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-JES-MRM

PLAINTIFFS' SUR-REPLY IN FURTHER OPPOSITION TO DEFENDANT'S MOTION FOR AWARD OF COSTS AND FEES

Dated: October 23, 2018

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

ARGUMENT

I. The Court Should Disregard the "Expert" Report Submitted by Devine

With her Reply, Devine submits the hearsay report of Lawrence J. Fox, an attorney who argues that the Funds' counsel violated certain ethical rules. (Doc. #751-23 ("Fox").) Fox's report presents new arguments that are improper for a reply. Moreover, it is proof positive that some "experts" will say anything for a price – in Fox's case, $875 per hour. (*Id.* at 3.) Fox has strayed far from the province of his supposed expertise concerning attorney ethics into issues of substantive law reserved to the Court, even offering in one instance a legal opinion that directly conflicts with a ruling by the Magistrate Judge. His report is a discredit to both Fox and the lawyers who commissioned it, and it should be disregarded.[2]

A. Fox's Report Is Improper Reply Material

Devine's use of her Reply to level, for the first time, very serious allegations against the Funds' counsel is patently improper. "The purpose of a reply brief is to rebut any new law or facts contained in an opposition[']s response to a request for relief before the Court." *Tardif v. PETA*, 2011 WL 2729145, at *2 (M.D. Fla. July 13, 2011). Far from serving that narrow purpose, Fox's report makes arguments that Devine never made previously, unprompted by any argument in the Funds' Opposition. This is an abuse of the reply.

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[1] The following abbreviations are used herein: "Opposition" or "Opp." (Doc. #732); "Reply" (Doc. #750); "Lee Reply Decl." (Doc. #751); and "Dysard Declaration" or "Dysard Decl." (Declaration of Christopher Dysard dated Oct. 23, 2018). Capitalized terms not defined herein have the same meaning set forth in the Second Amended Complaint (Doc. #560) and the Opposition.

[2] *See Autrey v. United States*, 889 F.2d 973, 986 n.20 (11th Cir. 1989) ("The rules governing the ethical conduct of lawyers are far too important to be trivialized and used in baseless mud-slinging. . . . We will not tolerate attempts to use the ethical rules in a way contrary to the spirit of those very rules.").

In her Motion, Devine accused the Funds' counsel of violating one specific ethical rule by not immediately disclosing the Swiss Complaint to her: Rule 4-3.4(a) of the Rules Regulating the Florida Bar ("Florida Rules"), which prohibits the "unlawful" alteration, destruction, or concealment of evidence. (Mot. at 22 n.20.) In response, the Funds pointed out that Florida Rule 4-3.4(a) has no possible application here. (Opp. at 10-11.) Neither Devine's Reply nor Fox's report attempts to refute the Funds' argument. Indeed, neither even mentions Florida Rule 4.3-4. Instead, Fox's report pivots to argue that the Funds' counsel violated a hodgepodge of *other* Florida Rules and Model Rules of Professional Conduct ("Model Rules").[3] (Fox at 7.) Baseless as they are, these arguments were available to Devine when she filed her Motion. Accordingly, she has waived them. *See, e.g.*, *Gross v. Sec'y, Dep't of Corr.*, 2013 WL 2477086, at *5 (M.D. Fla. June 10, 2013) (Steele, J.).

B. Fox's Report Improperly Invades the Judicial Function

Further, Fox's report is irredeemably defective. His discussion of the ethical rules is merely a cover for the core of his report: his arguments that the Funds' counsel (1) fraudulently induced Devine to enter into the Protective Order, and (2) filed a "frivolous" complaint. Those are legal conclusions, which lie exclusively in the province of the Court, and Fox's views on these matters are neither relevant nor reliable.

Devine has failed to carry her burden of showing that "(1) the expert is qualified to testify on the topic at issue, (2) the methodology used by the expert is sufficiently reliable,

[3] Fox's discussion of the ethical rules casts doubt on his supposed expertise. For example, he cites certain Model Rules, but it is the Florida Rules that govern attorneys' conduct in this District. *See* Local Rule 2.04(d). This is not merely a technical matter, as the definition of "fraud" or "fraudulent" in the Florida Rules differs materially from the definition in Model Rule 1.0(d) that Fox cites (Fox at 5). *See* Florida Rules, ch. 4, pmbl. ("'Fraud' or 'fraudulent' denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information."). Fox also refers to "Model Rules 4-3.1, 4-3.3, 4-4.1 and 4-8.4." (Fox at 7.) There are no such Model Rules; the cited provisions are *Florida* Rules.

and (3) the testimony will assist the trier of fact." *Arthrex, Inc. v. Parcus Med., LLC*, 2014 WL 3747598, at *1 (M.D. Fla. July 29, 2014) (Steele, J.). Whatever Fox's credentials as an expert in attorney ethics may be (*but see* notes 3, 5, and 6), he is not qualified to instruct the Court on matters of domestic substantive law; no expert is.[4] *See United States v. Delatorre*, 308 F. App'x 380, 383 (11th Cir. 2009) ("[A]n expert witness may not testify as to his opinion regarding ultimate legal conclusions."); *see also S. Gardens Citrus Processing Corp. v. Barnes Richardson & Colburn*, 2013 WL 5928676, at *3 (M.D. Fla. Nov. 1, 2013) (Federal Rule of Evidence 704(a), concerning opinions on "ultimate issue[s]," "was not intended to allow experts to offer opinions embodying legal conclusions"). Moreover, Fox does not disclose any "methodology" whatsoever. In violation of the Federal Rules, he fails to specify "the facts or data [he] considered" in forming his opinions. Fed. R. Civ. P. 26(a)(2)(B)(ii). He merely states that his opinions are based on his "review of various briefs and other documents filed on the docket by the parties in this case" (Fox at 3) – presumably limited to a selection furnished to him by Devine's counsel. *See also* Fed. R. Evid. 702(b) (expert testimony must be "based on sufficient facts or data").

1. Fox's opinion concerning fraudulent inducement

Fox first offers his "view" that the Funds' counsel committed "fraud" when they did not disclose the Swiss Complaint to Devine's counsel during the negotiation of the Protective Order.[5] (Fox at 5.) That legal conclusion, however, is not his to make. *See, e.g.*, *United*

[4] Although Fox's report is essentially a legal brief, he is not a member of the Florida bar and has not been admitted to appear before the Court in this matter on a *pro hac vice* basis. *See generally* Fla. Stat. § 454.23 (prohibiting the unauthorized practice of law).

[5] One ethical rule that Fox cites in his discussion of fraud – Florida Rule 4-3.1, which he erroneously calls a "Model Rule" (Fox at 7) – concerns meritorious claims and contentions. It has nothing to do with fraud.

States ex rel. Armfield v. Gills, 2013 WL 371457, at *3 (M.D. Fla. Jan. 30, 2013) (precluding any expert from testifying that defendants "committed Medicare fraud or fraud in general"). In fact, Devine already asked the Court to decide *precisely this issue*, and the Magistrate Judge did so in the Funds' favor. (Doc. #743 at 5 (holding that "[Devine's] allegations of fraud in the inducement relating to the Stipulation and Protective Order are without merit and lack credibility").) That order – which Fox fails to address – demonstrates that the issue of whether Devine was fraudulently induced to enter the Protective Order is a legal issue to be determined by the Court, not an outside "expert." It also exposes Fox's report as nothing more than a blind repackaging of Devine's discredited arguments.

2. Fox's opinion concerning frivolous claims

Fox's second opinion is that the Funds' counsel brought a "frivolous lawsuit" against Devine.[6] (Fox at 8.) However, the conclusion that a claim is frivolous is a legal conclusion reserved exclusively to the Court. *See, e.g.*, *Gomez v. City of Miami Beach*, 2012 WL 12948518, at *1 (S.D. Fla. Mar. 2, 2012) (precluding defendants' experts from testifying that plaintiff's claims are "frivolous" or "have no merit").

Fox's legal conclusion that the Funds' claims were "frivolous" is also erroneous.[7] Looking "in retrospect" (Fox at 7), Fox writes that his conclusion is "compelled" by the fact that the RICO counts "were dismissed and may have been filed in violation of the statute of limitations" (*id.* at 8). However, the judicial inquiry into whether a claim was frivolous

[6] In his discussion of ethical principles in connection with this point, Fox cites Model Rule 8.4(c) and Florida Rule 4-8.4(b). (Fox at 8.) As discussed in note 3 above, the Model Rules are not controlling. And Florida Rule 4-8.4(b), which refers to a lawyer's "criminal act[s]," has no conceivable application here.

[7] Tellingly, Devine has never made a motion under Rule 11. *See Fid. Land Tr. Co., LLC v. Sec. Nat'l Mortg. Co.*, 2013 WL 524961, at *3 (M.D. Fla. Jan. 7, 2013) ("[A] sanctions motion under inherent authority is not a substitute for compliance with the safe harbor provisions of Rule 11.").

"focuses only on the merits of the pleading gleaned from facts and law known or available to the attorney *at the time of filing*," *Jones v. Int'l Riding Helmets, Ltd.*, 49 F.3d 692, 694-95 (11th Cir. 1995) (emphasis in original), and the mere fact that a claim is ultimately dismissed in no way indicates that it was frivolous, *see, e.g.*, *JES Props., Inc. v. USA Equestrian, Inc.*, 432 F. Supp. 2d 1283, 1290 (M.D. Fla. 2006) (cautioning against "after-the-fact reasoning" "that the . . . claims must have been frivolous because Plaintiffs did not ultimately prevail").

The folly of using hindsight logic to assess the frivolousness of claims is particularly stark here. The Court ruled in the TRO that the Funds were likely to prevail on the merits of their RICO claims, which centered on Devine's role in a money laundering scheme. (Doc. #10 at 50-59.) The Court re-affirmed the viability of the Funds' RICO claims when it denied Devine's initial motion to dissolve the TRO. (Doc. #368.) Filings by government authorities in the U.S. and Switzerland independently confirmed Devine's participation in a money laundering scheme. (*See* Opp. at 1-2.) Only after the Supreme Court's landscape-shifting decision in *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), did this Court dismiss the RICO claims on the basis of its conclusion that the Funds had not pleaded a "domestic injury," as newly required by *RJR*.[8] (*See* Doc. #521 at 48-56.) This record, none of which Fox addresses, debunks his conclusion that the RICO claims were frivolous.

As for the Funds' unjust enrichment claim, Fox seems to argue that it was frivolous because the Funds voluntarily dismissed it. (Fox at 8.) But the Funds' dismissal was not a

[8] Fox muses that the Funds' RICO claims "may have been filed in violation of the statute of limitations" (Fox at 8), but that is incorrect as a matter of law (*see* Opp. at 6-9), and the statute of limitations was not the basis for the Court's dismissal of those claims.

resolution on the merits, and many rulings by the Court recognized the viability of the unjust enrichment claim. (*See, e.g.*, Doc. #10 at 59-60; Doc. #368; Doc. #521 at 62-63.)

Fox's recitation of this case's history simply channels Devine's misguided arguments. This action was not a "pretext" (Fox at 8) "for the undisclosed purpose of supporting the Swiss proceeding" (*id.* at 7). Rather, it was a hard-fought effort to recover monies fraudulently taken from the Funds. While Devine has previously challenged the Funds' conduct in both this litigation and the Swiss proceeding, the Court has rejected her claims. (*See* Opp. at 11-14.) Fox ignores those rulings. Likewise, it is untrue that, as Fox asserts, the Funds did not "permit[] any reciprocal testimony to be taken from [them]" before dismissing the action. (Fox at 8.) Prior to dismissal, Devine took a day-long deposition of Glenn Kennedy, the designated corporate representative for the Funds, in his personal capacity. (*See* Opp. at 25 & n.15.) Fox ignores that testimony.

Fox has abandoned all professional standards, and his report should be disregarded.

II. There Is No Basis for Inherent-Authority Sanctions

Devine refuses to own up to her failure to cite the controlling case concerning a court's exercise of its inherent authority (Reply at 3-5), but the mistaken analysis in her Motion speaks for itself.

A. The Funds Have at All Times Acted in Good Faith

In her Reply, Devine cycles through certain of the baseless accusations of bad faith she made in her Motion, but nothing changes the final analysis.[9] She has failed to establish,

[9] In her Reply, Devine does not develop the meritless argument in her Motion that the Funds engaged in bad faith conduct by using this proceeding to advance their interests in the Swiss proceeding and by collaborating with the Swiss Prosecutor. Instead, she calls the Funds' detailed survey of these heavily litigated

by "clear and convincing evidence," bad faith by the Funds under the governing standard. *JTR Enters., LLC v. Columbian Emeralds*, 697 F. App'x 976, 987 (11th Cir. 2017).[10]

1. The Funds acted in good faith in relation to the Swiss Complaint

Devine makes two arguments regarding the Funds' Swiss Complaint. *First*, she contends that the Funds "acted in bad faith" by not immediately disclosing to her their submission of the Swiss Complaint. (Reply at 6.) Astonishingly, she does not mention the Magistrate Judge's rejection of this argument in his recent order. (Doc. #743 at 5.) Devine re-styles her argument as "an equitable one" (Reply at 6), but the Funds had no obligation – equitable, legal, or otherwise – to notify Devine of the Swiss Complaint when the Protective Order was being negotiated. By that point in time, Devine and her counsel had long been acutely aware of her legal jeopardy in Switzerland. (*See, e.g.*, Doc. #692, ¶ 24.)

Second, Devine argues that the Funds' allegations in the Swiss Complaint were "inconsistent" with their allegations here. (Reply at 6.) The Funds addressed this argument in the Opposition and in briefing on Devine's motion to dismiss. (Opp. at 5-6; Doc. #351 at 5-7.) In fact, the allegations are entirely consistent: both accuse Devine of participating in a money laundering scheme, and neither accuses her of securities fraud. (*See* Opp. at 6.) On this point, Devine contends that "[i]f this Court had, from the outset, been aware that the private, Swiss version of Plaintiffs' case against Ms. Devine necessarily was based on the Penny Stock Scheme allegedly committed by her ex-husband, the Court would have

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issues (Opp. at 11-14) "a red herring" and refers the Court to her separate arguments concerning the Swiss Complaint and the depositions of certain Funds (Reply at 10). Those arguments are addressed herein.

[10] Devine dismisses *JTR*'s discussion of the "clear and convincing" burden of proof as "*dicta*." (Reply at 5 n.7.) However, the *JTR* Court unambiguously refers to the movant's "burden to prove sanctionable conduct . . . by clear and convincing evidence." 697 F. App'x at 988-89; *see also id.* at 986, 987.

recognized that the PSLRA barred Plaintiffs' RICO claims at the inception." (Reply at 6.) Either Devine has forgotten the Court's prior ruling on this issue, or she is hoping the Court has. In her briefing on her motion to dismiss the Amended Complaint, Devine made exactly the PSLRA argument that she makes here, quoting the Swiss Complaint at length. (Doc. #336 at 4-10.) The Court, however, ruled against Devine, holding that the federal RICO claims were not barred by the PSLRA because the conduct giving rise to the alleged predicate offenses did not amount to securities fraud. (Doc. #521 at 42-48.) That ruling, which Devine does not mention, leaves no room for her argument here.

2. The Funds brought this action in good faith

In her Motion, Devine argued that the Funds acted in bad faith by bringing this action because "it was clear from the inception of this Action that all of Plaintiffs' claims . . . were time-barred." (Mot. at 3.) In response, the Funds demonstrated that this assertion is belied by the Court's rulings, including its entry of the TRO, as well as Devine's own decision to forgo an immediate preliminary injunction hearing and her tepid treatment of the statute of limitations issue in numerous briefs. (Opp. at 6-9.) Devine urges the Court to ignore this history (Reply at 8), but it goes to the heart of the issue of what was "clear" from the outset of this litigation. And it undermines Devine's effort to inflate a notional statute of limitations defense – which this Court never endorsed – into evidence of the Funds' bad faith.

On the merits, Devine's statute of limitations argument is flawed. The purported "notice" events she cites in her Motion and Reply did not, in fact, alert the Funds to their injuries. (*See* Opp. at 8-9.) Indeed, certain of the Funds' RICO claims were premised on injuries suffered well within the limitations period – and after any purported "notice" event

cited by Devine – and were therefore timely on their face. Additionally, equitable doctrines defeated Devine's statute of limitations defense as to *all* claims because she fraudulently concealed the Funds' claims. (*See, e.g.*, Initial Compl. ¶¶ 222-32; Doc. #604 at 3-14.)

Relatedly, Devine argues that the Funds brought this action in bad faith because they "were never, from the inception, able to trace the funds they sought." (Reply at 9.) She misleadingly suggests that the section of the Court's dissolution order concerning tracing addressed the merits of the Funds' claims. (*Id*.) In fact, although the Court found that Devine's funds were "commingled" and held that such commingling precluded preliminary injunctive relief (Doc. #575 at 18), it also "clarifie[d] that it does not hold that it is impossible to trace the funds among the assets" (*id.* at 18 n.10) and emphasized that, in any event, "money damages" were available to the Funds to compensate them for losses resulting from Devine's unjust enrichment (*id.* at 14). Nothing in that order supports Devine's contention that the Funds' claims were "meritless." (Reply at 10.)

In the end, Devine's Reply simply rehashes her old merits arguments. Even if the Court had agreed with Devine's view of the merits and dismissed the Funds' claims on the basis of the statutes of limitations or tracing – which, of course, it did not do – such dismissal would not have provided the basis for a finding of bad faith. *See, e.g.*, *Fid. Land Tr.*, 2013 WL 524961, at *4 (denying inherent-authority sanctions, noting that "even if [defendant] were absolutely correct in its position on the lack of merit of the lawsuit, that is not enough to establish the requisite bad faith" and that "[t]he imposition of attorney's fees as a *sanction* requires more than just asserting a position that turns out to be wrong") (emphasis in original).

3. The Funds acted in good faith in dismissing this action

Devine argues that the Funds' dismissal of the action was an act of bad faith. (Reply at 10-12.) That argument is puzzling since, at the time of dismissal, Devine was seeking that very relief (*see* Doc. #569 (Devine's motion to dismiss)), and she repeatedly complains about the expense of the litigation (*see, e.g.*, Mot. at 27; Reply at 11). Devine's argument is also baseless. The Funds had the absolute right pursuant to Rule 41 to dismiss this action, and they have explained their reasons for doing so. (Opp. at 14-16.) Devine speculates that the Funds dismissed the action "because they were unwilling to testify on the record" (Reply at 11), but the corporate representative for all of the Funds had already testified in his personal capacity prior to dismissal. She also speculates that the Funds' "primary aim in bringing this case was to gather evidence for use in Swiss proceedings while crippling Ms. Devine financially" (*id.*), but dismissing the case during discovery would serve neither aim. The Funds did not act in bad faith in dismissing the action.[11]

B. Devine's Billing Records Do Not Support Her Motion for Attorneys' Fees

Even if Devine had established bad faith on the Funds' part – and she unquestionably has not – she has failed to demonstrate that she is entitled to the attorneys' fees she claims.

First, it is clear that the millions of dollars in fees sought by Devine were not "incurred because of, *and solely because of*" much of the discrete conduct she complains of, including in relation to the Swiss Complaint and the Funds' dismissal of the action.

[11] In connection with her argument concerning the Funds' dismissal, Devine renews her accusation that the Funds made a misstatement about the Estera Report. (Reply at 11 n.12.) At this point, that contention can only be the product of bad faith. As Devine well knows, she made a very specific allegation in her motion for partial judgment – that the Estera Report was based on a tracing analysis performed by Tonya Pinkerton of the FBI – and the Funds forthrightly refuted it. (*See* Opp. at 13-14.) The Funds made no misstatement, and Devine's willingness to mischaracterize the record only highlights the weakness of her Motion.

Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1189 (2017) (emphasis added). Indeed, Devine makes no effort to tie her particular accusations of bad faith to any specific expenses. *Second*, Devine can only recover those fees that are "reasonable and appropriate." *See, e.g.*, *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1545 (11th Cir. 1993). She failed to include any detailed billing records with her Motion; that alone is reason to deny her Motion. (*See* Opp. at 22 & n.12.) And her belated submission now of more than 900 pages of heavily redacted records, with minimal explanation, does not begin to satisfy her burden.

The extensive redactions in the records submitted by Devine, which often make it impossible to discern what her counsel was doing at a given time, are especially problematic. (A sample of the redactions is attached as Exhibit 1 to the Dysard Declaration.) Devine's counsel asserts that they redacted entries that are "[p]rivileged" or "financially sensitive" but provides no legal authority for doing so. (Lee Reply Decl. ¶ 5.) That is because there is none. Even if Devine's redactions do conceal privileged or financially sensitive information – and context suggests otherwise (*see, e.g.*, Doc. #751-3 at 3 ("review letter from Plaintiffs' counsel regarding [redacted]")) – she is not entitled to withhold such information from the Funds or the Court. A party seeking attorneys' fees waives any privilege that might otherwise apply to her billing records. *See, e.g.*, *Essex Builders Grp., Inc. v. Amerisure Ins. Co.*, 2007 WL 700851, at *1 (M.D. Fla. Mar. 1, 2007). It would be "manifestly unfair" to require the Funds to defend against a claim for fees "without the benefit of the full record upon which the fees are based." *Banta Props., Inc. v. Arch Specialty Ins. Co.*, 2012 WL 12836516, at *2 (S.D. Fla. July 10, 2012) (internal quotation marks omitted).

Where some sense of the billing records can be made, they raise serious concerns about the nature and reasonableness of the fees Devine seeks to shift to the Funds. By way of example only, Devine seeks to recover: fees incurred in connection with her failed campaign to prevent the Funds' production of materials to the Swiss Prosecutor (*see* Dysard Decl. ¶ 4); fees incurred after her counsel produced privileged documents to the Funds (*see id.* ¶ 5); and fees incurred after the Funds' voluntary dismissal (*see id.* ¶ 6). The bills also evidently include counsel's defense of Devine in U.S. and Swiss government investigations. (*See id.* ¶¶ 7-8.) The heavy redactions throughout the records undoubtedly mask significant additional billing for tasks that should not be shifted to the Funds under any circumstance.

Finally, Devine is seeking to recover for the work of an unreasonable number of attorneys. At just one of the law firms representing Devine, there were as many as 10 attorneys billing time on her case in a single month. (*See, e.g.*, Doc. #751-2 at 24 (Fox Rothschild Sept. 30, 2016 bill).) Such overstaffing is patently unreasonable.

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

Devine continues to ignore the critical limitation on recovery of fees and expenses under Florida RICO: a claim must be without substantial factual or legal support when filed. *See, e.g.*, *MacNeill v. Yates*, 2010 WL 5491234, at *5 (M.D. Fla. Dec. 17, 2010). The Court found legal and factual support for the Florida RICO claims when it granted the TRO, and it dismissed those claims only because of the Supreme Court's intervening decision in *RJR*. (*See* Opp. at 16-18.) Devine is exactly right that the Funds' arguments "amount to a defense of the merits of their since-dismissed Florida RICO claims" (Reply at 12) – because those claims had merit when filed, Devine cannot recover fees and costs under Florida RICO.

Devine's only rejoinder is to repeat her citation to *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290 (11th Cir. 1998). (Reply at 13.) That case is inapposite. *Johnson* involved the entry of judgment on the plaintiff's Florida RICO claim because it was not supported at the time of filing, not because there was an intervening change in the law. (*See* Opp. at 18 n.10.) *Johnson* certainly does not stand for the proposition, as Devine suggests (Reply at 13), that the mere dismissal of a Florida RICO claim automatically entitles a defendant to attorneys' fees. *See Grasso v. Grasso*, 2016 WL 8716273, at *7 (M.D. Fla. Oct. 21, 2016) ("Section 772.11 is not a prevailing party statute.").

Even if Devine were entitled to certain fees and expenses under Florida RICO, she has failed to identify them. As noted in the Opposition, "fees awarded under [Florida RICO] are limited to work performed defending the Florida RICO claims, and the fee petition must be tailored accordingly." (Opp. at 22 (quoting *Gray v. Novell, Inc.*, 2010 WL 2593608, at *11 (M.D. Fla. Feb. 22, 2010)).) However, Devine does not provide an accounting of her expenditures that relate specifically to her defense against the Florida RICO claims. She casually asserts that her billing records demonstrate her expenditure of over $4 million in fees and more than $500,000 in costs "while defending against Plaintiffs' Florida RICO claims" (Reply at 12), but that is the grand total of every expenditure from the beginning of the case through February 28, 2017 (*see* Opp. at 22). Devine's failure to limit her application to fees and expenses relating specifically to the Florida RICO claims is fatal to her request.

IV. The Equities Militate Against Awarding Devine Damages on the TRO Bond

Devine should not be awarded damages on the TRO bond. (*See* Opp. at 27-29.) Even if the Court were to consider her belatedly-submitted billing records, her claimed

damages – expenses associated with submitting 90-day accountings[12] (Reply at 13-14) – should not, as an equitable matter, be recoverable. Those accountings were not required in the TRO in its original form. Rather, Devine herself requested them in December 2015, to avoid being held in contempt after admitting to repeated violations of the TRO. (Doc. #176 at 3; *see also* Doc. #230 at 7-8 (order requiring accountings).)

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

Devine incorrectly asserts that Rule 37(d) sanctions are "mandatory." (Reply at 1.) The Court is not required to impose sanctions where there is "a pending motion for a protective order," Fed. R. Civ. P. 37(d)(2), or the failure to attend a deposition "was substantially justified or other circumstances make an award of expenses unjust," Fed. R. Civ. P. 37(d)(3). Both exceptions apply here. (*See* Opp. at 23-27.) Moreover, Devine's expenses on preparation, shipping, travel, and lodging were entirely unnecessary. If she was determined to make a record of AAV's non-appearance at the improperly-noticed deposition, her counsel could have done so by telephone – just as they did for AGF and AIF. (*See* Doc. ##685-26 and 685-27.)

VI. Devine Has Not Provided a Basis for an Award of Most of the Costs She Seeks

The Funds have demonstrated that Devine should not recover any costs incurred after February 28, 2017, when the Funds elected to proceed only on their unjust enrichment claim, and, further, that she should not recover various costs relating to transcripts, copying, and e-discovery. (Opp. at 30-35.) In her Reply, Devine fails to address many of the points raised

[12] In a footnote, Devine also refers to "thousands of dollars in additional legal fees" she incurred in briefing concerning the dissolution of the TRO (Reply at 14 n.13), but it is well-established that attorneys' fees incurred in litigating the injunction are not recoverable against the bond (*see* Opp. at 29).

by the Funds (for example, concerning copying costs), and the arguments she does advance are unpersuasive. For the Court's convenience, the Funds submit herewith a chart detailing the costs to which Devine is not entitled. (Dysard Decl., Ex. 10.)

As to costs incurred after February 28, 2017, Devine simply falls back on the groundless assertions of bad faith she makes throughout her Motion. (Reply at 15.) As to transcript costs, she does not dispute that many of the costs she seeks are not recoverable. (*See* Opp. at 32-33.) She presses for the costs of the transcripts of status conferences on July 20, July 28, and October 1, 2015 (Reply at 15), but those conferences were primarily procedural. Finally, as to e-discovery costs, at least one court in this District has held that such costs are not recoverable. (*See* Opp. at 34.) In any case, Devine's request for more than $80,000 in such costs cannot be reconciled with the principle that "[t]axable costs are limited to relatively minor, incidental expenses" and "are modest in scope." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 573 (2012). Devine again relies primarily 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 (Reply at 15), but the modest award of $258 in that case (*see* Opp. at 35 n.21) only highlights the improper nature of Devine's outsized request.[13]

CONCLUSION

Devine's Motion should be denied, with the exception of certain limited costs.

[13] The two out-of-Circuit cases cited by Devine (*see* Reply at 15) are not representative of the developing state of the law on e-discovery costs. One case, *In re Aspartame Antitrust Litigation*, 817 F. Supp. 2d 608 (E.D. Pa. 2011), was effectively abrogated by the Third Circuit in *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir. 2012). Following *Race Tires*, "almost all district courts considering the issue, including district courts within the Eleventh Circuit, have held that the costs of creating and maintaining an electronic discovery database are not recoverable under § 1920," except the costs of actually making copies. *Abbott Point of Care, Inc. v. Epocal, Inc.*, 2012 WL 7810970, at *3-4 (N.D. Ala. Nov. 5, 2012). The other case cited by Devine, *Tibble v. Edison International*, 2011 WL 3759927 (C.D. Cal. Aug. 22, 2011), has been denounced as "untethered from the statutory mooring" of § 1920. *Race Tires*, 674 F.3d at 169.

Dated: October 23, 2018

Respectfully submitted,

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