Order that required "Confidential" Discovery Materials to be destroyed or returned after the conclusion of this litigation. Thus, Defendant and her counsel had to have known and understood

> that the destroy-or-return requirement in Paragraph 18 of the Stipulation and Protective Order would prevent Defendant from retaining copies of Plaintiffs' "Confidential" Discovery Materials for use in her defense in connection with other proceedings of any kind. In this light, Defendant's suggestion that any omission was material because had she known more, she would not have agreed to the destroy-or-return provision lacks credibility.

[14] Order at 5-6 (emphasis added).

The Magistrate Judge's reasoning elides the critical distinction between the mere existence of an investigation in a certain jurisdiction, on one hand, and one's status as a *target* or *putative defendant* in that jurisdiction, on the other. Contrary to the Magistrate Judge's conclusion, that is not a "distinction without a difference." Rather, it is an obvious distinction whose significance has been recognized by the federal courts. *See*, *e.g.*, *In re Grand Jury Subpoena Subpoena to Facebook*, No. 16-MC-1300 (JO), 2016 WL 9274455, at *3 n.4 (E.D.N.Y. May 12, 2016) ("The difference between a target and a subject, however, is one of some significance to consideration of the likely effect of the disclosure of a subpoena.").[9]

---

[9] The U.S. Department of Justice recognizes the significance of that distinction and directs federal prosecutors to apprise a target of his or her status as such before he or she is called to testify before a grand jury. *See* U.S. Attorney's Manual § 9-11.151 (describing the DOJ's "longstanding policy to advise witnesses who are known 'targets' of the investigation that their conduct is being

Moreover, even Plaintiffs' *own expert witness* conceded that in the years preceding the filing of Plaintiffs' private criminal complaint, the OAG had informed Ms. Devine's Swiss counsel that the OAG had "designated Ms. Devine as a participant in the proceedings under Article 105-1-f of the SCPC, which refers to *a third-party who has suffered detriment* due to procedural acts." Declaration of Georg Friedli (Dkt. Entry 310), at ¶ 8 (emphasis added). Thus, at the time when the Protective Order was negotiated, Ms. Devine was still [15] operating under the unremarkable impression that the OAG had given her earlier—namely, that she was regarded as a third-party in connection with the OAG's investigation. As a third-party, Ms. Devine could not reasonably have anticipated that she would—years later—need to "retain[ ] copies of Plaintiffs' "Confidential" Discovery Materials for use in her defense" in Swiss proceedings. By contrast, such a need could have been anticipated by an individual who *already was aware that she had been designated as a putative defendant in connection with those very same*

---

investigated for possible violation of Federal criminal law" and directing that "[t]his supplemental advice of *status of the witness as a target should be repeated on the record* when the target witness is advised of the matters discussed in the preceding paragraphs.") (emphasis added). The DOJ also "encourages" federal prosecutors, "in appropriate cases, . . . to notify [a target] a reasonable time before seeking an indictment in order to afford him or her an opportunity to testify" and affords discretion to federal prosecutors to notify "an individual, who has been the target of a grand jury investigation, that the individual is no longer considered to be a target." U.S. Attorney's Manual §§ 9-11.153, 9-11.155. Plainly, this distinction is material.

Swiss proceedings as a result of the filing of the private Swiss criminal complaint. Ms. Devine, however, was deprived of that knowledge because Plaintiffs furtively kept it from her even after they filed their private Swiss criminal complaint and negotiated the terms of the Protective Order. By denying Ms. Devine the reasonable relief she sought in the Modification Motion, the Order effectively rewarded Plaintiffs for hiding highly material evidence from Ms. Devine and the Court.

In short, the Magistrate Judge committed clear error in finding that the materiality of Plaintiffs' concealment of their private Swiss criminal complaint was "highly questionable." Because the Order was premised on that clearly erroneous finding, the Order represents an abuse of discretion and should be vacated. *See*, *e.g.*, *Arlook*, 952 F.2d at 374; *O'Keeffe*, 184 F. Supp. 3d at 1371; *Pensacola*, 2010 WL 4683935, at *1.

II. THE MAGISTRATE JUDGE COMMITTED CLEAR ERROR BY RELYING ON A CLEARLY ERRONEOUS FINDING RELATING TO THE NECESSITY OF THE DISCOVERY MATERIAL AT ISSUE AND BY DISREGARDING MS. DEVINE'S INABILITY TO OBTAIN THAT MATERIAL FROM ANY OTHER SOURCE

The Magistrate Judge further erred by relying on a clearly erroneous finding relating to the necessity of the discovery material at issue and by disregarding Ms. Devine's inability [16] to obtain the discovery

material at issue from any other source should the Court order her to destroy it or return it to Plaintiffs.

A. The Magistrate Judge Committed Clear Error in Finding That the Discovery Material at Issue Is Merely "Potentially Useful or Beneficial" to Ms. Devine's Defense

The Magistrate Judge's denial of certain of the relief requested in the Modification Motion rests in part on the Court's finding that "Defendant has not demonstrated good cause to justify modifying the parties' agreement merely because certain documents are potentially useful or beneficial to her defense in other legal proceedings." Order at 7. Because the documents at issue are, in fact, critically important to Ms. Devine's defense, Ms. Devine respectfully submits that the Magistrate Judge committed clear error in making and relying on that finding.

Courts routinely consider the importance of or need for the documents or information at issue when ruling on a motion to modify a protective order. *See*, *e.g.*, *City of Rome, Georgia v. Hotels.com, LP*, No. 4:05-CV-249-HLM, 2011 WL 13232091, at *3 (N.D. Ga. Sept. 12, 2011) ("For the following reasons, the Court finds that modification of the state court protective order is appropriate. First, Plaintiffs have a pressing need for the unredacted briefs, motions, and records in *City of*

Atlanta.").[10] Here, Ms. Devine's need for the documents and deposition testimony at issue is likewise pressing.

[17] As Ms. Devine explained in the Modification Motion, she intends to use "Confidential" deposition testimony she obtained from Glenn Kennedy, the general counsel of Absolute Capital Management Holdings Limited and the architect of Plaintiffs' "asset recovery" campaign, to demonstrate that Plaintiffs' claims were time-barred even before they were brought, that Plaintiffs lack standing to pursue any claims against her, that any claims Plaintiffs might attempt to assert against her in the U.S. or in Switzerland are barred by the doctrines of unclean hands and *in pari delicto*, and to show that certain financial arrangements Plaintiffs have made appear to have prompted them to commence legal proceedings against her in bad faith. Modification Motion at 8-9. Ms. Devine also intends to use "Confidential" deposition testimony obtained from Ronald Tompkins, one of Plaintiffs' former directors, and "Confidential" exhibits introduced during the Tompkins and Kennedy depositions, to prove those same points. *Id*. Critically, the only evidence available to Ms. Devine regarding certain of

---

[10] The *City of Rome* court further noted, citing *Tucker v. Ohtsu Tire & Rubber Co, Ltd.*, 191 F.R.D. 495, 501-502 (D. Md. 2000), that "[t]here is less need for deference" to an agreement between counsel "approved, almost as a ministerial act, by the court, than [to] an action directed by the court after full consideration of the merits of a fully briefed dispute." 2011 WL 13232091, at *2.

those issues is discovery material that Plaintiffs designated as "Confidential."

Because the aforementioned "Confidential" discovery materials—and the factual showing they will permit Ms. Devine to make—are essential to her defense against Plaintiffs' legal offensives in both the U.S. and Switzerland, her need for those materials is pressing. Accordingly, the Magistrate Judge's finding that those documents are merely "potentially useful or beneficial to her defense" is clear error. Therefore, the Order should be vacated. *Arlook*, 952 F.2d at 374; *O'Keeffe*, 184 F. Supp. 3d at 1371; *Pensacola*, 2010 WL 4683935, at *1.

[18] **B. The Magistrate Judge Committed Clear Error and an Abuse of Discretion by Disregarding Ms. Devine's Arguments Regarding Her Inability to Obtain the Discovery Material at Issue from any Other Source**

The Magistrate Judge further erred by dismissing as "wholly unavailing" Ms. Devine's arguments regarding her inability "to obtain the same documents or testimony in connection with other proceedings." Order at 6. Aside from that single sentence, the Order does not address the significance of Ms. Devine's inability to obtain the documents and testimony at issue from any other source. Ms. Devine respectfully submits that the Magistrate Judge committed an abuse of discretion and clear error by effectively ignoring Ms. Devine's

arguments regarding her inability to obtain the evidence at issue from any other source.

Courts ruling on motions to modify a protective order typically consider whether the evidence at issue can be acquired from some other source. *See SmithKline Beecham Corp. v. Synthon Pharm., Ltd.*, 210 F.R.D. 163, 166 (M.D.N.C. 2002) ("A number of factors may be employed to help guide a court in exercising its discretion as to whether to modify a protective order. These factors include: the reason and purpose for a modification, whether a party has alternative means available to acquire the information, ..."); [11] *Jones v. Pulte Home Corp.*, No. 5:07-CV-473-H(3), 2009 WL 10690096, at *1 (E.D.N.C. Apr. 3, 2009) (quoting *SmithKline*, 210 F.R.D. at 166) (same). In the Modification Motion, Ms. Devine argued persuasively that the Court should grant the requested modifications for precisely that reason.

[19] First, Ms. Devine explained that in all likelihood, she will be unable to obtain the relevant evidence from any other source because Plaintiffs are citizens of the Cayman Islands, where they are incorporated and have their principal places of business. Modification Motion at 13. Because Plaintiffs are foreign entities domiciled abroad, Ms. Devine will be unable to compel Plaintiffs to participate in any U.S. discovery in a subsequent proceeding. *Id*. In fact, Plaintiffs themselves

[11] The *SmithKline* court also noted that when "the reason opposing disclosure is mainly the desire to make litigation more difficult, opposition to modification carries less weight." 210 F.R.D. at 167 (citations omitted).

have argued that their need to comply with Cayman law can limit their ability to participate in discovery in U.S. proceedings. *See* Opposition at 16 (stating that "the Funds designated certain documents Confidential in order to comply with Cayman Islands law concerning the protection of confidential investor information, which documents the Funds would not have been able to produce absent the Confidential designation."). These facts weigh heavily in favor of the requested modification and the Magistrate Judge appears to have disregarded them.

Second, Ms. Devine likely would encounter great, if not insurmountable, difficulty were she attempt to obtain the documents at issue—many of which are or reflect banking records—through Swiss legal proceedings. *See*, *e.g.*, *S.E.C. v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 339 (N.D. Tex. 2011) (noting that "'disclosure of banking records will itself constitute [an] initial violation of Swiss laws.'") (quoting *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958)); *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 118 F.R.D. 331, 333 (S.D.N.Y. 1988) (noting that "the Swiss national interest . . . is embodied in its bank secrecy laws," which "prohibit[] by criminal law" the "disclosure of customer information") (footnote and citation omitted). This fact, too, weighs heavily in favor of the requested modification.

[20] Ms. Devine submits that by effectively ignoring her arguments regarding her inability to obtain the relevant evidence from any other source, the

Magistrate Judge committed an abuse of discretion and clear error. Accordingly, the Order should be vacated. *See Arlook*, 952 F.2d at 374; *O'Keeffe*, 184 F. Supp. 3d at 1371; *Pensacola*, 2010 WL 4683935, at *1.

III. THE MAGISTRATE JUDGE COMMITTED AN ABUSE OF DISCRETION BY DISREGARDING MS. DEVINE'S EQUITABLE ARGUMENTS RELATING TO PLAINTIFFS' MISCONDUCT

The Magistrate Judge concluded in the Order that the equitable arguments Ms. Devine advanced in the Modification Motion are "wholly unavailing." Order at 6. Beyond that conclusory dismissal, the Order does not address the merits of Ms. Devine's equitable arguments. Ms. Devine respectfully submits that the Magistrate Judge committed an abuse of discretion by effectively ignoring Ms. Devine's equitable arguments.

Courts regularly take equitable considerations into account when ruling on motions to modify protective orders. *See United States v. All Assets Held at Bank Julius Baer & Co., Ltd.*, 312 F.R.D. 16, 22 (D.D.C. 2015) (concluding that "[c]laimant has demonstrated good cause warranting a modification of the protective order in this case *based on his equitable, non-contractual confidentiality interests*"), *aff'd in part*, 233 F. Supp. 3d 143 (D.D.C. 2017) (emphasis added); *Boca Raton Community Hosp., Inc. v. Tenet Healthcare Corp.*, 271 F.R.D. 530, 537 (S.D. Fla. 2010) (weighing the prejudice a

litigant would suffer if denied access to the documents at issue and concluding that "[o]n balance, the equities clearly favor modification of the protective order."); *City of Rome*, 2011 WL 13232091, at *3 (concluding, "[a]s a matter of equity and to ensure thorough, accurate argument and prevent prejudice to Plaintiffs," that modification of protective order was appropriate).

[21] In the Modification Motion, Ms. Devine made powerful equitable arguments. She cited Plaintiffs' concealment of the private Swiss criminal complaint that they filed just days before they commenced this Action, and argued persuasively that the Court should view the Protective Order as voidable because Plaintiffs concealed that very material information from her while the parties negotiated the terms of the Protective Order. Modification Motion at 5, 11-12. Ms. Devine also argued persuasively that it would be fundamentally unfair for the Court to deny Ms. Devine an opportunity to make reciprocal disclosures of confidential discovery material to the OAG in light of the fact that Plaintiffs themselves have funneled a significant amount of discovery obtained in this case to the OAG in an effort to persuade the OAG to commence legal proceedings against Ms. Devine and/or her assets. *Id.* at 11.

Additionally, Ms. Devine noted that although Plaintiffs had twice deposed her in this case—and had forwarded certain of her deposition testimony to the OAG—they themselves steadfastly refused to testify on the record in this Action, going so far as to refuse, inexcusably, to sit for duly noticed depositions before

they eventually abandoned their suit once the Court ordered them to be deposed. *Id.* at 4-5; see also Judgment Motion at 19-23.[12]

These equitable arguments present a compelling case for modification of the Protective Order. Ms. Devine submits that by effectively ignoring those arguments, the Magistrate Judge committed an abuse of discretion. Accordingly, the Order should be vacated. *See Arlook*, 952 F.2d at 374; *Merkin*, 283 F.R.D. at 700.

[22] Finally, Ms. Devine notes that in the Order, the Magistrate Judge concluded that "Defendant's attempt to tie her destroy-or-return obligation to the latter of two future events—i.e., '(1) the conclusion of Plaintiffs' global litigation campaign against [Defendant]; and (ii) the Court's ruling on [Defendant's] forthcoming motion for an award of costs and fees' (Doc. 686 at 7)—provides no real or meaningful time limit on Defendant's compliance." Order at 6. In an effort to address those concerns, Ms. Devine hereby amends the Modification Motion to request instead that the destroy-or-return requirement set forth in Paragraph 18 of the Protective Order be suspended as to Ms. Devine until her pending Motion for Award of Costs and Fees (Dkt. Entry 713) is resolved and then only until the latter of (i) the date on which the asset freeze imposed

---

[12] If this alone were not sufficient, Plaintiffs have not been deposed by the OAG and have even succeeded in persuading the OAG not to depose Mr. Tompkins, one of Plaintiffs' former directors. *See* Exhibit B (translated May 9, 2018 letter from Swiss federal prosecutor Graziella De Falco Haldemann denying request to depose Mr. Tompkins).

by the OAG is lifted or otherwise resolved by way of a judicial or administrative adjudication and (ii) the date on which the restraint of one of Ms. Devine's U.S. bank accounts by the Office of the U.S. Attorney for the Central District of California is lifted or otherwise resolved by way of a judicial or administrative adjudication.

Ms. Devine further notes that in the Order, the Magistrate Judge concluded that "Defendant's request would require modifying [Paragraph 14 of the Protective Order] to permit Defendant to voluntarily and without notice disclose documents . . . to the Swiss government and the Office of the United States Attorney for the Central District of California." Order at 3. In an effort to address the Magistrate Judge's concern regarding notice to Plaintiffs, Ms. Devine hereby amends the Modification Motion to clarify that she will comply with the notice requirements set forth in Paragraph 14 of the Protective Order before providing to the Swiss government or the Office of the United States Attorney for the [23] Central District of California any Discovery Material that Plaintiffs designated "Confidential" pursuant to the Protective Order.

CONCLUSION

For the foregoing reasons, Ms. Devine respectfully requests that the Court sustain the objections set forth above and issue an order vacating the Order and granting the Modification Motion or, in the alternative, remanding the Modification Motion to Magistrate Judge McCoy for further proceedings.

Dated: September 10, 2018

Respectfully submitted,

By: */s/ Ian M. Comisky*

Carl F. Schoeppl
Fla. Bar. No. 818518
SCHOEPPL LAW, P.A.
4651 North Federal Highway
Boca Raton, FL 33431-5133
Phone: (561) 394-8301
Fax: (561) 394-3121
carl@schoeppllaw.com

Attorney for Defendant

Ian M. Comisky
Fla. Bar No. 225304
Matthew D. Lee
Admitted pro hac vice
FOX ROTHSCHILD LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103
Phone: (215) 299-2795, 2765
Fax: (215) 299-2150
icomisky@foxrothschild.com
mlee@foxrothschild.com

Attorneys for Defendant

[Certificate Of Service Omitted]

APPENDIX G

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

DEFENDANT'S MOTION FOR MODIFICATION OF STIPULATION AND PROTECTIVE ORDER

(Filed Apr. 20, 2018)

Table of Contents

Defendant Susan Elaine Devine ("Ms. Devine"), by and through her undersigned counsel, respectfully moves for modification of the Stipulation and Protective Order entered by the Court on July 30, 2015 (Dkt. Entry 64) (the "Protective Order").

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 time-barred claim for common law unjust enrichment. That ruling was followed on July 25, 2017 by an Order dissolving the temporary restraining order on a number of grounds, including that Plaintiffs were unable to trace assets for which restraint was sought.[1] 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.

---

[1] Specifically, the Court concluded in its July 25, 2017 Order that "[d]ue to the commingling of funds . . . 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." Dkt. Entry 575 at 17-18 (footnote omitted).

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 expert 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 allowing 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.

As a matter of basic fairness, the instant Motion seeks modification of the Protective Order to allow Ms. Devine to use certain materials designated "Confidential" by Plaintiffs to defend herself against Plaintiffs' offensives here and abroad.

BACKGROUND

This litigation and the facts underlying it have been described at length in the parties' prior submissions to the Court. The facts relevant to the instant Motion, specifically, are set forth in the "Background" section of Ms. Devine's contemporaneously filed Motion for Entry of Partial Final Judgment (Dkt. Entry 685 at 4-20) (the "Motion for Judgment"). In the interests of economy, Ms. Devine respectfully refers the Court to the Motion for Judgment for a comprehensive account of the salient facts.[2]

---

[2] Capitalized terms used but not defined herein shall have the meaning set forth in the Motion for Judgment.

ARGUMENT

I. The Court Should Modify the Protective Order to Permit Ms. Devine (i) to Make Reciprocal Disclosures of Material Designated "Confidential" and (ii) to Retain Copies of Material Designated "Confidential"

The Protective Order entered in this case provides, *inter alia*, that "[a]t the conclusion of this litigation (including any appeals) all material designated Confidential pursuant to the terms of this Protective Order shall either be destroyed or returned to the designating Party, within sixty (60) days after the conclusion of the litigation." Protective Order at ¶ 18.[3] Because Ms. Devine will need to rely on and disclose certain of the materials that Plaintiffs have designated Confidential while she defends herself against Plaintiffs' legal offensives in Switzerland and the United States—and while she litigates her forthcoming motion for an

[3] As a preliminary matter, Ms. Devine does not believe that the destroy-or-return requirement set forth in Paragraph 18 of the Protective Order is effective as of yet, as the filing and pendency of the instant Motion mean, necessarily, that this litigation has not "conclu[ded]." *See* Fed. R. Civ. P. 54(b) ("[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties *does not end the action as to any of the claims or parties* and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.") (emphasis added). Notwithstanding that, the instant motion is being submitted within sixty days of the date on which this Court dismissed Plaintiffs' remaining unjust enrichment claim.

award of costs and attorney's fees[4]—she respectfully submits that the Court should modify the Protective Order to permit her to make reciprocal disclosures of material marked Confidential and to permit her to retain copies of such material until the latter of (i) the conclusion of Plaintiffs' global litigation campaign against Ms. Devine; and (ii) the Court's ruling on Ms. Devine's forthcoming motion for an award of costs and fees.

A. Plaintiffs' Designation of Various Deposition Transcripts and Deposition Exhibits as "Confidential"

Plaintiffs have produced some 606,949 documents in this matter. *See* Declaration of Matthew D. Lee filed herewith, at ¶ 2. Although it is not clear which of those documents they have designated as "Confidential,"[5] Plaintiffs *have* explicitly designated as

---

[4] Ms. Devine intends to file shortly a separate motion seeking an award of costs and attorney's fees.

[5] The Protective Order provides that "Discovery Material that is deemed Confidential shall be stamped by the producing Party 'CONFIDENTIAL.' In the case of Discovery Material produced on CD, DVD or other electronic storage medium that is deemed Confidential, the producing Party shall affix the legend 'CONFIDENTIAL' to such electronic storage medium and, to the extent practical, to each page or unit of material." Protective Order at ¶ 5. None of the electronic documents produced by Plaintiffs appears to bear a legend reading "CONFIDENTIAL" affixed by Plaintiffs to each page thereof. Accordingly, it is not clear which, if any, of the electronic documents Plaintiffs produced are entitled to treatment as "Confidential" Discovery Material pursuant to the Protective Order. Ms. Devine's counsel recently learned

"Confidential" portions of various deposition transcripts created during this Action and exhibits introduced during those depositions. *See* Exhibit CC, June 29, 2017 Letter from Linda Imes to Veritext, and Exhibit DD, January 17, 2018 Email from Justin Lo to Carl Schoeppl.[6] Ms. Devine intends to rely on at least two of those deposition transcripts—namely, the transcripts of the depositions of Glenn Kennedy and Ronald Tompkins—and exhibits introduced during those depositions to defend herself against Plaintiffs' campaign to persuade the Swiss government to commence legal proceedings against her and/or to seize certain of her assets. Ms. Devine likewise intends to rely on those materials in connection with her forthcoming motion for an award of costs and attorney's fees. Additionally, Ms. Devine intends to use those materials while communicating with the DOJ regarding the restraint of one of Ms. Devine's U.S. bank accounts pursuant to a seizure warrant executed by the FBI and

---

that of the more than 600,000 documents Plaintiffs produced in this Action, approximately 5,540 appear to have been produced with metadata indicating that each may be confidential. Ms. Devine disputes that the use of such metadata could be sufficient to render those documents "Confidential" under the Protective Order. Plaintiffs did not, for instance, "affix the legend 'CONFIDENTIAL' to . . . each page"—or, seemingly, to *any* pages—of those 5,540 documents. Ms. Devine's counsel contacted Plaintiffs' counsel via email to request a list of the documents in Plaintiffs' various productions that Plaintiffs have designated "Confidential" pursuant to the Protective Order but have not, to date, received a response to that particular request.

[6] All referenced exhibits are attached to Ms. Devine's Motion for Entry of Final Partial Judgment. Dkt. Entry 685.

the Office of the U.S. Attorney for the Central District of California. *See* Dkt. Entry 560 at ¶ 7.

Ms. Devine intends to rely on portions of the transcript of the deposition of Glenn Kennedy and exhibits introduced during that deposition, among other things, to demonstrate that Plaintiffs were on notice of their potential claims against Ms. Devine—and in fact signed an agreement whereby certain claims against Ms. Devine were assigned to them—no later than October 2009.[7] Ms. Devine also intends to use the transcript of Mr. Kennedy's deposition to show that Plaintiffs lack standing to assert claims against her, and to challenge Plaintiffs' claims regarding the extent of the purported damages they suffered. Ms. Devine intends to use the transcripts of the depositions of Mr. Tompkins *and* Mr. Kennedy—as well as exhibits introduced during those depositions—to show that Plaintiffs were, in fact, aware of and responsible for the alleged improprieties that they accuse Mr. Homm of having committed and, therefore, were not the faultless victims that they have held themselves out to be—

---

[7] The limitations period applicable to Plaintiffs' federal RICO claims and their unjust enrichment claim was four years. *See Rotella v. Wood*, 528 U.S. 549, 551 (2000); *Davis v. Monahan*, 832 So.2d 708, 709 (Fla. 2002). The limitations period applicable to Plaintiffs' Florida RICO claims was five years. *See* Fla. Stat. Ann. § 895.05(11). Accordingly, documents and other evidence showing that Plaintiffs were on notice of their claims against Ms. Devine no later than October 2009 establish that the instant Action was clearly time-barred long before it was filed in 2015. A fuller explanation of why Plaintiffs' claims are (and were) time-barred is set forth in Ms. Devine's Motion to Dismiss Plaintiffs' Second Amended Complaint. Dkt. Entry 569 at 11-19.

and to show that the since-dismissed Action never should have been filed. The transcript of Mr. Kennedy's deposition is particularly critical insofar as it shows that Plaintiffs retained Mr. Kennedy to manage their "value recovery process"—*i.e.*, their global litigation campaign. Because that transcript establishes that Mr. Kennedy is an agent of Plaintiffs for all purposes relating to their legal offensive against Ms. Devine, it has significant probative value.

B. The Court Should Modify the Protective Order

A District Court possesses "considerable discretion to modify its own protective order." *F.T.C. v. AbbVie Prod. LLC*, 713 F.3d 54, 58 (11th Cir. 2013). In fact, "[a]s long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed." *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990). When ruling on a motion to modify a protective order, "the best practice is to apply 'a balancing test to determine whether any justification exists for lifting or modifying the protective order.'" *Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp.*, 271 F.R.D. 530, 537 (S.D. Fla. 2010) (quoting *SRS Technologies, Inc. v. Physitron, Inc.*, 216 F.R.D. 525, 530 (N.D. Ala. 2003)). Where one party would be prejudiced in the absence of the requested modification, but the other party would "face only [a] comparatively *de minimis* burden" were the requested modification granted, then "the equities clearly favor

modification of the protective order." *Id.* (citations omitted).

Here, the equities favor the modification that Ms. Devine requests. Permitting Ms. Devine to retain and use the materials that Plaintiffs have designated "Confidential" would impose—at most—only a *de minimis* burden on Plaintiffs. Indeed, all such documents originated with Plaintiffs and therefore are known to them, and Ms. Devine would covenant not to disclose any such documents to any entities other than the OAG—to which Plaintiffs themselves have disclosed deposition testimony and other documents obtained in this action—and the DOJ, which likewise has provided documents to the OAG. *See*, *e.g.*, Ex. K to Motion for Judgment (letter from Plaintiffs' Swiss counsel to OAG enclosing "the depositions (in video and retranscription format) of Hernandez Sampere, Parsi, and Escalante that were collected as part of the civil proceedings initiated . . . in Florida against Susan Devine"); *see also* Exhibit EE to Motion for Judgment, Sept. 15, 2017 letter from Assistant U.S. Attorney Cassie Palmer "[e]nclos[ing] . . . a DVD containing various documents requested by the Swiss prosecutor"). Accordingly, Plaintiffs would run no risk of being surprised by the content of any such documents and already are familiar with the entities to which any such documents might be disclosed. Nor would permitting Ms. Devine to retain and use documents designated "Confidential" while she litigates her forthcoming motion for an award of costs and attorney's fees prejudice Plaintiffs, as such an arrangement

would simply continue the *status quo* that has existed since the Court entered the Protective Order in 2015.

By contrast, denying Ms. Devine the modification she seeks would prejudice her by denying her access to documents that will allow her to: (i) show that Plaintiffs' vexatious, bad-faith conduct in this case merits an award of costs and attorney's fees; (ii) defend herself against Plaintiffs' campaign to persuade the Swiss government to commence legal proceedings against her and/or to assist in seizing her assets; and (iii) defend against the U.S. government's seizure of a bank account held by Ms. Devine in Massachusetts. As set forth in Background Sections I and II of the Motion for Judgment, Plaintiffs have relied, in significant part, on documents and testimony that they obtained *in this Action* as they have attempted to persuade the OAG to commence legal proceedings against Ms. Devine and/or to seize her assets. Equity demands that Ms. Devine be permitted to use the documents and testimony *she* obtained in this Action to defend herself against those attacks.

Contract law principles also support Ms. Devine's request for modification of the Protective Order. As set forth in the Motion for Judgment, the parties negotiated the terms of the Protective Order months *before* Ms. Devine became aware that Plaintiffs had filed a private Swiss criminal complaint against her, and well before Ms. Devine learned of the full scope of Plaintiffs'

symbiotic relationship with the OAG.[8] *See* Protective Order at 7-9. Because Plaintiffs concealed from Ms. Devine that they were seeking her indictment in Switzerland *at the very same time that the parties were negotiating the terms of the Protective Order*, the Court should view that agreement as voidable. *See Mazzoni Farms, Inc. v. E.I. DuPont De Nemours and Co.*, 761 So.2d 306, 313 (Fla. 2000) ("It is axiomatic that fraudulent inducement renders a contract voidable. . . .") (citation omitted); *May v. Nygard Holdings Ltd.*, No. 6:03-cv-1832-Orl-DAB, 2007 WL 2120269, at *2 (M.D. Fla. July 20, 2007) (same) (citation omitted); *Bank of Am., N.A. v. GREC Homes IK, LLC*, No. 13- 21718-CIV, 2014 WL 351962, at *9 (S.D. Fla. Jan. 23, 2014) ("A contract entered as a result of fraudulent inducement results in a voidable contract.") (citations omitted). Had Ms. Devine been aware that Plaintiffs had filed a private criminal complaint against her in Switzerland, she would not have agreed to the provisions in the Protective Order permitting Plaintiffs to funnel documents to the OAG.

Moreover, forcing Ms. Devine to seek anew the "Confidential" materials already produced would needlessly duplicate discovery that the parties already have conducted at great expense. The unnecessary replication of discovery is generally disfavored. *See*, *e.g.*, *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 860 (7th Cir. 1994) ("'[W]here an appropriate

[8] A more detailed recitation of the facts concealed from Ms. Devine is set forth in the Motion for Judgment at Background Section I(D).

modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification.' ") (quoting *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980)).

More importantly, in the absence of the requested modifications, Ms. Devine likely would be unable to obtain the relevant documents and testimony. Plaintiffs are "citizen[s] of the Cayman Islands, where [they are] incorporated and ha[ve their] principal place[s] of business." Dkt. Entry 560 at 4-5. Accordingly, Ms. Devine may not be able to compel them to participate in any U.S. discovery in a subsequent proceeding. Similarly, Ms. Devine likely would encounter great difficulty were she attempt to obtain the documents at issue—many of which are or reflect banking records—through Swiss legal proceedings. *See*, *e.g.*, *S.E.C. v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 339 (N.D. Tex. 2011) (noting that " 'disclosure of banking records will itself constitute [an] initial violation of Swiss laws.' ") (quoting *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958)); *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 118 F.R.D. 331, 333 (S.D.N.Y. 1988) (noting that "the Swiss national interest . . . is embodied in its bank secrecy laws," which "prohibit[ ] by criminal law" the "disclosure of customer information") (footnote and citation omitted).

Accordingly, Ms. Devine respectfully requests that the Court issue an Order modifying the Protective Order to permit her to make reciprocal disclosures of material marked "Confidential"—*i.e.*, disclosures only to the OAG and the DOJ—and to permit her to retain copies of material designated "Confidential" until the latter of (i) the conclusion of Plaintiffs' global litigation campaign against Ms. Devine and (ii) the Court's ruling on Ms. Devine's forthcoming motion for an award of costs and fees.[9]

CERTIFICATE OF GOOD FAITH

Ms. Devine's undersigned counsel certify, in accordance with Local Rule 3.01(g), that they communicated with Plaintiffs' counsel regarding the issues raised herein, and were advised that Plaintiffs object to the relief requested in the instant Motion.

CONCLUSION

For the foregoing reasons, Ms. Devine respectfully requests that the Court enter an Order modifying the Protective Order so as to permit Ms. Devine (i) to retain copies of all Discovery Material designated "Confidential" by Plaintiffs pending the Court's ruling on

---

[9] As set forth in footnote 2, *supra*, Ms. Devine does not believe that the destroy-or-return requirement set forth in Paragraph 18 of the Protective Order is yet effective. Nonetheless, Ms. Devine and the undersigned counsel will refrain from disclosing any documents designated "Confidential" by Plaintiffs pending the Court's ruling on this Motion.

Ms. Devine's forthcoming motion for an award of costs and attorney's fees; (ii) to retain copies of all Discovery Material designated "Confidential" by Plaintiffs pending the resolution of the investigations and other legal proceedings involving Ms. Devine and/or any of Ms. Devine's assets in Switzerland and/or the United States; and (iii) to disclose to the Swiss government and the Office of the U.S. Attorney for the Central District of California certain Discovery Material designated "Confidential" by Plaintiffs. Ms. Devine also respectfully requests that the Court award her any other relief the Court deems just and proper.

Dated: April 20, 2018

Respectfully submitted,

By: */s/ Ian M. Comisky*

Carl F. Schoeppl
Fla. Bar. No. 818518
SCHOEPPL LAW, P.A.
4651 North Federal Highway
Boca Raton, FL 33431-5133
Phone: (561) 394-8301
Fax: (561) 394-3121
carl@schoeppllaw.com

Attorney for defendant

Ian M. Comisky
Fla. Bar No. 225304
Matthew D. Lee
Admitted pro hac vice
FOX ROTHSCHILD LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103
Phone: (215) 299-2795, 2765
Fax: (215) 299-2150
icomisky@foxrothschild.com
mlee@foxrothschild.com

Attorneys for defendant

[Certificate Of Service Omitted]

APPENDIX H

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

DEFENDANT'S MOTION FOR ENTRY OF PARTIAL FINAL JUDGMENT

(Filed Apr. 20, 2018)

Table of Contents

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[1]

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 the Swiss. *Id.* at 2; *see also* Exhibit B, Feb. 11, 2016 Declaration of

[1] 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.

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.[2]

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).[3]

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' alleged "Penny

---

[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.

Stock Scheme."[4] *See* Dkt. Entry 2 (the "Complaint") at ¶¶ 1-2.[5] 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 the *Ex Parte* TRO Motion in an

---

[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.

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[6]—further

[6] 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 production. *See* Dkt. Entries 248, 305. Had Ms. Devine been aware of Plaintiffs'

provided 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").[7]

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*. The OAG letter also requested "documentation in connection with the transactions set forth on pages 22 to

---

designs from the outset, that emergency motion practice would not have been necessary.

[7] 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.

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.[8]

---

[8] 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. 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

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[9] on February 12,

---

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.

[9] 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 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

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.[10]

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

---

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.

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.[11] Plaintiffs, however, were less forthcoming.

---

[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).

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 OAG, which provided it to

Plaintiffs, who in turn used it to create the Estera Report produced in the Action.[12]

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").[13] In response,

---

[12] 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*.

[13] 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 law" (*id.* at 14), and that "[d]espite the equitable titles affixed to the relief requested, plaintiffs are essentially seeking one thing—money." *Id.*

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

---

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).

Appellants' 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.[14] 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. 28, 2017).[15] As a

---

[14] 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.

[15] 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

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 ("AIFL," and collectively, the "January Notices," attached hereto as

---

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).

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.[16]

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).

Ms. Devine's counsel responded to the email from Plaintiffs' counsel on January 8, 2018. *See* Exhibit W,

---

[16] 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.

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.[17] The Deposition Order

[17] 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 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, 55-56, 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,

directed AEWFL to 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 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

---

and 59 in the AEWFL Notice were improper in 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.

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 respectfully submits that the Court should

enter a final judgment in her favor as to the RICO Claims and the Constructive Trust Claim.

A. Entry of Partial Final Judgment under Rule 54(b)

"Fed.R.Civ.P. 54(b) governs the procedure by which district courts may enter final judgments with respect to fewer than all claims or parties in cases involving multiple claims or parties." *In re Yarn Processing Patent Validity Litig.*, 680 F.2d 1338, 1339 (11th Cir. 1982).[18] *See also Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 3 (1980) ("Federal Rule of Civil Procedure 54(b) allows a district court dealing with multiple claims or multiple parties to direct the entry of final judgment as to fewer than all of the claims or parties; to do so, the court must make an

---

[18] Specifically, Rule 54(b) provides that:

> When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. *Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties* and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed. R. Civ. P. 54(d) (emphasis added).

express determination that there is no just reason for delay.").

"A district court must follow a two-step analysis in determining whether a partial final judgment may properly be certified under Rule 54(b). First, the court must determine that its final judgment is, in fact, both 'final' and a 'judgment.'" *Lloyd Noland Found., Inc. v. Tenet Health Care Corp.*, 483 F.3d 773, 777 (11th Cir. 2007) (quoting *Curtiss–Wright*, 446 U.S. at 7). "[T]he court's decision must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action,' and a 'judgment' in the sense that it is a decision upon a cognizable claim for relief." *Id.* (quoting *Curtiss–Wright*, 446 U.S. at 7) (internal quotation marks omitted). Second, the court must "determine that there is no 'just reason for delay' in certifying [the judgment] as final and immediately appealable." *Id.* (citing *Curtiss–Wright*, 446 U.S. at 8).

B. Entry of a Partial Final Judgment as to the Constructive Trust Claim

In the Order on the Second Motion to Dismiss, the Court dismissed the Constructive Trust Claim with prejudice. Dkt. Entry 521 at 65. A dismissal with prejudice is a final judgment as contemplated by *Lloyd Noland*. *See Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) ("The phrase 'final judgment on the merits' is often used interchangeably with 'dismissal with prejudice.'") (citations omitted). In fact,

"Supreme Court precedent confirms that a dismissal for failure to state a claim under Rule 12(b)(6) is a 'judgment on the merits' to which res judicata applies." *Id.* (citing *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 399 n.3 (1981)). *See also AMF Holdings, LLC v. Elie*, No. 1:15-CV-3916-MHC-CMS, 2016 WL 10520951, at *3 (N.D. Ga. Nov. 2, 2016) ("A dismissal with prejudice is an adjudication on the merits, barring further action on the same claims in the same court. In other words, it is final and has claim preclusive effect.") (citations omitted), *report and recommendation adopted*, No. 1:15-CV-3916-MHC, 2016 WL 10567163 (N.D. Ga. Nov. 28, 2016).

Additionally, there is no just reason for delay in certifying the dismissal of the Constructive Trust Claim as final. Rather, certifying the dismissal of that claim as final would promote justice insofar as it would permit Ms. Devine to seek certain of the costs to which she is entitled—namely, costs compensable under Rule 54(d). This is so because to date, no final judgment has been entered in this Action. *See Fowler by Fowler v. Jefferson Nat'l Life Ins. Co.*, No. 4:08-CV-0148-HLM, 2009 WL 10668900, at *1 (N.D. Ga. Oct. 15, 2009) ("There is no dispute that Defendant qualifies as a prevailing party here. . . . To recover costs under Rule 54(d), however, Defendant must wait until the Clerk enters a final judgment and then file a bill of costs.").

Nor would certifying the dismissal of the Constructive Trust Claim as final present any risk of piecemeal appeals, as Plaintiffs have discontinued

this litigation entirely and withdrawn to foreign jurisdictions. *See* Background Section III, *supra*. Moreover, were the Court to decline to enter a final judgment in this matter, Ms. Devine would be barred outright from seeking the costs to which she is entitled under Rule 54(d). *Fowler by Fowler*, 2009 WL 10668900, at *1.

C. Entry of a Partial Final Judgment as to the RICO Claims

In the Order on the Second Motion to Dismiss, the Court dismissed the RICO Claims without prejudice and granted Plaintiffs twenty-one days to file a second amended complaint. Dkt. Entry 521 at 65. However, on February 28, 2017, Plaintiffs instead filed a notice stating that they had "elected not to file a second amended complaint." Dkt. Entry 527 at 2. On May 8, 2017, the Court issued an Order directing Plaintiffs to file, within seven days, "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. On May 15, 2017, Plaintiffs filed a Second Amended Complaint including only one cause of action: a claim for common law unjust enrichment. Dkt. Entry 560 at ¶¶ 230-237.

The Court's February 21, 2018 Order dismissing this Action without prejudice does not constitute a final judgment. *U.S. Nineteen, Inc. v. Orange Cty., Fla.*, No. 99-1195-CIV-ORL-18B, 1999 WL 1336066, at *2

(M.D. Fla. Nov. 9, 1999) ("A voluntary dismissal without prejudice is not an adjudication on the merits, is not a 'judgment,' and is not an appealable order. As such, Defendants are not prevailing parties, within the meaning of Rule 54, and are not entitled to costs.") (footnote omitted); *see also Manhattan Constr. Co. v. Phillips*, No. 1:09-cv-1917-WSD, 2012 WL 13001901, at *5 (N.D. Ga. Dec. 12, 2012) ("[D]ismissal by a plaintiff pursuant to Federal Rule of Civil Procedure 41(a)(1) does not constitute relief from the court on the merits of a claim. . . .") (citations omitted).

When Plaintiffs chose not to amend the RICO Claims, however, they converted the Court's dismissal of those claims without prejudice into a dismissal *with prejudice*. *Dependable Component Supply, Inc. v. Carrefour Informatique Tremblant, Inc.*, 572 F. App'x 796, 802 n.6 (11th Cir. 2014) ("[A] dismissal without prejudice under Rule 12(b)(6) becomes a dismissal with prejudice when no timely amendment is made and no request for an extension is submitted.") (citing *Hertz Corp. v. Alamo Rent –A–Car, Inc.*, 16 F.3d 1126, 1127 n.3 (11th Cir. 1994)); *Hertz*, 16 F.3d at 1127 n.3 ("If the dismissal [without prejudice] had been effectuated pursuant to Fed.R.Civ.P. 12(b)(6) . . . we recognize that such a dismissal would have become a dismissal with prejudice when no timely amendment was filed and no request for an extension was submitted.").

Accordingly, the analysis set forth above relating to Plaintiffs' Constructive Trust Claim applies with equal force to the RICO Claims. The dismissal of the

RICO Claims with prejudice is a "final judgment" as contemplated by *Lloyd Noland*. *See Stewart*, 297 F.3d at 956; *AMF Holdings*, 2016 WL 10520951, at *3. Moreover, as set forth above, there is no just reason for delay in certifying the dismissal of the RICO Claims as final. To the contrary, certifying the dismissal of the RICO Claims as final would promote justice by allowing Ms. Devine to seek, pursuant to Rule 54(d), certain of the costs traceable to her successful defense of the RICO Claims. Therefore, Ms. Devine respectfully requests that the Court enter a final judgment in her favor as to the RICO Claims and the Constructive Trust Claim.

CERTIFICATE OF GOOD FAITH

Ms. Devine's undersigned counsel certify, in accordance with Local Rule 3.01(g), that they communicated with Plaintiffs' counsel regarding the issues raised herein, and were advised that Plaintiffs object to the relief requested in the instant Motion.

CONCLUSION

For the foregoing reasons, Ms. Devine respectfully requests that the Court enter a final judgment in her favor and against Plaintiffs as set forth above, and

award her any other relief the Court deems just and proper.

Dated: April 20, 2018

SCHOEPPL LAW, P.A.

By: /s/ Carl F. Schoeppl
Carl F. Schoeppl
Fla. Bar. No. 818518
4651 North Federal Highway
Boca Raton, FL 33431-5133
Phone: (561) 394-8301
Fax: (561) 394-3121
carl@schoeppllaw.com

Respectfully submitted,

FOX ROTHSCHILD LLP

By: /s/ *Ian M. Comisky*
Ian M. Comisky
Fla. Bar No. 225304
Matthew D. Lee
Admitted pro hac vice
2000 Market Street,
20th Floor
Philadelphia, PA 19103
Phone: (215) 299-2795, 2765
Fax: (215) 299-2150
mlee@foxrothschild.com
Attorneys for
Susan Elaine Devine

[Certificate Of Service Omitted]

APPENDIX I

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-29MR **DISPOSITIVE MOTION** **ORAL ARGUMENT REQUESTED**

DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

(Filed Jul. 19, 2017)

SCHOEPPL LAW, P.A.
4651 North Federal Highway
Boca Raton, FL 33431-5133
Phone: (561) 394-8301
Fax: (561) 394-3121

FOX ROTHSCHILD LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103
Phone: (215) 299-2795
Fax: (215) 299-2150

Attorneys for Defendant

Dated: July 19, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Susan Elaine Devine ("Ms. Devine"), by and through her undersigned counsel, respectfully seeks dismissal of the Second Amended Complaint (Injunctive Relief Sought) (Dkt. Entry 560) (the "Second Amended Complaint" or "SAC") filed by Plaintiffs on May 15, 2017.

PRELIMINARY STATEMENT

Plaintiffs commenced this action in June 2015 with a sprawling, 112-page complaint premised on Ms. Devine's alleged involvement in a "criminal enterprise." That pleading was replete with references to purported "money laundering" and "wire fraud" upon which Plaintiffs' four federal and Florida RICO claims were based. Now, more than two years later, the four RICO counts on which this action initially were premised have been dismissed. (*See* Dkt. Entry 521 at 65 (stating that the RICO counts were "essentially gutted").) While the Court granted Plaintiffs an opportunity to replead those counts, Plaintiffs have instead attempted to shoehorn their already-rejected RICO allegations into what remains: a time-barred and, in

Ms. Devine's view, insufficiently pleaded count for unjust enrichment.[1, 2]

The operative events described in the SAC allegedly occurred between 2004 and 2007. The four-year statute of limitations applicable to an unjust enrichment claim expired long before this suit was commenced. Plaintiffs, therefore, are compelled to make various tolling arguments to prevent dismissal of the SAC. But, Plaintiffs acknowledge that they were aware in 2006 and again in 2007 of assets Ms. Devine received by way of her divorce and this concession is fatal to their claims. Plaintiffs' assorted tolling arguments,

---

[1] As the contemporaneously filed redline comparing the SAC to Plaintiffs' Amended Complaint (Dkt. Entry 196) (the "Amended Complaint" or "AC") shows, the third and most recent iteration of Plaintiffs' complaint differs from their prior pleading in only a few respects. (*See* Ex. 1.) Aside from the deletion of their dismissed counts and the appendices listing purported "money laundering" and "wire fraud" violations, the SAC varies from the Amended Complaint primarily in that the phrase "Money Laundering Scheme" has been replaced by "Transfer and Concealment Activity." (*See id. passim*.)

[2] Ms. Devine is cognizant of this Court's prior rulings with respect to the unjust enrichment count. (Dkt. Entry 368 at 23; Dkt Entry 521 at 63.) With respect to Plaintiffs' most recent pleading, as to which the Court has yet to issue any ruling, Ms. Devine herein repeats (in order to preserve) certain arguments previously raised and makes additional arguments, primarily that Ms. Devine was not enriched by Plaintiffs at all. Ms. Devine notes that Plaintiffs' current attempt to reprise their RICO allegations—allegations replete with references to purported wrongful conduct by Ms. Devine—is particularly risible in light of their prior assertion that their "unjust enrichment claim is not (and never was) predicated on any wrongdoing by [Ms.] Devine." (Dkt. Entry 318 at 62.)

based upon alleged delayed discovery, equitable tolling, and equitable estopped, raise purely legal issues that should be rejected now. Plaintiffs' claim is time barred and is fatally defective on its merits, as Plaintiffs cannot plead that *they* enriched Ms. Devine, nor that even if they did so, they did so directly. Plaintiffs' claim is also barred by the rule against claim-splitting. Further, Plaintiffs sustained a foreign injury that cannot form the basis for a claim for unjust enrichment under Florida law. Ms. Devine respectfully requests that the Court dismiss the Second Amended Complaint.

FACTUAL BACKGROUND[3]

I. THE PARTIES AND "RELEVANT NON-PARTIES"

Plaintiffs are nine former hedge funds "incorporated in the Cayman Islands" claiming to be victims of a securities fraud and "Penny Stock Scheme" purportedly orchestrated and carried out from 2004 to 2007 by Absolute Capital Management Holdings Limited ("ACM") and a number of ACM's officers and agents, including Ms. Devine's former husband, Florian Homm ("Homm") and many others. (SAC at ¶¶ 1-2, 9, 11-23,

[3] In the interest of brevity, Ms. Devine recounts herein only the most pertinent portions of the factual background that informs this litigation. For a more detailed summary, Ms. Devine respectfully refers the Court to her Motion to Dismiss the Amended Complaint filed on February 12, 2016 (Dkt. Entry 252).

32-44).[4] Ms. Devine, the lone defendant in this lawsuit, is a citizen of the United States and Brazil and resident of Florida. (*Id.* at ¶ 10.)[5] Homm is "a German national" who served as the Chief Investment Officer at ACM and is alleged to be the "primary architect of and participant in the underlying Penny Stock Scheme." (*Id.* at ¶¶ 15.)

Plaintiffs allege that in addition to Ms. Devine and Homm, "[o]ther non-party individuals and entities played roles, direct or indirect, in the Transfer and Concealment Activity" on which Plaintiffs based both their since-dismissed RICO claims and their sole remaining claim for unjust enrichment (*id.* at ¶ 14), including CSI, Urs Meisterhans, the Floma Foundation, Marcel Eichmann, Sammy Kapleta, and Jurg Brand. (*Id.* at ¶¶ 16-23.) The SAC refers to additional foreign actors and entities that Plaintiffs claim were involved in the alleged "Penny Stock Scheme," including a group

---

[4] "After the Penny Stock Scheme was revealed, the Funds' only business activity has been asset recovery." (SAC at ¶ 9). In a civil complaint they filed in the United States District Court for the Southern District of New York (the "SDNY Action"), the Funds stated, "By agreement dated October 20, 2009, ACM assigned and transferred to the Funds all of its rights to bring any and all claims that it may have against Defendants (as well as any other persons against whom ACM has or may have claims arising out of or relating to Homm's dealings in the Penny Stock Schemes on behalf of the Funds.)" (*See* Ex. 2 at ¶ 243.) It remains unclear whether the claim Plaintiffs have brought in this action is on behalf of ACM. (*See* Ex. 3 (Plaintiffs' Corporate Disclosure Statement filed in appeal arising out of SDNY Action).)

[5] Ms. Devine reserves her right to contest subject matter jurisdiction following the completion of discovery.

of individuals described as "Trading Conspirators," consisting of Homm, Todd Ficeto, Hunter World Markets, Inc., Colin and Craig Heatherington, Tony Ahn, Sean Ewing, and the Hunter Fund Ltd. (*Id.* at ¶¶ 33-41.)

II. THE ALLEGED SECURITIES FRAUD AND PENNY STOCK SCHEME

Notwithstanding the dismissal of all four of their RICO claims, Plaintiffs continue to rely on the alleged "Penny Stock Scheme" as the foundation of their lawsuit. (*Id.* ¶¶ 32-97.) In sum, Plaintiffs allege that "[f]rom at least September 2004 and escalating dramatically until Homm's resignation from ACM on September 18, 2007, the Trading Conspirators caused the Funds to invest in securities of Penny Stock Companies" that were "thinly capitalized" and had "thinly traded" stocks "susceptible to price manipulation," "without disclosing to [third-party] investors their knowledge of and participation in the Penny Stock Scheme." (*Id.* at ¶¶ 45-47.) Plaintiffs then allege that Ms. Devine concealed the Penny Stock scheme proceeds by working in concert with Homm and others beginning in 2006. (*Id.* at ¶¶ 1, 3, 44, 149-152.)

Beginning in 2006, "when they learned that the Penny Stock Scheme was at risk of being publicly disclosed, Devine and Homm [allegedly] commenced the transfer and concealment of proceeds from the Penny Stock Scheme" by "knowingly conceal[ing], transferr[ing], and us[ing]" those "proceeds." (*Id.* ¶¶ 1-3.)

Now, as before, Plaintiffs allege that it is the "underlying Penny Stock Scheme[] from which Devine's ill-gotten funds derive." (*Id.* at ¶ 4.) Plaintiffs do not allege Ms. Devine's participation with the "Trading Conspirators" nor in the "Penny Stock Scheme."

III. MS. DEVINE'S DIVORCE AND THE RESULTING ASSET DISTRIBUTION

Ms. Devine and Homm commenced divorce proceedings in 2006 and finalized their divorce in 2007. (*Id.* at ¶¶ 3, 15 102-132.) Plaintiffs characterize the divorce as "strategic," although they nonetheless concede that the divorce was initiated in 2006, well before Homm's resignation from ACM and the supposed revelation of the "Penny Stock Scheme." They further concede that assets were transferred to Ms. Devine in 2006 by way of her divorce (*Id.* at ¶ 102.) Plaintiffs do not attempt to reconcile their assertion that Ms. Devine's divorce was a "sham" with their own acknowledgement that Homm thereafter went into "hiding for the next five years[,] assuming false identities and secretly traveling the world." (*Id.* at ¶ 143.) Plaintiffs fail to allege that Ms. Devine received anything from Homm after the divorce was completed in 2007, a decade ago. (*Id.* at ¶¶ 105-106, 122, 129, 153-159.)

Ms. Devine retained certain of her and her former husband's marital assets after she and Homm divorced. Those assets included, but were not limited to, an "'equalizing payment' of $1,500,000 to Devine on August 1, 2006," which Ms. Devine received pursuant

to a September 18, 2006 Marital Settlement Agreement (*Id.* at ¶ 106.)[6] In connection with the divorce, Ms. Devine also received shares of ACM and certain rights in CSI. (*Id.* at ¶ 122.) Ms. Devine's rights in CSI were made public in notices published on the London Stock Exchange Aggregated Regulatory News Service and in press reports. (*See* Ex. 5 (Feb. 15, 2006 notice); Ex. 6 (Nov. 10, 2006 notice); Ex. 7 (March 20, 2007 article published by AFX News Limited); Ex. 8 (Sept. 6, 2007 Notice); Ex. 9 (Sept. 23, 2007 article published by The Sunday Times ("Homm had just handed over 4m shares in [ACM] to his wife and 2m to his children.")) and Ex. 13 (Sept. 26, 2007 article published in The Irish Times).)[7]

Referring to a May 21, 2007 judgment that incorporated the Marital Settlement Agreement, Plaintiffs allege that Ms. Devine, by "causing the filing of this public document declaring that she was no longer Homm's spouse and that all financial issues had been settled, [ ]was able to conceal and facilitate the

---

[6] Ms. Devine is cognizant of the Court's rulings relating to Ms. Devine's divorce (*see* Dkt. Entry 521 at 15-17), but highlights herein critical facts that correct Plaintiffs' misstatements or are dispositive with respect to her statute of limitations arguments. The Marital Settlement Agreement provided for child support in the amount of $4,500 monthly. (Ex. 4 at 5-6.)

[7] These documents, among others, are the subject of a motion for judicial motion filed simultaneously herewith. Although the Court previously took judicial notice of various facts and certain documents (*see* Dkt. Entry 521 at 31-38), Ms. Devine has filed a new motion for judicial notice herewith pertaining to additional documents and to present additional arguments regarding certain of the documents noticed previously.

laundering of Penny Stock Scheme proceeds, avoiding the scrutiny that would ultimately be trained on Homm." (*Id.* at ¶ 108.)[8] Plaintiffs further allege that the divorce gave Ms. Devine "a legal pretext to obtain control [via CSI] of certain proceeds of the Penny Stock Scheme while ostensibly distancing her from the criminal activity revealed in the Arness Email." (*Id.* at ¶ 102.) Yet, for purposes of this motion, there was never any mystery regarding the identity of CSI's beneficiaries, as notices made public on the London Stock Exchange Aggregated Regulatory News Service and even press reports confirmed. (*See* Ex. 5 (Feb. 15, 2006 notice); Ex. 6 (Nov. 10, 2006 notice); Ex. 7 (May 20, 2007 notice).)

Plaintiffs cannot plausibly allege that they lacked knowledge regarding the transfer of ACM shares to Ms. Devine in connection with the divorce, as those transfers were disclosed in ACM's regulatory filings and were addressed in the media. (*See* Ex. 8 at 1 (Sept. 6, 2007 notice) ("The Company has been notified that Susan E. Devine has an interest in 4,000,000 shares. . . ."); Ex. 9 at 2 (Sept. 23, 2007 article) ("Homm had just handed over 4m shares in Abcap to his wife and 2m to his children."); and Ex. 13 at 2 (Sept. 26, 2007 article) ("This will be particularly bad news for Homm's former wife. . . . Just weeks ago, she took ownership of a stake of almost 6 per cent in the firm as part of her divorce settlement. . . . [T]hose shares have now

---

[8] This assertion is not plausible. First, the agreement at issue *listed* assets the Plaintiffs now claim were the proceeds of the "Penny Stock Scheme" and second, no "scrutiny" has been avoided in the past decade since the divorce.

shrunk in value to little more than £2 million.").) While much of the SAC reprises Plaintiffs' RICO allegations regarding the purported transfer and concealment of assets by Ms. Devine after she received funds from Homm (*e.g.*, SAC at ¶¶ 146(f)-146(s)), these allegations relate to conduct occurring *after* the purported enrichment that forms the basis for the only count included in the SAC. Accordingly, those allegations are irrelevant. What is relevant is that Plaintiffs knew of assets that Ms. Devine received in 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.[9] 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

---

[9] *See* Ex. 10 at 9 (Settlement Deed and Release dated October 20, 2009); *see also* Ex. 12 at ¶ 8 (declaration stating that in October 2009, Plaintiffs acquired "all claims that ACM[] may have against Homm . . . and others.")

case. Plaintiffs' counsel contacted Ms. Devine again in February 2010. (SAC at ¶ 15 1 (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 event, cannot square this claim with the near-contemporaneous publication of a November 10, 2006 ARNS notice *by ACM* that identified Ms. Devine as a "potential beneficiar[y]" of CSI, which the notice described as the holder of 51.1% of the ordinary shares of ACM. (*See* Ex. 6; *see also* Ex. 8.) In addition, Ms. Devine was clearly one of the "Does" in the SDNY Action in 2009, yet this action was not brought until 2015.[10]

---

[10] Plaintiffs claim that Ms. Devine "lied to the Swiss authorities in testimony provided on May 29 and May 30, 2012" (SAC at ¶ 226) and that by doing so, Ms. Devine furthered her effort to "prevent[] the Funds from discovering their cause of action against Devine at an earlier time." (*Id.* at ¶ 228.) Plaintiffs do not,

PROCEDURAL HISTORY

On June 1, 2015, Plaintiffs filed a six-count Complaint against Ms. Devine. (*See* Dkt. Entry 2 (the "Complaint").) 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. Stat. §§ 772.103(3) and 895.03(3) (the "Florida RICO Claim"); violations of Fla. Stat. §§ 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.

Ms. Devine moved to dismiss the 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 file an amended pleading. (*See* Dkt. Entry 183). The Court denied the First Motion to Dismiss as moot. (*Id*.) Plaintiffs' Amended Complaint, filed January 14, 2016, contained the same causes of action that had been included in their initial complaint. (*See* AC.) Ms. Devine moved to dismiss the Amended Complaint on February 12, 2016.

---

however, proffer an explanation as to how the purportedly false testimony Ms. Devine provided to the Swiss government erased their prior knowledge of her assets.

(*See* Dkt. Entry 252) (the "Second Motion to Dismiss").[11]

On February 8, 2017, the Court issued its Opinion and Order 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 and Federal RICO Conspiracy Claims, concluding that the "misconduct [alleged in the Amended Complaint] took place entirely outside the United States and therefore cannot form the basis of RICO recovery." (*Id.* at 56.) On the same grounds, the Court dismissed without prejudice Plaintiffs' Florida RICO and Florida RICO Conspiracy Claims. (*Id.* at 60.) The Court dismissed with prejudice Plaintiffs' Constructive Trust Claim on the grounds that "a constructive trust is not a cause of action, but an equitable remedy based upon an established cause of action." (*Id.* at 62.) Only one of Plaintiffs' claims survived the Second Motion to Dismiss: the Unjust Enrichment Claim. The Court granted Plaintiffs twenty-one days to file a Second Amended Complaint. (*Id*. at 63-5.)

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"). The Notice finalized the dismissal of all of Plaintiffs' causes

---

[11] Ms. Devine filed a corrected version of the Second Motion to Dismiss on February 26, 2016. *See* Dkt. Entries 304, 304-1. Substantively, the two documents are identical.

of action other than their Unjust Enrichment Claim. 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.) Plaintiffs filed the Second Amended Complaint seven days later on May 15, 2017. (*See* SAC.)

ARGUMENT

I. THE LEGAL STANDARD APPLICABLE TO A MOTION TO DISMISS

With the aim of providing "fair notice of what the claim is and the grounds upon which it rests," Federal Rule of Civil Procedure 8(a)(2) requires that a complaint consist of "a short and plain statement of the claim showing that the pleader is entitled to relief." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010) (internal quotation marks and citation omitted). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level" such that "a complaint must now contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Cigna*, 605 F.3d at 1289 (citing *Twombly*, 550 U.S. at 557) (internal quotations and

alterations omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief ' '" and must, therefore, be dismissed. *Aschcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009) (citation omitted).

Courts must look beyond a plaintiff's assertions and "infer from the factual allegations in the complaint 'obvious alternative explanation[s],' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." *Cigna*, 605 F.3d at 1290 (quoting *Iqbal*, 129 S. Ct. at 1951-52) (alteration in original). Significantly, " 'the tenet that a court must accept as true all of the allegations contained in a complaint is 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).[12] 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 applicable to such a claim *cannot* be tolled under that doctrine pursuant to FLA. STAT. § 95.11. *Id.* at 710

[12] While Plaintiffs also allege additional movements of funds between Ms. Devine's accounts, the limitations period began to run on the date when Ms. Devine allegedly *received* those funds and not on any subsequent dates when those funds were allegedly moved among Ms. Devine's accounts.

(citing FLA. STAT. § 95.11). Courts within this district have followed this law. *See*, *e.g.*, *Razi v. Razavi*, No. 5:12-CV-80-OC-34PRL, 2012 WL 7801361, at *9 (M.D. Fla. Dec. 21, 2012) ("Because the statute codifying the delayed discovery doctrine does not cover . . . common count quasi contract . . . Plaintiff's claims in these counts predicated on transactions and conduct occurring more than four years prior to the filing of the action . . . are barred by the statute of limitations.") (footnote omitted), *report and recommendation adopted*, No. 5:12-CV-80-OC-34PRL, 2013 WL 1193005, at *1, n.1 (M.D. Fla. Mar. 22, 2013); *Wiand v. Dewane*, No. 8:10-CV-246-T-17MAP, 2011 WL 4460095, at *8 (M.D. Fla. July 11, 2011) ("The delayed discovery rule, hence, applies only to actions founded upon fraud, and is inapplicable to actions like Wiand's count II unjust enrichment claim governed by Fla. Stat. § 95.11(3)(k)."), *report and recommendation adopted*, No. 8:10-CV-246-T17MAP, 2011 WL 4459811 (M.D. Fla. Sept. 26, 2011). Accordingly, Plaintiffs cannot turn to the delayed discovery doctrine to prevent the dismissal of their time-barred claim.

B. The Fraudulent Concealment, Equitable Tolling, and Equitable Estoppel Doctrines Are Likewise Inapplicable to Plaintiffs' Unjust Enrichment Claim

In last-ditch bids to dodge Ms. Devine's statute of limitations defense, Plaintiffs fill several pages of the SAC with references to Ms. Devine's alleged "[f]raudulent [c]oncealment" of her "unjust enrichment." (SAC

at ¶¶ 219-229.) Plaintiffs also include the assertion that Ms. Devine "is equitably estopped from asserting the defense of statute of limitations." (*Id.* at 237.)[13] These attempts to evade Ms. Devine's statute of limitations defense are also unavailing as a matter of law.

1. Fraudulent Concealment and Equitable Tolling

Ms. Devine submits that the weight of the authority holds that the fraudulent concealment doctrine—one means by which a plaintiff might invoke equitable tolling—is not available as a matter of Florida law to toll the statute of limitations applicable to a claim for unjust enrichment. *See Pac. Harbor Capital, Inc. v. Barnett Bank, N.A.*, No. 2:97-CV-416-FTM-24D, 2000 WL 33992234, at *7-8 (M.D. Fla. Mar. 31, 2000) (analyzing Florida case law to find "a strong indication that the Florida Supreme Court would hold that . . . the doctrine of fraudulent concealment is no longer available"), *aff'd*, 252 F.3d 1246 (11th Cir. 2001), *as amended* (July 3, 2001); *Pierson v. Orlando Reg'l Healthcare Sys., Inc.*, No. 6:08-cv-466-Orl-28GJK, 2010 WL 1408391, at * 15 (M.D. Fla. Apr. 6, 20 10) ("Equitable tolling, however, is not available in civil actions in Florida."), *aff'd*, 451 F. App'x 862 (11th Cir. 2012); *In re U.S. Foodservice Inc. Pricing Litig.*, No. 3:06-cv-1657 CFD, 2011 WL 6013551, at *18, n.36 (D. Conn. Nov. 29, 2011) ("Although at one point fraudulent concealment was

[13] Neither the Complaint nor the Amended Complaint included any reference to equitable estoppel.

recognized in Florida, the U.S. District Court for the Middle District of Florida held that, given recent case law, the Florida Supreme Court would 'find the doctrine of fraudulent concealment no longer available to toll' the relevant statute of limitations.") (citation omitted), *aff'd*, 729 F.3d 108 (2d Cir. 2013).

As *Pacific Harbor* explains, the Supreme Court of Florida held in *Fulton Cnty. Adm'r. v. Sullivan*, No. 87110, 1997 WL 589312 (Fla. Sept. 25, 1997) ("*Sullivan*"), *withdrawn and superseded by* 753 So.2d 549 (Fla. 1999), that "the doctrine of fraudulent concealment is no longer available under Florida law to toll a statute of limitations." *Pacific Harbor*, 2000 WL 33992234, at *7-8 (citing *Sullivan*, 1997 WL 589312). However, the "*Sullivan* opinion was withdrawn in 1999, as the Court decided that Georgia law applied to the case before it." *Id*. (citation omitted.) Since the withdrawal of *Sullivan*, courts have not employed consistent approaches to the fraudulent concealment doctrine.[14] Nonetheless, *Pac. Harbor*, *Pierson*, and *U.S.*

---

[14] Ms. Devine notes that in *In re Takata Airbag Prods. Liab. Litig.*, 193 F.Supp.3d 1324 (S.D. Fla. 2016), a District Court Judge in the Southern District of Florida concluded, without acknowledging *Sullivan*, that at the motion to dismiss stage, "fraudulent concealment [would] implicate tolling of the state of limitations." 193 F.Supp.3d at 1344. In support of that conclusion, Takata cited just one case, *Am. Home Assur. Co. v. Weaver Aggregate Transp., Inc.*, 990 F.Supp.2d 1254, 1272 (M.D. Fla. 2013), in which the court "note[d] that there is an apparent conflict amongst the federal district courts concerning whether th[e fraudulent concealment] doctrine still exists in Florida" and concluded that it would "not create new law and hold that the doctrine does not apply." 990 F.Supp.2d at 1272, n.10 (citations omitted). *Weaver*, however,

Foodservice represent the weight of the authority on this issue. *See also HCA Health Servs. of Florida, Inc. v. Hillman*, 906 So. 2d 1094, 1100 (Fla. 2d DCA 2004) ("We find these cases to be persuasive authority in support of our conclusion that the doctrine of equitable tolling is not available to toll the running of the statute of limitations in this civil action."); *Lopez v. Geico Cas. Co.*, 968 F. Supp. 2d 1202, 1206 (S.D. Fla. 2013) ("Equitable tolling is unavailable outside of the administrative context. . . ."); *Watson v. Paul Revere Life Ins. Co.*, No. 11-21492-CLV, 2011 WL 5025120, at *4 (S.D. Fla. Oct. 21, 2011) ("However, equitable tolling is unavailable to Watson pursuant to Florida Statutes § 95.051(2)."); *Socas v. Nw. Mut. Life Ins. Co.*, 829

---

appears to have based its fraudulent concealment ruling on Florida cases predating *Sullivan*, and, Ms. Devine respectfully submits, errs in its interpretation of Florida law. *Weaver*, 990 F.Supp.2d at 1272 n.10 (citing *Berisford v. Jack Eckerd Corp.*, 667 So.2d 809 (Fla. 4th DCA 1995)); *Vargas v. Glades General Hospital*, 566 So.2d 282, 285 (Fla. 4th DCA 1990)). In *Krawchenko v. Raymond James Fin. Servs., Inc.*, No. 2:11-cv-409-FtM-29DNF, 2013 WL 489088, at *3, n.2 (M.D. Fla. Feb. 8, 2013), this Court cited *Raie v. Cheminova, Inc.*, 336 F.3d 1278, 1281, n.1 (11th Cir. 2003), for the definition of the fraudulent concealment doctrine, but concluded that the plaintiff failed adequately to allege it and did not hold that the doctrine is available under Florida law. *See also Raie*, 336 F.3d at 1282, n.1 (in wrongful death action, citing *Berisford* for the elements of the fraudulent concealment doctrine before concluding that "plaintiffs' fraud allegations are insufficient" and without holding that the doctrine is available under Florida law). Of these cases, only *Takata*—which cited just one case in its analysis of Florida law regarding the relevant statute of limitations—applied the fraudulent concealment doctrine to a claim for unjust enrichment. Ms. Devine submits that *Pac. Harbor*, *Pierson*, and *In re U.S. Foodservice* properly apply Florida law.

F. Supp. 2d 1262, 1275 (S.D. Fla. 2011) ("[I]n Florida, the application of equitable tolling is limited to administrative proceedings.").

Because the weight of the authority holds that fraudulent concealment and equitable tolling are no longer available to toll the running of a statute of limitations applicable to a claim for unjust enrichment, Plaintiffs may not rely upon those doctrines here.

2. Equitable Estoppel

Unlike "[e]quitable tolling, which involves no misconduct on the part of the defendant," *Major League Baseball v. Morsani*, 790 So.2d 1071, 1077 (Fla. 2001), "[e]quitable estoppel arises where the parties recognize the basis for suit, but the wrongdoer prevails upon the other to forego enforcing his right until the statutory time has lapsed." *Cook v. Deltona Corp.*, 753 F.2d 1552, 1563 (11th Cir. 1985) (citing *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036 (10th Cir. 1980)). In other words, "equitable estoppel '*presupposes that the plaintiff knows of the facts underlying the cause of action* but delayed filing suit because of the defendant's conduct.'" *Ryan v. Lobo De Gonzalez*, 841 So. 2d 510, 518 (Fla. 4th DCA 2003) (citing *Bell v. Fowler*, 99 F.3d 262, 266 n.2 (8th Cir. 1996)). *See also Dineen v. Pella Corp.*, No. 2:14-cv-03479-DCN, 2015 WL 6688040, at *5 (D.S.C. Oct. 30, 2015) ("Equitable estoppel only applies when a plaintiff is aware that he has a cause of action during the limitations period, but forbears from bringing suit because of the defendant's

misrepresentations.") (citations omitted). As we discuss below, this doctrine is not applicable here.

C. Even If Equitable Tolling or Equitable Estoppel Doctrines Were Applicable, Plaintiffs Have Not Pleaded Facts Sufficient to Invoke Those Doctrines

Even if the equitable tolling and equitable estoppel doctrines were applicable to Plaintiffs' unjust enrichment claim, they have not pleaded facts sufficient to invoke those doctrines.

First, "[e]quitable tolling is appropriate where the movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) (citations omitted). Plaintiffs knew of Ms. Devine's receipt of certain assets in 2006 and 2007. Plaintiffs could have commenced suit based upon the assets available within the limitations period. Plaintiffs cannot demonstrate extraordinary circumstances when they knew of some assets even if not of others. Tolling in these circumstances cannot apply.

Second, "[e]quitable tolling[ ] involves no misconduct on the part of the defendant." *Morsani*, 790 So.2d 1077. Plaintiffs' SAC is replete with accusations of bad-faith concealment on Ms. Devine's part. (*See*, *e.g.*, SAC at ¶ 219 ("Devine . . . used fraudulent and deceptive means . . . to prevent the Funds from discovering their cause of action against Devine"); ¶ 228 ("Devine's

deliberate and willful misrepresentations . . . successfully prevented the Funds from discovering their cause of action against Devine at an earlier time. . . .").) Accordingly, Plaintiffs have not pleaded facts sufficient to invoke the equitable tolling doctrine as to this requirement as well. Third, "[e]quitable estoppel arises where the parties recognize the basis for suit, but the wrongdoer prevails upon the other to forego enforcing his right until the statutory time has lapsed." *Cook*, 753 F.2d at 1563 (citation omitted). Here, by contrast, Plaintiffs allege that Ms. "Devine's deliberate and willful misrepresentations . . . successfully prevented the Funds from discovering their cause of action against Devine at an earlier time. . . ." (SAC at ¶ 228.) Similarly, Plaintiffs allege that "[u]ntil recently, Devine successfully concealed this cause of action from the Funds." (SAC at ¶ 5.) Plaintiffs cannot possibly square these allegations with the requirement that they have been "aware that [they had] a cause of action during the limitations period," *Dineen*, 2015 WL at 6688040.

Fourth, Plaintiffs do not, and cannot, allege that Ms. Devine "prevailed" upon them to forego enforcing their rights. *See*, *e.g.*, *Lurry v. Transcor Am., LLC*, 140 F. App'x 79, 81 (11th Cir. 2005) ("To prove equitable estoppel, [a party] must establish the following elements: (1) conduct which amounts to a false representation or concealment of material facts . . . ; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party. . . .") (quoting *Rinker Materials Corp. v. Palmer First Nat'l Bank & Trust Co. of Sarasota*, 361 So.2d 156, 157 (Fla. 1978)

(internal quotation marks omitted); *Morsani*, 790 So.2d at 1076 ("Equitable estoppel . . . arises when one party lulls another party into a disadvantageous legal position."). Rather, Plaintiffs' claim is that they did not know until after their receipt of the Swiss prosecutor's report that a cause of action existed. Thus, Plaintiffs' own allegations are insufficient to invoke the equitable estoppel doctrine.[15] Because none of the aforementioned tolling doctrines is applicable to Plaintiffs' time-barred claim for unjust enrichment, Ms. Devine respectfully submits that the Court must dismiss Plaintiffs' claim with prejudice.

---

[15] Plaintiffs previously cited *Fla. Dept. of Health and Rehabilitative Services v. S.A.P.*, 835 So.2d 1091 (2002), for the proposition that when a party conceals relevant facts, the doctrine of equitable tolling may be applied. (Dkt. Entry 554 at 5). A party may invoke the equitable tolling doctrine only when the "legal shortcoming in [that] party's case is directly attributable to the opposing party's misconduct," *S.A.P.*, 825 So.2d at 1097 (citing *Morsani*, 790 So.2d at 1077), and, based upon the collected cases, the doctrine, as discussed above, appears applicable only when the defendant directly interacts with the other party, for example, by (a) misleading it so that it will forebear bringing suit or (b) discussing settlement and thereby lulling the other party into the belief that suit need not be brought. *See S.A.P.*, 835 So.2d at 1098 n.1 1 (collecting authorities). Here, by contrast, Ms. Devine made no such alleged overtures to Plaintiffs. In fact, the only direct interactions between Ms. Devine and Plaintiffs alleged in the SAC were instances when *Plaintiffs* deliberately contacted Ms. Devine. Plainly, Plaintiffs were not lulled or mislead by Ms. Devine into their failure to bring this suit.

III. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR UNJUST ENRICHMENT

Even if Plaintiffs could evade Ms. Devine's statute of limitations defense—which, as set forth above, they cannot do—this action nonetheless would require dismissal on the grounds that Plaintiffs have failed to state a claim for unjust enrichment under Florida law.

A. Plaintiffs Have Not Pled That They Enriched Ms. Devine

In order to state a claim for unjust enrichment under Florida law, "[f]irst, the plaintiff must have conferred 'a benefit on the defendant.'" *Merle Wood & Assocs.*, 714 F.3d at 1237 (quoting *Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co.*, 695 So. 2d 383, 386 (Fla. 4th DCA 1997)). Here, Plaintiffs do not allege that *they* enriched Ms. Devine. The nine Plaintiff funds were not themselves investors but rather invested money provided by others (including Ms. Devine). As a result, Plaintiffs are forced to allege that ACM—the "investment manager for the Funds" and the entity that employed Homm (SAC at ¶ 15)—enriched Ms. Devine. For instance, Plaintiffs allege that Homm, and derivatively Ms. Devine, "received the benefit of [an] inflated performance fee in the form of a semi-annual bonus from ACM and a semi-annual dividend paid to the investment vehicle that owned Homm's ACM shares," *i.e.*, CSI. (*Id.* at ¶ 83.)

Indeed, allegations made by Plaintiffs in the SDNY Action confirm that Plaintiffs previously

acquired ACM's "rights to bring . . . claims that [ACM] may have . . . arising from or relating to Homm's dealings in the Penny Stocks. . . ." (Ex. 2. at ¶ 243 (Second Amended Complaint filed in SDNY Action); Ex. 10 at 7-8 (Settlement Deed and Release conveying ACM's "claims . . . it has against . . . Homm" and others "relating to Homm's dealing in Illiquid Investments"); Ex. 12 at ¶ 8 (declaration filed by Plaintiffs' counsel stating that in October 2009, Plaintiffs were "assigned . . . all claims that ACM[ ] may have against Homm . . . and others.").) Because Plaintiffs have not pleaded that *they* enriched Ms. Devine, and instead bring a derivative claim on behalf of others whose rights they have evidently purchased, they have failed to state a claim for unjust enrichment.

Moreover, a plaintiff must "allege that it had directly conferred a benefit on the defendants." *Peoples Nat. Bank of Commerce v. First Union Nat. Bank of Florida, N.A.*, 667 So.2d 876, 879 (Fla. 3d DCA 1996) (dismissing unjust enrichment claim where alleged benefit was paid by different lender in participating group). Federal and state courts have strictly followed this requirement. *See Virgilio v. Ryland Grp., Inc.*, 680 F.3d 1329, 1337 (11th Cir. 2012) (affirming dismissal of unjust enrichment claim where home-buyers sought to recover 1.5% of the amount they paid to the home builder, which the builder in turn paid to a marketer); *Caldwell v. Compass Entm't Grp. LLC*, No. 6:14-cv-170 1-Orl-4 1 TB S, 2016 WL 7136181, at *2 (M.D. Fla. Feb. 4, 2016) ("It is not enough to show that the defendant obtained a benefit and that the plaintiff was

in some roundabout way damaged.") (citing *Century Sr.*, 770 F.Supp.2d at 1267); *Tambourine Comerico International S.A. v. Solowsky*, No. 06-20682-Civ, 2007 WL 689446 at *8 (S.D.Fla. Mar. 4, 2007) (dismissing unjust enrichment claim that a third-party transferred funds to a defendant that belonged to the plaintiff); *Huntsman Packaging Corp. v. Kerry Packaging Corp.*, 992 F.Supp. 1439, 1446 (M.D. Fla. 1998) (dismissing unjust enrichment claim where seller who provided raw materials to company sought to obtain funds paid to bank and asset purchaser), *aff'd*, 172 F.3d 882 (11th Cir. 1999).[16]

Here, however, even if Plaintiffs conferred any benefit, they did not directly confer any such benefit on Ms. Devine. Plaintiffs assert that more than half dozen individuals, law firms, and other entities collaborated in various processes that eventually led to Ms. Devine's alleged enrichment. (*See* SAC at ¶¶ 14-23 (claiming that Meisterhans, Eichmann, Pascal Frei, Phillipe Meyer, and Homm, among others, participated in the

[16] Ms. Devine acknowledges the Court's order granting the *ex parte* TRO. (Dkt. Entry 10 at 60). Ms. Devine did not have the opportunity to be heard in connection with that ruling on the issue of indirect benefit, and the issue of whether any benefit was provided, as opposed to whether such benefit was conferred directly versus indirectly, was not analyzed at length by the Court. Ms. Devine further notes that the Court's sole citation on the indirect benefit issue, *Williams v. Wells Fargo Bank, N.A.*, No. 11-21233-CIV, 2011 WL 4901346 (S.D.Fla. Oct. 14, 2011), dealt with an insurance kickback scheme orchestrated by a bank, which ended up with the funds. This is vastly different from the facts of the case at bar, where Plaintiffs have now conceded that Ms. Devine was not involved in the alleged "Penny Stock Scheme."

alleged "Transfer and Concealment Activity").) Other portions of the SAC depict the Hunter Fund receiving more than $34 million from Plaintiffs, which capital was then invested in certain "Penny Stock Companies," a portion of which capital later flowed to ACM in the form of, inter alia, allegedly inflated management fees that purportedly increased the value of ACM shares, some of which belonged to CSI, in which Ms. Devine was a shareholder. (*See id*. at ¶¶ 70-73, 80-84.)

These alleged movements of capital are anything but direct as between Plaintiffs and Ms. Devine. Plaintiffs seek the "return" of funds that they claim to have paid or otherwise transferred to individuals and entities *other* than Ms. Devine. Additionally, the alleged recipients of those funds—which recipients included, but were not limited to, Homm and ACM, received those monies pursuant to agreements to which Ms. Devine was not a party, such as the "Investment Management Agreement[s]" under which the Funds agreed to pay ACM to work as their investment manager. (SAC at ¶ 43.) Accordingly, "[t]he mere fact that [Homm or ACM] bargained away its right to [some percentage of the funds that Plaintiffs claim to have paid to it] d[oes] not change the fact that [Homm or ACM], not Plaintiffs, conferred the benefit on Defendant[ ]." *Virgilio*, 680 F.3d at 1337.

In short, Plaintiffs have failed to plead that they directly conferred a benefit on Ms. Devine. Rather, they have pleaded that a host of *other* individuals, businesses, and institutions effectuated and profited from a scheme in which more than a half-dozen participants

separated Plaintiffs from Ms. Devine. Accordingly, Plaintiffs have failed to state a claim for unjust enrichment under Florida law.

B. A Claim for Unjust Enrichment Cannot Be Based on Wrongful Conduct

Plaintiffs' unjust enrichment claim is also fatally deficient insofar as it is premised on Ms. Devine's alleged wrongful conduct.[17] Florida law does not recognize a claim for unjust enrichment that is based on tortious conduct. *Guyana Tel. & Tel. Co., Ltd. v. Melbourne Int'l Commc'ns, Ltd.*, 329 F.3d 1241, 1245 n.3

---

[17] Ms. Devine is mindful of the Court's prior ruling that a footnote in *Guyana Tel. & Tel. Co., Ltd. v. Melbourne Int'l Commc'ns, Ltd.*, 329 F.3d 1241, 1245 n.3 (11th Cir. 2003), stating that a claim for unjust enrichment cannot be premised on wrongful conduct, was *dicta*. (Dkt. Entry 521, at 63.) Because Ms. Devine has moved for reconsideration of the Court's prior ruling on that issue (*see* Dkt. Entry 380 at 18-21) and because said motion for reconsideration remains pending, Ms. Devine respectfully reiterates her argument here lest she later be found to have waived it. Further, Ms. Devine respectfully notes that a Florida court as well as federal courts in this Circuit have held that for purposes of an unjust enrichment claim, the benefit at issue "must be independent of wrongs and contracts." *A & E Auto Body, Inc. v. 21st Century Centennial Ins. Co.*, No 6:14-cv-310-Orl-31TBS, 2015 WL 12867010, at *5-6 (M.D. Fla. Jan. 22, 2015); *see also Delta Air Lines, Inc. v. Network Consulting Assocs., Inc.*, No. 8:14-cv-948-T-24 TGW, 2014 WL 4347839, at *10 (M.D. Fla. Sept. 2, 2014)); *Traditions Senior Mgmt., Inc. v. United Health Adm'rs, Inc.* No. 8:12-cv-2321-T-30MAP, 2013 WL 3285419 (M.D. Fla. Jun. 27, 2013) (citing *State v. Tenet Health Care Corp*, 420 F.Supp.2d 1288 (S.D. Fla. 2005)); *United States v. Liberty Ambulance Serv., Inc.*, No. 3:11-cv-587-J-32MCR, 2016 WL 81355, at *4 (M.D. Fla. Jan. 7, 2016).

(11th Cir. 2003) (quoting Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 TEX. L. REV. 1767, 1789 (2001)); *Traditions Senior Mgmt., Inc. v. United Health Adm'rs, Inc.*, No. 8:12-cv-232 1-T-30MAP, 2013 WL 3285419, at *4 (M.D. Fla. June 27, 2013) (citations omitted); *Tilton v. Playboy Entm't Grp., Inc.*, No. 88:05-cv-692-T-30TGW, 2007 WL 80858, at *3 (M.D. Fla. Jan. 8, 2007) (citation omitted). Because the SAC is replete with references to Ms. Devine's alleged wrongful conduct (*see*, *e.g.*, SAC at ¶¶ 99, 104), Plaintiffs have failed to state a claim for unjust enrichment under Florida law.

C. Florida Law Cannot Be Applied Extra-territoriallv

Plaintiffs' claim for unjust enrichment arises under Florida common law, which in Ms. Devine's view does not apply extraterritorially. "Florida courts have consistently declined to apply Florida law outside [of Florida's] territorial boundaries unless a statute contains an express intention that its provisions are to be given extraterritorial effect." *United States v. Berdeal*, 595 F.Supp.2d 1326, 1330 (S.D.Fla. 2009) (quoting *Boehner v. McDermott*, 332 F.Supp.2d 149, 155 (D.D.C. 2004) (internal quotation marks omitted) (citing cases); *see also Boehner*, 332 F.Supp.2d at 155 (noting "Florida's strong presumption against extraterritorial application of its law"). Although Plaintiffs' remaining claim sounds in common law rather than statute, the extraterritoriality principle articulated in *Berdeal* and *Boehner* should apply with equal force here and at

least applies by analogy. Florida decisional law confirms this point, as there does not appear to be any Florida unjust enrichment jurisprudence applying such cause of action extraterritorially.

Given Florida's strong presumption against extraterritorial application of its laws, and in light of the Court's prior ruling that all of Plaintiffs' "injuries were suffered . . . in the only location where the plaintiffs were located—in the Cayman Islands" (Dkt. Entry 521 at 55), Plaintiffs have failed to state a claim for unjust enrichment under Florida law. Alternatively, any such claim must be limited to assets that currently remain within the State of Florida.

IV. THIS SUIT VIOLATES THE PROHIBITION AGAINST SPLITTING CAUSES OF ACTION

Plaintiffs' follow-on action against Ms. Devine violates the prohibition on splitting causes of action. The rule against claim-splitting is recognized under both Florida law and federal law. *See*, *e.g.*., *Mims v. Reid*, 98 So. 2d 498, 500–01 (Fla. 1957) (" 'The law does not permit the owner of a single or entire cause of action . . . to divide or split that cause of action so as to make it the subject of several actions. . . . All damages sustained or accruing to one as a result of a single wrongful act must be claimed or recovered in one action or not at all.' ") (quoting 1 FLA. JURIS. ACTIONS ¶42); *Robbins v. Gen. Motors De Mexico, S. DE R.L. DE CV.*, 816 F. Supp. 2d 1261, 1263–64 (M.D. Fla. 2011) ("Federal

courts also recognize a prohibition against splitting of claims relating to the same transaction or occurrence. That doctrine 'reflects that a district court . . . has the authority to stay or dismiss a suit that is duplicative of another case then pending in federal court.' ") (quoting *Zephyr Aviation III, L.L.C. v. Keytech Ltd.*, No. 8:07–CV–227–T–27TGW, 2008 WL 759095 at *6 (M.D. Fla. Mar. 20, 2008)). "To determine whether such duplicative claim-splitting has occurred, courts borrow from the doctrine of claim preclusion and permit the later-filed suit to be dismissed if it 1) involves the same parties or their privies; and 2) arises out of the same transaction or series of transactions as the first suit." *Greene v. H & R Block E. Enterprises, Inc.*, 727 F.Supp.2d 1363, 1367 (S.D. Fla. 2010).

Here, the instant action is duplicative of the SDNY Action. First, the SDNY Action arises out of the same transaction or series of transactions as the instant case. In the SDNY Action, the same nine former hedge funds that are Plaintiffs herein filed suit to recover damages they claim to have sustained "through an elaborate scheme" whereby the defendants "caused the Funds to purchase billions of shares of stock (the 'Penny Stock') of virtually worthless companies. . . . at artificially high prices." (Ex. 2 at ¶ 3.) This alleged "Penny Stock" scheme is, of course, the very same "Penny Stock Scheme from which [Plaintiffs allege] Devine's ill-gotten funds derive." (SAC at ¶ 4.) Thus, the two actions "arise out of the same transaction or

series of transactions." *Greene*, 727 F.Supp.2d at 1367.

Second, the two actions involve the same parties or their privies. As set forth above, the nine Plaintiffs in the instant action are the same nine former hedge funds named as plaintiffs in the SDNY Action. (*See* Ex. 2 at ¶ 11; SAC at ¶ 9.) And while Ms. Devine is the sole defendant in the instant action, Homm is named as a defendant in the SDNY Action. (*See* Ex. 2 at ¶ 12; SAC at ¶ 10.) As Plaintiffs note in the SAC, Ms. Devine and Homm are privies. (*See* SAC at ¶¶ 106, 116(a), ¶ 116(b), ¶ 118, ¶ 122). Indeed, the instant action purports to arise, in large part, from these very agreements between Ms. Devine and Homm.

Because the SDNY Action and the instant action against Ms. Devine involve the same parties or their privies and arise out of the same transaction or series of transactions, Plaintiffs' instant suit against Ms. Devine violates the prohibition on splitting causes.

CONCLUSION

For the foregoing reasons, Ms. Devine respectfully requests that the Court dismiss the Second Amended Complaint with prejudice.

Dated: July 19, 2017 Respectfully submitted,

SCHOEPPL LAW, P.A.

By: */s/ Carl F. Schoeppl*
Carl F. Schoeppl
(Fla. Bar. No. 818518)
4651 North Federal Highway
Boca Raton, FL 33431-5133
Phone: (561) 394-8301
Fax: (561) 394-3121
carl@schoeppllaw.com

FOX ROTHSCHILD LLP

By: */s/ Ian M. Comisky*
Ian M. Comisky
(Fla. Bar No. 225304)
Matthew D. Lee
(*pro hac vice*)
2000 Market Street,
20th Floor
Philadelphia, PA 19103
Phone: (215) 299-2795, 2765
Fax: (215) 299-2150
icomisky@foxrothschild.com
mlee@foxrothschild.com

Attorneys for defendant
Susan Elaine Devine

[Certificate Of Service Omitted]

APPENDIX J

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.