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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION FOR AWARD OF COSTS AND FEES

Dated: August 22, 2018

TABLE OF CONTENTS

Plaintiffs (the "Funds") respectfully submit this opposition to the Motion for Award of Costs and Fees (Doc. #713, "Motion" or "Mot.") filed by Defendant Susan E. Devine ("Devine").[1]

PRELIMINARY STATEMENT

Devine's Motion is a colossal overreach. Having implemented a strategy of distraction and delay, with seemingly bottomless funding from unknown sources, Devine now seeks an order directing the Funds to pay more than $7 million in attorneys' fees and expenses she claims to have spent in her defense of this matter. There is, however, no legal basis for such an award. At all times, the Funds pursued this action in good faith. Devine's wildly revisionist account to the contrary ignores her central role in transferring and concealing tens of millions of dollars in Penny Stock Scheme proceeds taken from the Funds by fraud and absurdly recasts herself as the innocent target of both criminal investigations and civil litigation, reviving a conspiracy theory already rejected by the Court.

Devine is no victim. The 69-page TRO entered by the Court at the outset of this case contains numerous factual findings, based on volumes of evidence, concerning Devine's receipt, transfer, and concealment of fraud proceeds – core findings that she never meaningfully refuted and were not disturbed by any of the subsequent rulings in this case. A pending federal indictment identifies Devine as an unindicted co-conspirator in a money laundering conspiracy, based on her involvement in "a complex scheme utilizing various entities and money laundering techniques." (Doc. #170-1, ¶ 108(d).) And detailed

[1] The following abbreviations are used herein: "Initial Complaint" (Doc. #2); "TRO" (Doc. #10); "Amended Complaint" (Doc. #196); "Second Amended Complaint" (Doc. #560); "Bill of Costs" (Doc. #713-1); "Lee Decl." (Doc. #714); "Spears Decl." (Declaration of David Spears dated Aug. 22, 2018). Other capitalized terms have the same meaning set forth in the Second Amended Complaint.

investigative reports filed in an ongoing, years-long Swiss criminal proceeding recount Devine's receipt and laundering of fraud proceeds.

In this action, regrettably, Devine will not be called to account for her conduct. But her request for millions of dollars in fees and expenses – ostensibly supported by summary records she has heaped into the record with little detail or explanation – is indefensible. She is entitled to certain costs in a limited amount, but nothing more. The "American Rule," applied by the courts of this country for more than 200 years, requires parties to bear their own attorneys' fees, and neither the inherent authority of the Court nor Florida RICO provides a basis for departing from that rule here. Further, Devine is not entitled to any fees or expenses she incurred in relation to the improperly noticed depositions of three Funds. Nor is she entitled to recover damages against the TRO bond posted by the Funds because the Court dissolved the TRO only after an unforeseen change in the law.

ARGUMENT

I. There Is No Legal Basis for the Court to Sanction the Funds Pursuant to Its Inherent Power

Devine asks the Court to award her all of her attorneys' fees and costs (totaling $7,048,629) pursuant to its "inherent authority," accusing the Funds of various supposedly bad faith actions over the life of the case. (Mot. at 17-32.) That request is utterly baseless. Only in the rarest and most extreme circumstances can courts impose sanctions under their inherent power, and there is no plausible argument that such circumstances are present here.

A. Devine Relies on an Erroneous Legal Standard

In her discussion of the law regarding courts' inherent power, Devine fails to call to the Court's attention the Eleventh Circuit's recent decision in *Purchasing Power, LLC v.*

Bluestem Brands, Inc., 851 F.3d 1218 (11th Cir. 2017), which addresses that topic in great detail. Devine's failure to consider this controlling authority taints her entire argument.

Devine states, incorrectly, that "[w]hether the Plaintiffs acted unreasonably and vexatiously enough to warrant sanctions is measured objectively." (Mot. at 19.) In *Purchasing Power*, the Eleventh Circuit reversed a lower court ruling because that court had applied an objective standard in invoking its inherent power as a basis for imposing sanctions. The Eleventh Circuit could not have been more explicit: "As a starting point, the inherent-powers standard is a subjective bad-faith standard." 851 F.3d at 1223.

The Eleventh Circuit provided important guidance for district courts concerning the purpose and limits of their inherent power. The Court explained that "[t]he purpose of the inherent power is both to vindicate judicial authority without resorting to contempt of court sanctions and to make the non-violating party whole." *Id.* at 1225. The Court emphasized that "[t]he inherent power must be exercised with restraint and discretion" and "is not a remedy for protracted litigation" but rather "is for rectifying disobedience." *Id*. Thus, "[c]ourts considering whether to impose sanctions under their inherent power should look for disobedience and be guided by the purpose of vindicating judicial authority." *Id*. The Court directed that "[i]f a district court is unsure whether to sanction a party under its inherent powers, it should look to the guidance of the Supreme Court in *Chambers*," citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991). 851 F.3d at 1225. In the cited passage from *Chambers*, the Supreme Court held that a court may assess attorneys' fees only "when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." 501 U.S. at 45-46 (internal quotation marks omitted). The Supreme Court added: "In this regard, if a

court finds that fraud has been practiced upon it, or that the very temple of justice has been defiled, it may assess attorney's fees against the responsible party." *Id.* at 46 (internal quotation marks omitted). Notably, in *Purchasing Power*, the Eleventh Circuit reversed the district court's imposition of sanctions. 851 F.3d at 1225.

After *Purchasing Power*, district court rulings on inherent power have relied on the guidance set out in that case. In *In re Engle Cases*, 283 F. Supp. 3d 1174 (M.D. Fla. 2017), the court imposed sanctions pursuant to its inherent power where, in connection with 3,700 products liability actions, plaintiffs' counsel had advanced "frivolous" complaints and defied a court order. *Id.* at 1243. The court found that this conduct was "tantamount to bad faith," and that it was therefore appropriate to impose sanctions to "vindicate judicial authority" and "rectify disobedience." *Id.* at 1242, 1244 (internal quotation marks omitted). By contrast, in another case, the court refused to sanction a defendant that had incorrectly characterized its own citizenship in removing the case to federal court, even though the misstatement was not identified until appeal, more than one year into the case, and the district court was required to vacate all of its orders, including a summary judgment ruling for the plaintiff. *Bldg. Materials Corp. of Am. v. Henkel Corp.*, 2017 WL 4082440, at *2 (M.D. Fla. Apr. 17, 2017).

B. There Was No Bad Faith Conduct by the Funds in This Proceeding

In her Preliminary Statement, Devine alleges six different categories of bad faith conduct by the Funds. (Mot. at 6.) Below, we address those categories in the order they are presented.[2] In short, Devine's request for inherent-authority sanctions is frivolous. She has

[2] Devine sprinkles allegations of bad faith throughout the Motion, accusing the Funds of bad faith in filing a shotgun pleading (Mot. at 21) and in taking positions on issues that were opposed to hers, including tracing, direct benefit, and standing (*e.g.*, *id.* at 25, 30, 34). Obviously, none of these accusations even begins to establish bad faith. Other accusations – including that the Funds "chose not to be candid with this Court as to

not come close to carrying her burden of establishing – by "clear and convincing evidence," *see, e.g.*, *Outlawlessness Prods., Inc. v. Paul*, 2011 WL 13177704, at *1 (M.D. Fla. Mar. 15, 2011) – the kind of extreme bad faith conduct that warrants the exercise of the Court's inherent authority. Indeed, at all times in this matter, the Funds acted in good faith.[3]

1. The Funds did not take different factual positions in their Swiss criminal complaint and their complaint in this action

Devine alleges that the Funds took different factual positions in the criminal complaint they submitted in Switzerland (Doc. #269-9, the "Swiss Complaint") and the complaint they filed in this proceeding (the "U.S. Complaint"). (*See* Mot. at 2-3, 6, 21, 33-34.) This allegation has been raised before (*see* Doc. #351 at 4-7), and it is still baseless.

Devine notes that the Funds unerringly took the position in this proceeding that they were not alleging that Devine had committed securities fraud. (Mot. at 3.) By contrast, she argues, the Swiss Complaint "explicitly alleged" that she (1) "knew of the Penny Stock Scheme in 2006 and 2007," and (2) "necessarily was responsible as a conspirator for the purported Penny Stock *securities fraud*." (*Id.* at 2-3 (emphasis in original).) Neither clause of the preceding sentence is accurate.

As to the first clause, the Funds did not allege in the Swiss Complaint that Devine "knew of the Penny Stock Scheme in 2006 and 2007." Rather, the Funds alleged only that "by May 2006, Susan Devine knew that Florian Homm was engaging in extensive fraud at ACMH" (*id.* at 3 n.2 (quoting Swiss Complaint)) – not the specific details of the Penny Stock

---

the origin of" the Collins financial document (*id.* at 4 n.5) and that the Funds "forced [her] to file a full, opposed motion" for entry of partial final judgment (*id.* at 26 n.26.) – are demonstrably false and highlight just how misguided and inappropriate Devine's approach to "bad faith" is. (*See* Spears Decl. ¶¶ 3, 5.)

[3] In her Motion, Devine offers various "split-the-baby" alternatives, whereby she would receive some, but not all, fees and expenses. (*E.g.*, Mot. at 28-32.) To be clear, Devine is not entitled to any award.

Scheme. This allegation is strikingly similar to the allegation in the U.S. Complaint that, "no later than in or around May 2006, Devine understood that Homm was engaged in fraudulent activities." (*See*, *e.g.*, Initial Compl. ¶ 148.) Thus, there is no discrepancy.

As to the second clause, the Funds have never alleged anywhere, including in the Swiss Complaint, that Devine "was responsible as a conspirator for the purported Penny Stock *securities fraud*." (Mot. at 3 (emphasis in original).) As Devine emphasizes, the Funds always made clear in this case that they were not accusing her of any form of securities fraud. (*Id.*) Likewise, the Funds' Swiss Complaint does not accuse her of securities fraud or any other form of fraud, but rather of money laundering and forgery of a document. (*See* Doc. #269-9 at 34-40.) Devine selectively quotes excerpts of the Swiss Complaint alleging that she "'provided support to an important component of the scheme hatched by Florian Homm'" and "'played a role in this scheme'" (Mot. at 3 n.2 (quoting Swiss Complaint) (emphasis omitted)) – referring only to her role in securing and concealing fraud proceeds – and then misleadingly equates the word "scheme" as it appears in these excerpts with the defined term "Penny Stock Scheme" in the U.S. Complaint. As before, her conflation of these two obviously distinct references is misguided.[4] (*See* Doc. #351 at 5-6.)

2. The Funds' claims in this action were not time-barred

Devine argues that the Funds' "decision to *file* this Action was an act of bad faith" (Mot. at 22 (emphasis in original)) because "it was clear from the inception of this Action that all of Plaintiffs' claims . . . were time-barred" (*id.* at 3). That contention is meritless.

[4] Notably, the distinction the Funds have always drawn between Homm's securities fraud and Devine's participation in a separate scheme to launder fraud proceeds is identical to the distinction the U.S. Attorney's Office for the Central District of California drew in its 2015 indictment against Homm and others, which alleges that Homm conspired to commit securities fraud (Doc. #170-1, ¶ 7) and that Devine, as "unindicted co-conspirator A," participated in a separate money laundering conspiracy with Homm and others (*id.* ¶¶ 107-09).

The Court's decision to enter the TRO, which included findings that the Funds had demonstrated a substantial likelihood of success on the merits (TRO at 59, 60), puts the lie to Devine's contention that the untimeliness of the Funds' claims "was clear from the inception of this Action" (Mot. at 3). So does Devine's decision not to insist on a preliminary injunction hearing at the earliest possible moment, but rather to agree to extend the TRO through trial. (*See* Doc. #81.) To be sure, Devine has, over the course of this litigation, presented various statutes of limitations arguments, but the Funds have rebutted those arguments. As discussed below, Devine has at times abandoned her statute of limitations arguments altogether, and in the single instance that the Court ruled on any statute of limitations argument, the Funds *prevailed*. Thus, for Devine to contend now that a notional statute of limitations defense means that the Funds filed the action in bad faith is ludicrous.

In support of her present statute of limitations argument, Devine points to certain 2006 and 2007 announcements made through the London Stock Exchange (the "LSE") and news of her divorce from Homm. (Mot. at 22-23.) Prior briefing, however, demonstrates that those isolated items are not proof that the Funds' claims were untimely.

In her 2015 motion to dismiss, Devine devoted just two and a half pages to the statute of limitations, and only in the context of federal RICO. In that discussion she included only a passing reference to the 2006 and 2007 LSE announcements and the divorce, arguing simply that the Funds "and all the world" knew about the subject matter of those news announcements and the divorce. (*See* Doc. #94 at 46.) Otherwise, her timeliness argument focused on her assertion that the statute of limitations on the federal RICO claims had begun to run "from the date of injury" (*id.* at 45), and she directed the Court to various allegations

in the Initial Complaint – which did not refer to the LSE announcements or the divorce – that she claimed established the Funds' knowledge of their injury long before this proceeding was commenced in 2015 (*id.* at 46). In the same motion, Devine confined to a single footnote her entire argument that the Funds' Florida RICO claims were time-barred, stating only that her analysis relating to the federal RICO claims applied to the Florida RICO claims as well. (*Id.* at 46 n.40.) And she offered *no argument at all* as to why the Funds' unjust enrichment and constructive claims were time-barred. (*Id.* at 45.)

In their opposition to Devine's 2015 motion to dismiss, the Funds rebutted all of Devine's statute of limitations arguments concerning federal RICO, emphasizing that the purported "notice" events identified by Devine did not alert the Funds to their RICO injuries – many of which occurred *after* the events cited by Devine. (Doc. #124 at 37-42.) The Funds also pointed out that the Initial Complaint invoked equitable doctrines that prevent dismissal on timeliness grounds, based on Devine's fraudulent concealment of her money laundering activity. (*Id.* at 41.) The Funds also explained that the Florida RICO claims had a longer statute of limitations than the federal RICO claims and were subject to a "last predicate act" analysis pursuant to which they were inarguably timely. (*Id.* at 42.) And the Funds noted Devine's failure to develop any argument as to the statutes of limitations for the unjust enrichment and constructive trust claims. (*See id.* at 36 n.32.)

Devine's 2016 motion to dismiss the Amended Complaint replicated her first motion. As to federal RICO, she cut-and-pasted the same passing reference to the LSE announcements and the divorce that she had included in her first motion to dismiss, without developing it at all. (Doc. #304-1 at 46.) Again she argued that the Florida RICO claims

were untimely "for the very same reasons as the[] federal RICO claims." (*Id.* at 47.) And again she offered no argument as to why the unjust enrichment and constructive trust claims were untimely. (*Id.* at 45.) In her reply, she surrendered on all statute of limitations issues, declining to take on any of the points raised in the Funds' opposition. (*See* Doc. #351 at 1.)

The Court never ruled on any of the statute of limitations arguments in Devine's 2015 motion to dismiss, or on the RICO statute of limitation arguments in her 2016 motion to dismiss.[5] But the Court did rule on Devine's 2016 motion to dismiss the Funds' unjust enrichment and constructive trust claims on timeliness grounds. The Court denied that aspect of her motion, holding that she "has not shown that plaintiffs' claims for unjust enrichment and constructive trust are barred by the statute of limitations."[6] (Doc. #521 at 61.)

Thus, in multiple rounds of briefing directed at all of the Funds' claims, Devine made only the most cursory, unpersuasive references to the LSE announcements and the divorce. Those items did not put the Funds on notice of essential facts concerning their causes of action, which they were able to learn only in 2015, through analysis of documents made available in the Swiss investigation. Further, the Court never endorsed any of Devine's theories concerning the statutes of limitations. Under these circumstances, Devine's allegation that the Funds' mere filing of the lawsuit was an act of bad faith is wholly incredible.

---

[5] Without ruling on Devine's 2015 motion to dismiss, the Court found that the Initial Complaint relied on shotgun pleading and ordered the Funds to file an amended complaint. (Doc. #183.) In connection with Devine's 2016 motion to dismiss, the Court dismissed the Funds' federal and Florida RICO claims in light of the Supreme Court's ruling in *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), thereby mooting Devine's other arguments relating to those claims. (Doc. #521.)

[6] In her third motion to dismiss, directed at the Second Amended Complaint, Devine attempted to develop a statute of limitations argument concerning the unjust enrichment claim, the only claim that remained. That third motion discussed the LSE announcements but focused largely on the Funds' argument that equitable doctrines defeated her statute of limitations defense. (Doc. #569 at 12-19.)

3. The Funds did not have any obligation to immediately disclose to Devine the submission of the Swiss Complaint

Devine argues that the Funds acted in bad faith by not disclosing to her, at the outset of this proceeding, the fact that they had submitted the Swiss Complaint. (Mot. at 6, 21.) This argument fails. The Funds already addressed this issue extensively in connection with Devine's motion for partial final judgment and motion to modify the Protective Order, pointing out that they acted in conformity with Swiss procedural law by submitting the Swiss Complaint to the Swiss Prosecutor without notice to Devine. (Doc. #692, ¶ 15.) And in response to Devine's contention that the Funds' failure to notify her immediately of the Swiss Complaint constituted fraudulent concealment, the Funds emphasized that there was nothing fraudulent about it because they had no obligation to tell her.[7] (Doc. #703 at 9.)

Devine goes so far as to accuse the Funds' counsel of committing an ethics violation in this regard. (Mot. at 22 n.20.) That accusation is irresponsible. Devine cites Rule 4-3.4(a) of the Rules Regulating the Florida Bar (*id.*), but that rule plainly has no application here. By its express terms, Rule 4-3.4(a) prohibits the "unlawful[]" alteration, destruction, or concealment of evidence. *See, e.g.*, *Fla. Bar v. Adams*, 198 So. 3d 593, 622 (Fla. 2016). The rule is intended to protect a party's "important procedural right" "to obtain evidence through discovery or subpoena" from the opposing party, a right that "can be frustrated if relevant material is altered, concealed, or destroyed." Rules Regulating the Florida Bar, R. 4-3.4 cmt. Here, the Funds did not "unlawfully" conceal the Swiss Complaint from Devine. In fact, long before Devine produced almost any evidence to the Funds in discovery, the Funds filed

[7] At some point after the Funds submitted the Swiss Complaint, the Swiss Prosecutor placed a copy into the Swiss file. (*See* Doc. #269-10 at 3 (entry in index to Swiss file relating to Swiss Complaint).) It was the Funds' understanding, as confirmed by both the Swiss Prosecutor and Swiss counsel, that Devine had equal access to the Swiss file. (*See, e.g.*, Doc. #310, ¶¶ 6, 8-9 (Decl. of Georg Friedli, Esq.).)

the Swiss Complaint on the public docket. (Doc. #269-9 (filed Feb. 19, 2016).) In distorting the applicable rules and falsely accusing opposing counsel of ethical violations, it is Devine's counsel who have stepped out of bounds.

4. The Funds did not misuse this proceeding to advance their interests in the Swiss proceeding or engage in improper collaboration with the Swiss Prosecutor

Devine seeks to revive the thoroughly exhausted argument that the Funds used this proceeding as "a discovery device in an attempt to support their Swiss legal campaign." (Mot. at 6.) Perhaps no issue in this case has been more extensively briefed than this one, including months of briefing on Devine's failed motion to stay the Funds' production of requested materials to the Swiss Prosecutor and additional briefing in connection with Devine's motions for partial judgment and to modify the Protective Order.

Devine ignores the fact that her initiative to stay the Funds' production of requested materials to the Swiss Prosecutor culminated in findings by both the Magistrate Judge and this Court that are fatal to her theory of improper dealings between the Funds and the Swiss Prosecutor. (*See* Doc. ##502, 535.) In his Amended Order rejecting all of Devine's arguments relating to the Funds' interactions with the Swiss Prosecutor, the Magistrate Judge held that "[p]ursuant to the unambiguous language of paragraph 14 of the Protective Order, Plaintiffs are *expressly permitted* to disclose Discovery Material marked as Confidential by Defendant to the Swiss prosecutor because the Swiss prosecutor is an international criminal authority requesting the information." (Doc. #502 at 11 (emphasis in original).) The Magistrate Judge also held that Devine "has not met her burden of demonstrating that Plaintiffs are acting in an unlawful joint venture with the Swiss prosecutor," and "it appears

that Plaintiffs are acting independently, and within their rights under Swiss and domestic law." (*Id.* at 36.) When Devine filed an objection to the Amended Order, this Court reviewed the Amended Order and endorsed it, finding, among other things, that "the factual allegations rehashed in defendant's Objection are insufficient to support a finding of a *de facto* joint venture between plaintiffs and the Swiss prosecutor."[8] (Doc. #535 at 6.)

The Funds have never provided to the Swiss Prosecutor any material marked confidential in this proceeding in the absence of an authorizing order of the Court, and any non-confidential information that they have provided to the Swiss Prosecutor was theirs to use as they saw fit – just as Devine is free to use, and has in fact used, the non-confidential material in her possession. (*See* Doc. #703 at 8-9.)

Devine also continues to repeat the fiction that the Funds improperly received from the Swiss Prosecutor information that had been obtained from the U.S. DOJ through MLAT requests, including certain grand jury material. Devine has raised this issue repeatedly, including in an April 11, 2016 "emergency" filing. (Doc. #349.) The Magistrate Judge rejected Devine's argument, observing that "*both* Plaintiffs and Defendant received access to documents from the Swiss file" "based on applicable Swiss law resulting from the parties' respective statuses *in the Swiss investigation*." (Doc. #502 at 37 (emphasis in original); *see also id.* at 20-24 (rejecting Devine's claim that the Funds had improperly obtained grand jury material forwarded by the DOJ to the Swiss pursuant to an MLAT request).)

[8] Devine asserts that the Funds' supposed "collaboration" with the Swiss Prosecutor "continued . . . even *after* the dismissal of Plaintiffs' suit." (Mot. at 4 (emphasis in original).) The Funds have previously addressed this baseless allegation, in their response to Devine's partial judgment motion. (Doc. #691 at 15 n.7.)

As a variation on this theme, Devine has recently begun to focus on the report prepared by one of the Funds' experts, Estera Fund Services (Isle of Man) Limited ("Estera" and the "Estera Report"). (Mot. at 28.) She first surfaced an allegation concerning the Estera Report in her motion for partial judgment. That allegation was very specific: Devine claimed that the Estera Report "was based, in part, on a tracing analysis performed by Tonya Pinkerton, a forensic accountant employed by the FBI" (Doc. #685 at 12 (emphasis omitted)), and she attached that tracing analysis to her motion along with the affidavit from FBI Special Agent Tonya Pinkerton that originally accompanied it (Doc. #685-17). The Funds responded that Devine's claim was "simply wrong" (Doc. #691 at 15) and submitted a sworn declaration from Estera stating: "We were unable to locate a copy of any affidavit or tracing analysis by Ms. Pinkerton and confirmed that we did not use or rely on any such document in the preparation of the Estera Report." (Doc. #693, ¶ 4.)

Now Devine argues that the Funds previously produced to her "records that establish that the Estera report did rely, in part, on FBI *work product*" (Mot. at 28 n.30 (emphasis added)) and, therefore, that the Funds' denial that Estera "'rel[ied] upon' a 'tracing analysis' prepared by a *particular* FBI agent" was "misleading at best and outright false at worst" (*id.* at 28 (emphasis in original)). The "records" now cited by Devine consist of an excerpt of an Excel spreadsheet with transaction details from an RBC Dain account, which bears the legend, "These spreadsheets were created by the FBI Forensic Accountant based upon the RBC Dain Rauscher brokerage statements." (*Id.* at 28 n.30 (emphasis omitted).) The spreadsheet makes no mention of Special Agent Pinkerton, and it has no obvious relation to the tracing analysis that Devine attached to her motion for partial judgment (Doc. #685-17).

Devine's effort to link the specific tracing analysis by Special Agent Pinkerton to the generic spreadsheet she now cites is misguided and misleading. Devine attempts to connect the two by re-characterizing her earlier allegations, about a specific tracing analysis by a specific FBI Agent, as a general complaint about Estera's use of "FBI work product." (Mot. at 28.) Devine's attempt to square the circle in this manner fails, and her claim that the Funds' denial was misleading is improper.

5. The Funds did not refuse to be deposed at a properly noticed deposition

Devine cites as an instance of the Funds' bad faith the refusal by three Funds to appear at Rule 30(b)(6) depositions. (Mot. at 5, 6, 31.) We refer the Court to the discussion in Section III below for the relevant facts. For the same reasons that the Funds' refusal to appear at the improperly noticed depositions does not merit the imposition of sanctions under Rule 37(d), that refusal cannot be considered an act done in bad faith.

6. The Funds did not act in bad faith in dismissing the action

In a deeply ironic turn in light of her complaint that the Funds "wasted" her resources by litigating this case (Mot. at 27), Devine argues that their voluntary dismissal was an act of bad faith (*id.* at 5, 6, 26). Devine already made this argument in connection with her motion for partial judgment, and the Funds refuted it. (*See* Doc. #691 at 17-18; Doc. #703 at 10.) Devine's contention that the Funds "intended" to dismiss this case when they filed it is absurd on its face. (Mot. at 27.) The Funds fought hard to maintain the asset freeze; after granting a temporary stay, the Eleventh Circuit lifted that stay on December 28, 2017; by January 4, 2018, the Funds' counsel were being contacted by Bank of America regarding Devine's request to access her accounts; and it thus was clear that Devine was already

starting to move assets. Because it would be impossible to find such assets again, the Funds could no longer justify the anticipated costs of pursuing the case to the end and obtaining a judgment. Accordingly, on February 14, 2018, the Funds filed their notice of dismissal. (*See* Doc. #691 at 10-11; Doc. #692, ¶¶ 53-56, 77.)

Devine characterizes the Funds' explanation as "simply unconvincing" because, given her many accounts and assets, the movement of assets from a single U.S. account would not render a judgment uncollectable. (Mot. at 26 n.25.) That argument is not only unconvincing, it is disingenuous. As the Funds well understood by the time they filed this action, Devine is very experienced and accomplished at transferring and hiding assets, as she regularly engaged in such activity over a very long period of time. (*See, e.g.*, Initial Compl. ¶¶ 198-216.) Given her willingness in the past to take such risky and reckless actions to avoid the impending asset freeze in Switzerland, it defies logic to suggest that she would shy away from transferring out of reach all of her financial assets after an existing freeze order was lifted but the underlying litigation was still pending.

Rather than filing an answer, Devine made the decision to repeatedly move to dismiss, as was her right. But because she had not filed an answer (or a motion for summary judgment), it was the Funds' "unfettered right" under Rule 41(a)(1)(A)(i) to voluntarily dismiss the action. *Carter v. United States*, 547 F.2d 258, 259 (5th Cir. 1977) (noting that "[d]efendants who desire to prevent plaintiffs from invoking their unfettered right to dismiss actions under [R]ule 41(a)(1) may do so by taking the simple step of filing an answer"). The Funds' decision to exercise that right – a decision that was entirely reasonable under the circumstances – was not an act of bad faith and is not sanctionable. *See, e.g.*, *Wolters Kluwer*

Fin. Servs., Inc. v. Scivantage, 564 F.3d 110, 115 (2d Cir. 2009) (reversing sanctions based on voluntary dismissal because plaintiff "was entitled by law to dismiss the case").

II. Devine Is Not Entitled to Fees and Expenses Under Florida RICO

In the alternative, Devine asks the Court to award her more than $4.5 million in fees and expenses pursuant to the Florida RICO statute – that is, every cent she claims to have expended in this action through the date of the Funds' election not to re-plead the RICO claims. (Mot. at 32-34.) That request is entirely unsupported by the law.

A. Florida RICO Does Not Authorize the Award of Fees or Expenses Here

Florida RICO authorizes the recovery of "reasonable attorney's fees and court costs" only if the claim brought under that statute was "without substantial fact or legal support."[9] Fla. Stat. § 772.104(3). Section 772.104(3) is in derogation of the common law "American Rule," which provides that "each party, including the successful one, in litigation must ordinarily bear the burden of his own attorney's fees." *Gen. Motors Corp. v. Sanchez*, 16 So. 3d 883, 884 (Fla. App. 3d Dist. 2009). As such, the statute must be strictly construed. *See generally Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 223 (Fla. 2003).

The standard under Section 772.104(3) is "more stringent than the mere prevailing party standard." *Shelton v. Schar*, 2018 WL 3636698, at *3 (M.D. Fla. Apr. 23, 2018). One court has explained that a claim "without substantial fact or legal support" is a claim "based on tenuous suppositions without any supportive evidence." *Rogers v. Nacchio*, 2006 WL 7997562, at *19 (S.D. Fla. June 6, 2006), *aff'd in part, appeal dismissed in part*, 241 F.

[9] Identical language is used in the attorneys' fees provision of Florida's civil-theft statute, Fla. Stat. § 772.11. *See, e.g.*, *Allstate Indem. Co. v. Father & Son Auto Sales, Inc.*, 2009 WL 1393318, at *1 (S.D. Fla. May 15, 2009). Civil-theft case law interpreting this language is therefore instructive, and certain cases cited in this Section apply the civil-theft provision.

App'x 602 (11th Cir. 2007). Further, and critically here, the proper inquiry is whether the Florida RICO claim was "without substantial legal or factual support *when it was filed*." *MacNeill v. Yates*, 2010 WL 5491234, at *5 (M.D. Fla. Dec. 17, 2010) (emphasis added).

The Funds' Florida RICO claims plainly had substantial factual and legal support at the time they were filed. In the TRO, the Court found the Funds were likely to prevail on the RICO claims. (TRO at 50-59.) Only with the Supreme Court's intervening decision one year into this litigation in *RJR* did the viability of the Funds' RICO claims come into question. Prior to *RJR*, there was a three-way split among lower federal courts concerning the degree to which federal RICO extends to extraterritorial conduct, and under *any* of the tests adopted by the courts, the Funds' RICO claims against Devine were viable. (*See* Doc. #318 at 7-11; Doc. #351 at 11.) Indeed, just months before the *RJR* decision, this Court rejected Devine's argument that the Florida RICO claims were impermissibly extraterritorial, holding that the Funds' allegations of Devine's activities "are sufficiently connected with Florida to support plaintiffs' Florida RICO claims and are not based solely on extra-territorial activities." (Doc. #368 at 20-21.)

In *RJR*, the Supreme Court held that 18 U.S.C. § 1964(c), which creates federal RICO's private right of action, "requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries." 136 S. Ct. at 2111. This "domestic injury" rule was brand new – no other court had ever adopted such a rule – and the Supreme Court gave no guidance to the lower courts on how to determine whether a particular injury is sufficiently "domestic."

After briefing by the parties on the impact of *RJR*, the Court acknowledged its prior ruling that the "Amended Complaint contained sufficient allegations to show that [the Funds'] claims are not solely based on extra-territorial activities" (Doc. #521 at 48 (internal quotation marks omitted)) but concluded that *RJR* "requires a fresh look at this determination" (*id.*). The Court held that under the "domestic injury" test announced in "the intervening decision" in *RJR*, the Funds' complaint "does not set forth plausible civil RICO claims" (Doc. #521 at 56) and, further, that "Florida courts would now apply the holding of [*RJR*] to determine if a domestic injury for Florida civil RICO claims is adequately pleaded" and "[a]s with the federal RICO claims," the injuries alleged by the Funds in their RICO claims were not "domestic" (*id.* at 60). Promptly after that ruling, the Funds notified the Court and Devine of their intent not to press the RICO claims against Devine. (Doc. #527.) Under these extraordinary circumstances, it cannot possibly be said that the Funds' Florida RICO claims were without substantial factual or legal support when they were filed.

None of Devine's arguments to the contrary is availing. *First*, she contends that she is entitled to fees and expenses under Florida RICO because the claims were ultimately dismissed with prejudice. (Mot. at 33.) But, as discussed, the mere fact of dismissal does not entitle the defendant to fees and expenses under Florida RICO.[10]

Second, Devine repeats her claim that the Funds "concealed that they were making incompatible allegations against Ms. Devine in Switzerland and in this Action." (*Id.*) As discussed in Section I.B.1 above, this contention is a red herring. As a follow-on to this argument, Devine contends that the Funds "were too clever by half, simultaneously seeking

[10] Devine cites *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290 (11th Cir. 1998) (Mot. at 32), but that case did not involve a dismissal based on intervening legal authority.

to avoid the PSLRA bar to the RICO Claims while somehow alleging the existence of RICO predicate offenses that required knowledge." (*Id.* at 33-34; *see also id.* at 21-22.) This is nonsense. Devine effectively conceded long ago that the PSLRA bar did not apply to the Funds' claims, as she acknowledged that the Funds "do not – and cannot – allege that she had a role in the alleged Penny Stock Scheme they admit ended in September 2007." (Doc. #94 at 1.) The Court agreed. (Doc. #521 at 47.)

But that holding did not mean that Devine lacked the requisite "knowledge" to be guilty of money laundering. Certain of the money laundering offenses pleaded as RICO predicates in this action require that Devine "know[]" that the funds at issue "represent the proceeds of some form of unlawful activity." *See, e.g.*, 18 U.S.C. §§ 1956(a)(1), (a)(2)(B). This did not require proof that Devine participated in the Penny Stock Scheme herself. Rather, it is well-established that "a defendant may be convicted of money laundering even if she is not a party to, much less convicted of, the specified unlawful activity." *United States v. Martinelli*, 454 F.3d 1300, 1312 n.8 (11th Cir. 2006) (internal quotation marks omitted). Thus, there was nothing inconsistent about the Funds' allegations that Devine did not participate in the underlying Penny Stock Scheme but was guilty of money laundering. More to the point, nothing about those allegations indicates that the Funds' Florida RICO claims lacked substantial factual or legal support when they were brought.

Third, Devine contends that the Funds "were never able to trace funds that [she] received, dooming their RICO and unjust enrichment claims," citing the Court's July 25, 2017 order dissolving the TRO. (Mot. at 34.) The Court did not dismiss the Florida RICO claims on tracing grounds. Moreover, Devine grossly overstates the Court's holding in its

dissolution order. That order was simply about the availability of preliminary relief after the dismissal of the RICO claims, not the merits of any claim. (*See* Doc. #575 at 17-18.) The Court did not find, as Devine asserts, that tracing issues "doom[ed]" any claim. To the contrary, in the same order the Court stressed that "money damages" were available to the Funds to compensate them for their loss resulting from Devine's unjust enrichment. (Doc. #575 at 14.) The same, of course, was true of the Florida RICO claims. *See* Fla. Stat. § 772.104(1) (providing for award of treble damages).

Fourth, Devine conclusorily argues that the Funds' Florida RICO claims were time-barred. (Mot. at 34.) Again, that was not the basis for the Court's dismissal of the RICO claims. And it is clear that the Florida RICO claims were timely. Florida RICO has a five-year statute of limitations, which does not begin to run until "after the conduct in violation of a provision of this act terminates *or* the cause of action accrues." Fla. Stat. §§ 772.17, 895.05(11) (emphasis added). That is, the limitations period extends five years from either (1) the date of the defendant's last predicate act, *or* (2) the date when the injury was or should have been discovered. Because many of Devine's alleged predicate acts were committed within the five-year period prior to the filing of the Initial Complaint (*i.e.*, after June 1, 2010), the Florida RICO claims were timely. (*See* Doc. #318 at 45-46.) Moreover, even if the Florida RICO claims were not timely on their face, long-recognized equitable principles would have defeated a statute of limitations defense, given Devine's fraudulent concealment of her racketeering conduct.[11] (*See id.* at 45.)

[11] In a footnote, Devine argues that the Funds' complaint in New York "included a veiled reference to [her] as a Jane Doe defendant" and thus constitutes "proof" that the Funds were on notice of their Florida RICO claims against Devine in 2009. (Mot. at 34 n.35.) The New York complaint's inclusion of "Doe" defendants is a standard pleading device, not an indication that one of the "Does" is Devine. The New York complaint

B. Devine Has Failed to Identify Specific Fees and Expenses That Relate to Her Defense Against the Florida RICO Claims

Even if Florida RICO might permit certain fee-shifting here – and it plainly does not – Devine is not entitled to any award because she has failed to submit detailed billing records and failed to isolate the fees and expenses that related specifically to her defense against the Florida RICO claims. For that matter, she has failed to provide any evidence that she herself paid any of the claimed fees and expenses.

It is undisputed that Devine is not entitled to attorneys' fees under any other statute, including federal RICO. In such circumstances, courts have recognized that the movant bears the burden of allocating her fees and expenses between the Florida RICO claims and all other claims. *See*, *e.g.*, *Acosta v. Campbell*, 2009 WL 4639704, at *6 (M.D. Fla. Dec. 4, 2009) (denying defendants' requests for fees under Florida RICO where "[d]efendants have failed to appropriately set forth any documentation whatsoever that distinguishes time spent in defending the two separate claims – [d]efendants have not filed any supporting billing sheets or time records that distinguish time spent defending against Plaintiff's federal and Florida RICO claims").

---

defines the "Doe" defendants as unknown "persons or entities who participated in the scheme to defraud" (Doc. #569-2, ¶ 21), and the Funds have not alleged that Devine had any role in the Penny Stock Scheme.

In the same footnote, Devine also argues that an [redacted] (Doc. #714, Ex. O (unredacted)) – somehow speaks to the Florida RICO statute of limitations. (Mot. at 34 n.35.) It does not. [redacted]

Devine has not submitted any detailed billing records.[12] This alone is reason to deny her request, whether pursuant to Florida RICO or the Court's inherent authority. *See, e.g.*, *Travelers Home & Marine Ins. Co. v. Calhoun*, 2014 WL 1328968, at *8 (M.D. Fla. Apr. 2, 2014) ("The applicant for attorney's fees bears the burden of documenting the time spent on litigation and must provide specific and detailed evidence from which a determination of the reasonableness of the hourly rates for the work performed can be made.") (internal quotation marks omitted). She does not explain the figures she attributes to her defense of the Florida RICO claims, but a review of her filing reveals that she seeks to recover every last penny of her alleged fees and expenses in this case through February 28, 2017. (*See* Spears Decl. ¶ 6.)

Devine insists that she is not under any obligation to allocate fees and expenses because the *Acosta* case was "wrongly decided." (Mot. at 33 n.34.) She is mistaken. *Acosta* is consistent with a long line of cases holding that in the exceptional circumstance that a statute or contract authorizes fee-shifting for a particular claim, the defendant bears the burden of isolating the fees and expenses related to that claim, lest the exception swallow the rule. *See, e.g.*, *Gray v. Novell, Inc.*, 2010 WL 2593608, at *11 (M.D. Fla. Feb. 22, 2010) ("Of course, fees awarded under [Florida RICO] are limited to work performed defending the Florida RICO claims, and the fee petition must be tailored accordingly.").[13]

By any measure, Devine's request for $4.5 million in fees and expenses is spectacularly excessive. Although she has failed to provide any billing detail, the invoices

[12] Devine volunteers to provide billing records at some point in the future and also vows to request more fees and expenses later. (Mot. at 29 n.31.) The time to provide such support, for review by the Funds as well as the Court, was when she filed her Motion, and her failure to do so precludes an award.

[13] *Accord Larkon Grp. Servs., LLC v. Boardwalk Regency Corp.*, 2014 WL 12603177, at *2 (S.D. Fla. June 23, 2014); *MacNeill v. Yates*, 2010 WL 5491234, at *5 (M.D. Fla. Dec. 17, 2010); *Action Sec. Serv., Inc. v. Am. Online, Inc.*, 2007 WL 191308, at *2 (M.D. Fla. Jan. 23, 2007), *aff'd*, 241 F. App'x 619 (11th Cir. 2007); *Van Diepen v. Brown*, 55 So. 3d 612, 614 (Fla. App. 5th Dist. 2011).

from which that figure is obviously drawn necessarily cover extensive work on issues that had absolutely nothing to do with the Florida RICO claims. By way of example only, Devine devoted almost an entire year to aggressively litigating her unsuccessful motion to prevent the Funds from producing certain requested materials to the Swiss Prosecutor, a motion wholly unrelated to the Florida RICO claims. (Doc. #248.) Indeed, a review of Devine's filings in this matter indicates that her counsel's work on Florida RICO issues was minimal. (*See, e.g.*, Doc. #94 at 46 n.40 (arguing summarily that "Plaintiffs' Florida RICO claims fail for the very same reasons as their federal RICO claims").) Having failed to provide the Court with any means to isolate her expenditures relating to her defense of the Florida RICO claims, Devine has added to the reasons her request should be denied.

III. Devine Is Not Entitled to Sanctions Under Rule 37(d)

Devine is not entitled to any attorneys' fees or expenses in connection with the improperly noticed depositions of three Funds. (*See* Mot. at 12-14.)

The relevant events are described in detail in the Declaration of David Spears dated May 18, 2018. (Doc. #692, ¶¶ 57-76.) In summary, on July 5, 2017, Devine served a Rule 30(b)(6) notice for Plaintiff Absolute East West Fund Limited ("AEW") (the "First Notice"), which included a list of at least 120 topics and subtopics. (Doc. #567-1.) The Funds moved for a protective order, and the Court promptly canceled the deposition pending resolution of the Funds' motion. (Doc. #568.) On January 3, 2018, out of frustration that the Court had not yet ruled on the Funds' motion for a protective order, Devine served Rule 30(b)(6) notices (the "Additional Notices") for three other Funds – Absolute Activist Value Master Fund, Ltd. ("AAV"), Absolute India Fund, Ltd. ("AIF"), and Absolute Germany Fund, Ltd.

("AGF") – that were substantially identical to the First Notice, setting the depositions for January 24-26. (Doc. #714-16; *see also* Doc. #692-17 (comparing First Notice and an Additional Notice).) In subsequent emails and on a meet-and-confer call, the Funds objected to the improper Additional Notices and confirmed that no witness would be attending. (Doc. #685-22; Doc. #685-24; Doc. #692, ¶¶ 72-75.)

Devine's counsel nevertheless chose to press ahead with the depositions several days later, unannounced. Specifically, unbeknownst to the Funds at the time, an associate from the Fox Rothschild firm in Philadelphia prepared for the depositions; sent two boxes of materials by express mail to Ft. Myers; flew to Florida on January 23; stayed overnight at a hotel; traveled locally; appeared at the January 24 "deposition" of AAV with a stenographer and a videographer, summarily noting on the record AAV's non-appearance; and then flew back to Philadelphia.[14] (*See* Doc. #714-17 (travel, hotel, and mailing expenses in connection with Nathan Huddell's January 2018 trip to Ft. Myers); Doc. #685-25 at 2 (noting Mr. Huddell's in-person appearance at AAV deposition).) In connection with this farce, Devine now seeks to recover $28,200.86 in expenditures (Lee Decl. ¶¶ 27-28), including $22,729 in unsubstantiated "legal fees incurred preparing for the depositions" (*id.* ¶ 27) and $4,720 in unsubstantiated legal fees "charged by Ms. Devine's counsel for time spent in transit and time spent waiting for [AAV] to appear at its noticed deposition" (*id.*).

Sanctions pursuant to Rule 37(d) are unavailable to Devine under these circumstances. Rule 37(d)(2) provides that a party's failure to appear for a deposition is excused if "the party failing to act has a pending motion for a protective order under Rule

[14] The subsequent non-appearance of AGF and AIF over the next two days was memorialized in certificates of non-appearance. (Doc. #685-26 (AGF); Doc. #685-27 (AIF).)

26(c)." Such was the case here: at the time Devine served the Additional Notices, the Funds' motion for a protective order relating to the First Notice was pending.

Devine cites *Kelly v. Old Dominion Freight Line, Inc.*, 376 F. App'x 909 (11th Cir. 2010), for the proposition that "[t]he district court's inaction on a party's motion for a protective order to postpone the taking of his deposition does not relieve the party of the duty to appear for the deposition." (Mot. at 12 (quoting *Kelly*, 376 F. App'x at 913).) But that proposition, which conflicts with the plain language of Rule 37(d)(2), has no relevance here because this is not a case involving "inaction" by the Court in the face of a pending motion for a protective order. Rather, the Court canceled AEW's deposition just one day after the Funds filed their motion for a protective order. The Additional Notices that Devine served during the pendency of that motion were substantially identical to the First Notice, and, as Devine was aware, the same corporate representative (Glenn Kennedy) had been designated to testify on behalf of *all* the Funds.[15] The Additional Notices were simply an attempt to make an end-run around the Funds' pending motion. This case therefore falls squarely within the "pending motion" exception to sanctions under Rule 37(d)(2).

Moreover, an award of expenses is improper because the three Funds' failure to appear at the depositions was "substantially justified" and "other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(d)(3). "Substantially justified means that reasonable people could differ as to the appropriateness of the contested action." *Knight through Kerr v. Miami-Dade Cty.*, 856 F.3d 795, 812 (11th Cir. 2017) (internal quotation marks omitted). The Additional Notices were functionally the same as the notice that was

[15] Mr. Kennedy had already testified in his personal capacity for seven hours, on December 1, 2017.

then under review by the Court, and the Court's rulings would necessarily extend with equal force to the Additional Notices. The Funds were substantially justified in concluding that the Federal Rules protected them from Devine's abusive gambit without requiring them to file a new motion identical to one already pending before the Court.[16]

Further, even if some nominal award were warranted under Rule 37(d) – and it is not – the specific expenses sought by Devine are not recoverable for at least three reasons. *First*, a "fee applicant bears the burden of establishing entitlement and documenting the appropriate hours and hourly rates." *Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1999). Devine has not carried her burden, failing to provide any support beyond her say-so for the attorneys' fees she claims under Rule 37, which exceed $27,000.

Second, Devine's claimed expenses are not recoverable because they were not "reasonable," as required by Rule 37(d)(3). *See, e.g.*, *Montesa v. Schwartz*, 2015 WL 13173166, at *3 (S.D.N.Y. Oct. 13, 2015) (under Rule 37, "where an expense could reasonably have been avoided, that expense is not recoverable") (internal quotation marks omitted). The Funds' counsel advised Devine's counsel in no uncertain terms that the Funds

[16] In a rambling footnote in her discussion of bad faith, Devine argues that, as additional sanctions under Rule 37, the Court should "treat as established" that [redacted], and that [redacted]" (Mot. at 25-26 n.24.) That argument is meritless. First, as discussed above, there is no basis for sanctions under Rule 37. Moreover, Devine's footnote is a transparent attempt to introduce a wholly irrelevant discussion under the guise of "standing." The Funds, as victims claiming actual injury as a result of Devine's conduct, plainly had standing to bring this lawsuit, and [redacted] has no bearing on their standing. In any event, as Devine tacitly acknowledges, [redacted]. It is patently false that [redacted]. But Devine herself claims to have spent more than $7 million on this litigation (*id.* at 27) – an amount, it must be noted, that is far in excess of the liquid assets released by the Court when the TRO was in place – and [redacted].

would not be attending the depositions, yet Devine's counsel somehow racked up more than $27,000 in legal fees and, on top of that, expenses for travel and shipping between Philadelphia and Florida and a night's stay in a Ft. Myers hotel. The decision to incur those gratuitous costs was wasteful, and they should not be passed along to the Funds.

Third, the bulk of Devine's claimed expenses – most notably, $22,729 in "legal fees incurred preparing for the depositions" (Lee Decl. ¶ 27) – are preparatory expenses that are not recoverable under Rule 37(d)(3) because they are not extra expenses "caused by" a party's failure to appear at a deposition, as required by the Rule. *See, e.g.*, *Makohoniuk v. Cent. Credit Servs., Inc.*, 2010 WL 3633862, at *1 (S.D. Iowa Sept. 8, 2010).

IV. The Court Should Not Award Devine Damages Against the TRO Bond

The Court ordered the Funds to post a TRO bond of $10,000 (TRO at 65), and Devine now seeks damages against that bond (Mot. at 14-16). Under established law, a defendant is not entitled to damages on an injunction bond if "there is good reason for not requiring the plaintiff to pay in the particular case.'" *Ala. ex rel. Siegelman v. EPA*, 925 F.2d 385, 390 (11th Cir. 1991) (quoting *Coyne-Delany Co. v. Capital Dev. Bd. of Ill.*, 717 F.2d 385, 391 (7th Cir. 1983)). Because "good reason" exists here, Devine's request should be denied.

First, the Funds indisputably brought this case in good faith. *See Coyne-Delany*, 717 F.3d at 392 (plaintiff's good faith in bringing the action, although not dispositive, may be a relevant equitable "factor[]"). The U.S. and Swiss governments have recognized that the Funds are the victims of Homm's Penny Stock Scheme and, moreover, that Devine has benefited from and laundered the proceeds of that scheme. Devine's role in transferring and concealing fraud proceeds is described in extensive detail in the Court's factual findings in

the TRO, and nothing in the Court's subsequent rulings undermines those core findings in any way.[17] As discussed in detail in Section I.B.4 above, Devine's depiction of herself as the hapless victim of a conspiracy between the Funds and the Swiss Prosecutor is a fiction.

Second, the Court dissolved the TRO because of an intervening change in the law, not because of a determination that the TRO was improvidently granted at the time of issuance. Nine months after entering the TRO – but before *RJR* was decided – the Court had the occasion to revisit the TRO when Devine moved to dissolve it. Carefully surveying the relevant facts and the governing law once again, the Court re-affirmed the TRO in its entirety. (Doc. #368.) Only after the dismissal of the RICO claims in the wake of *RJR* did the Court take a different view of the TRO. In its order dissolving the TRO, the Court emphasized that "[f]ederal law supported the issuance of the TRO when it was initially entered" (Doc. #575 at 10), but concluded that the dismissal of the RICO claims after *RJR* was a "sufficient change in circumstances to justify" further review (*id.* at 9).

As the Eleventh Circuit has noted, "cases have recognized that an unfor[e]seen change in the law, which occurs subsequent to filing suit and effectively prevents the plaintiff from obtaining permanent injunctive relief, is an equitable factor that militates against an award of damages on the injunction bond." *Siegelman*, 925 F.2d at 391.[18] Devine is not

[17] Devine contends that the Funds' assertions in their TRO motion concerning the strength of their case were "representations . . . made in bad faith." (Mot. at 15.) In fact, volumes of evidence supported the Funds' motion, and the Court entered the TRO based on its own exacting evaluation of that evidence, comprising 117 exhibits. (*See, e.g.*, TRO at 4-5.) Also unavailing is Devine's complaint that an October 2015 letter from the Funds' counsel to Deutsche Bank was "indefensible." (Mot. at 16.) That letter simply reported the facts concerning the Court's findings in support of the TRO and, moreover, Devine's improper transfers of control over certain Deutsche Bank accounts (Doc. #714-3) – transfers that the Court shortly thereafter held "clearly violated the July 1, 2015 TRO" (Doc. #156 at 9-10).

[18] *Accord Zenith Radio Corp. v. United States*, 823 F.2d 518, 522 (Fed. Cir. 1987); *Kan. ex rel. Stephan v. Adams*, 705 F.2d 1267, 1270 (10th Cir. 1983).

entitled to damages on the bond because she was not "wrongfully enjoined" within the meaning of Rule 65(c). *See, e.g.*, *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054 (2d Cir. 1990) (focus of the "wrongfulness" inquiry is whether "the injunction should not have issued in the first instance").

In any event, Devine has failed to submit detailed records substantiating her summary contention that she incurred damages that were proximately caused by the TRO. (Mot. at 16.) Any recoverable damages on an injunction bond are only "those that arise from the operation of the injunction itself." *U.S. D.I.D. Corp. v. Windstream Commc'ns, Inc.*, 775 F.3d 128, 141 (2d Cir. 2014). Additionally, while Devine seeks "attorneys' fees" against the bond (Mot. at 16), it is well-established that attorneys' fees incurred in litigating the injunction and the action in general are not recoverable against an injunction bond. *See, e.g.*, *Cont'l Cas. Co. v. Hardin*, 2017 WL 1157870, at *2 (M.D. Fla. Mar. 28, 2017). And a defendant's failure to mitigate damages is "[a] good reason for not awarding such damages" against an injunction bond. *Coyne-Delany*, 717 F.2d at 392. Without detailed records, it is impossible to know which expenditures, if any, Devine incurred specifically as a result of the TRO, and whether those expenditures were both allowable and reasonable.

V. The Court Should Deny Many of the Costs Sought By Devine

Finally, Devine moves pursuant to Rule 54(d) for costs she claims to have expended in defense of this action. As discussed below, the Court should reduce Devine's Bill of Costs to a total of $3,264.50. (*See* Spears Decl. ¶ 7.)

A. Applicable Principles

Only a "prevailing party" may recover costs. Fed. R. Civ. P. 54(d). Moreover, as Devine acknowledges (Mot. at 9), recoverable costs are strictly limited to the categories enumerated in 28 U.S.C. § 1920. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987). The taxable costs listed in § 1920 are "limited to relatively minor, incidental expenses" and "are modest in scope." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 573 (2012). A "party seeking costs must provide sufficient detail and documentation regarding the requested costs so the opposing party may challenge the costs and the court may conduct a meaningful review of the costs." *Blitz Telecom Consulting, LLC v. Peerless Network, Inc.*, 2016 WL 7325544, at *2 (M.D. Fla. Aug. 31, 2016). "Failure to provide sufficient detail or supporting documentation verifying the costs incurred . . . can be grounds for denial of costs." *Id.* And even when an expenditure falls under one of the categories enumerated in § 1920 and is adequately documented, a court may deny that cost in its discretion. *See Crawford Fitting*, 482 U.S. at 442 (Rule 54(d) "generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party").

B. Costs Incurred After February 28, 2017

The Court should deny Devine's request for all costs incurred after the Funds' February 28, 2017 notice of their election to pursue only the unjust enrichment claim. (Doc. #527.) Those costs total $12,712.23. (*See* Spears Decl. ¶ 8.)

As noted above, only a prevailing party may recover costs under Rule 54(d). On February 14, 2018, the Funds voluntarily dismissed their unjust enrichment claim pursuant to Rule 41(a)(1)(A)(i). (Doc. #680.) A voluntary dismissal under that Rule is not a resolution

on the merits and therefore "does not create a prevailing party." *Harris v. Captiva Condos, LLC*, 2008 WL 4911237, at *2 (M.D. Fla. Nov. 14, 2008); *accord Orlando Commc'ns LLC v. Sprint Spectrum, L.P.*, 2015 WL 4911087, at *4 n.2 (M.D. Fla. Aug. 17, 2015); *Williams v. Spanish Trace of Orlando, Ltd.*, 2012 WL 1416413, at *3 (M.D. Fla. Apr. 4, 2012). Accordingly, it would be inequitable to tax any of the costs that Devine incurred in the year between the Funds' notice and their voluntary dismissal of the unjust enrichment claim.

Courts have disallowed costs relating to claims as to which the movant was not the prevailing party. *See, e.g.*, *Kane v. Rose*, 2009 WL 10667877, at *3 (S.D. Fla. Mar. 16, 2009) (reviewing defendant's request for attorneys' fees under Rule 54(d) and declining to award fees related to claims dismissed without prejudice); *see also Leonard v. Momentum Grp., Inc.*, 2016 WL 4506799, at *2 (N.D. Ga. June 13, 2016) ("Additionally, a court may, within its discretion, reduce requested costs to reflect a prevailing party's partial success.") (collecting cases). Devine quotes the statement in *Head v. Medford*, 62 F.3d 351 (11th Cir. 1995), that "[a] party need not prevail on all issues to justify a full award of costs" (Mot. at 9 (quoting *Head*, 62 F.3d at 354)), but that case does not speak to the circumstances presented here. In *Head*, the district court granted the defendants' motion for summary judgment on federal claims and declined to exercise supplemental jurisdiction over the remaining state law claims. 62 F.3d at 355. With the dismissal, the case ended, and the Eleventh Circuit held that the defendants were entitled to a full award of costs. *Id*. Here, in stark contrast, the case continued for another year after the Court's dismissal of certain claims.

While the Funds do not ask the Court to disaggregate from the total, and disallow, *all* costs relating to the unjust enrichment claim incurred by Devine from the beginning of the

case, there can be no dispute that every cent of costs she incurred after February 28, 2017 related exclusively to the unjust enrichment claim. She should not be awarded such costs.

C. Transcript Costs

Devine seeks $16,532.74 in transcript costs. (Lee Decl. ¶¶ 4, 6; Bill of Costs, Ex. 2.) Certain of those costs, totaling $6,691.84, are not recoverable. (*See* Spears Decl. ¶ 9.)

Section 1920(2) permits taxation of costs only for "transcripts necessarily obtained for use in the case." Certain of the transcripts for which Devine seeks costs were *not* necessary for her to obtain. The status conferences on July 20, July 28, and October 1, 2015 primarily concerned the schedule on which the parties would argue certain matters. Accordingly, transcript costs for those conferences should not be awarded to Devine. *See Egwuatu v. Burlington Coat Factory Warehouse Corp.*, 2011 WL 3793457, at *7 (M.D. Fla. Aug. 25, 2011) (excluding the cost of a hearing transcript from defendant's bill of costs where that hearing "was simply . . . a status conference"). Further, as discussed in Section III above, Devine noticed the depositions of AAV, AIF, and AGF in an attempt to circumvent a pending motion for a protective order. Not only were those depositions unnecessary, they were improper, and Devine should not be awarded any related costs.

In addition, Devine seeks certain costs related to transcripts that are not recoverable under § 1920. It is well-settled that the following costs associated with deposition transcripts may not be taxed under § 1920: (1) rough drafts; (2) litigation packages; (3) Optical Character Recognition ("OCR") costs; (4) processing, shipping, handling, and delivery;

(5) color exhibits; (6) transcript synchronization; and (7) expedited transcripts.[19] Devine also may not recover costs for copies of exhibits used in the deposition of Mr. Kennedy because she took that deposition. *See, e.g.*, *Robinson v. Alutiq-Mele, LLC*, 643 F. Supp. 2d 1342, 1354 (S.D. Fla. 2009). Nor may she recover costs for *both* the transcript and video of the same deposition without justifying her need for both, as she seeks to do for the depositions of Mr. Kennedy, Karen Neptune, and herself. *See Blitz Telecom*, 2016 WL 7325544, at *3.

D. Copying Costs

Devine seeks $5,584.49 in copying costs. (Lee Decl. ¶¶ 4, 7; Bill of Costs, Ex. 3.) The Court should deny those costs in their entirety.

Section 1920(4) permits recovery of "the costs of making copies of any materials where the copies are necessarily obtained for use in the case." Accordingly, copies made "merely for counsel's convenience" are not compensable. *Monelus v. Tocodrian, Inc.*, 609 F. Supp. 2d 1328, 1335 (S.D. Fla. 2009) (collecting cases). The party seeking copying costs must "present . . . evidence regarding the documents copied[,] including their use or intended use" in order to recover those costs. *Cullens v. Ga. Dep't of Transp.*, 29 F.3d 1489, 1494 (11th Cir. 1994). "[G]eneral copying costs without further description are not recoverable." *Monelus*, 609 F. Supp. 2d at 1335 (collecting cases).

Devine's submission fails to supply even the barest detail about which documents were copied. Having failed to carry her burden under § 1920(4), Devine should not recover

[19] *See, e.g.*, *Meidling v Walgreen Co.*, 2015 WL 12838340, at *4 (M.D. Fla. June 19, 2015); *Wiand v. Wells Fargo Bank, N.A.*, 2015 WL 12839237, at *9 (M.D. Fla. June 10, 2015); *Marler v. U-Store-It Mini Warehouse Co.*, 2011 WL 13174437, at *4 (S.D. Fla. May 26, 2011); *Woods v. Deangelo Marine Exhaust Inc.*, 2010 WL 4116571, at *8-9 (S.D. Fla. Sept. 27, 2010).

any of the requested copying costs.[20] *See, e.g.*, *Cullens*, 29 F.3d at 1494 (denying requested copying costs in their entirety where requesting party did not explain why copies were necessary); *Blitz Telecom*, 2016 WL 7325544, at *6 (same).

E. E-Discovery Costs

Devine seeks $81,198.14 in e-discovery costs. (Lee Decl. ¶¶ 4, 8; Bill of Costs, Ex. 4.) Those costs should be disallowed in their entirety. Although it is an unsettled question in the Eleventh Circuit whether e-discovery costs are recoverable, at least one court in this District has held they are not. *See, e.g.*, *Wiand*, 2015 WL 12839237, at *10. Guided by the principle that "[t]axable costs are limited to relatively minor, incidental expenses," *Taniguchi*, 566 U.S. at 573, this Court should follow that line of authority. Further, a party seeking e-discovery costs must demonstrate that those expenditures were necessary. *See, e.g.*, *Osorio v. Dole Food Co.*, 2010 WL 3212065, at *8 (S.D. Fla. July 7, 2010). Devine has failed to provide an adequate justification for the e-discovery costs she claims. It is impossible to determine which, if any, of the vaguely described costs in Exhibit 4 to the Bill of Costs were necessary to Devine's case.

In the alternative, Devine should not be permitted to recover costs for e-discovery activities that are not analogous to making paper copies. The courts in this Circuit that have permitted the recovery of certain e-discovery costs have held that such costs are "tightly circumscribed." *HRCC, Ltd. v. Hard Rock Cafe Int'l (USA), Inc.*, 2018 WL 1863778, at *10 (M.D. Fla. Mar. 26, 2018). Those courts have concluded that e-discovery costs are recoverable under § 1920(4) only to the extent that they are a means of copying materials.

[20] Additionally, Devine may not recover any costs for color copying because she has not shown that color documents were necessary. *See Gray v. Novell, Inc.*, 2012 WL 3886026, at *2 (M.D. Fla. Sept. 6, 2012).

See Blitz Telecom, 2016 WL 7325544, at *6. The Federal Circuit, applying Eleventh Circuit law, has identified the e-discovery costs that are analogous to making paper copies and thus, in its view, recoverable under § 1920(4): conversion to a uniform production format or to a form in which metadata can be preserved once copied, if necessary, and making the electronic copy. *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320, 1329 (Fed. Cir. 2013). Costs related to "*preparing* to copy," on the other hand, are not recoverable. *Id.* at 1330 (emphasis in original). Likewise, costs incurred *after* the documents are placed in a database are not compensable. Such costs include "project management, keyword searching, . . . [and] extraction of proprietary data." *Id.* at 1331. And costs relating to OCR are not recoverable. *See Procaps v. Patheon Inc.*, 2016 WL 411017, at *13 (S.D. Fla. Feb. 2, 2016).

Here, many of the costs requested by Devine do not appear to relate to the copying of materials. Consistent with her general let-them-sort-it-out approach, Devine fails to provide the Funds or the Court with any explanation or context concerning the referenced activities.[21] The Funds have nonetheless made every effort to deduce which of Devine's claimed charges may relate to copying activities, and the impermissible costs total $51,502.41. (*See* Spears Decl. ¶ 10.)

CONCLUSION

For the foregoing reasons, the Funds respectfully request that the Court deny Devine's Motion for Award of Costs and Fees, with the exception of certain costs totaling $3,264.50.

[21] Devine relies principally on *C.M.J. v. Walt Disney Parks & Resorts US, Inc.*, 2017 WL 3065111 (M.D. Fla. July 19, 2017), to justify her request for e-discovery costs. (Mot. at 10.) But there, the defendant explained why the modest amount of $258 in e-discovery costs requested was necessary. *C.M.J.*, 2017 WL 3065111, at *12. Here, Devine has made no such showing for her costs, which exceed what was claimed in *C.M.J.* by many multiples.

Dated: August 22, 2018

Respectfully submitted,

By: /s/ *David Spears*

Thomas A. Tucker Ronzetti
Florida Bar No. 965723
Kenneth Hartmann
Florida Bar No. 664286
Maia Aron
Florida Bar No. 17188
KOZYAK TROPIN
THROCKMORTON, LLP
2525 Ponce de Leon Boulevard, 9th Floor
Miami, Florida 33134
Telephone: (305) 372-1800
Facsimile: (305) 372-3508
Email: tr@kttlaw.com
krh@kttlaw.com
ma@kttlaw.com

Counsel for Plaintiffs

David Spears
Linda Imes
Christopher Dysard
Admitted Pro Hac Vice
SPEARS & IMES LLP
51 Madison Avenue
New York, New York 10010
Telephone: (212) 213-6996
Facsimile: (212) 213-0849
Email: dspears@spearsimes.com
limes@spearsimes.com
cdysard@spearsimes.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, David Spears, hereby certify that on this 22nd day of August 2018, I caused the foregoing to be served via CM/ECF on the following counsel of record:

Carl Francis Schoeppl, Esq.
Schoeppl Law, P.A.
4651 N. Federal Hwy.
Boca Raton, Florida 33431

Ian M. Comisky, Esq.
Matthew D. Lee, Esq.
Fox Rothschild LLP
2000 Market Street
20th Floor
Philadelphia, Pennsylvania 19103

William J. Schifino, Jr., Esq.
Burr & Forman LLP
201 N. Franklin St., Ste. 3200
Tampa, Florida 33602

/s/ *David Spears*