UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:16-cv-21301-DPG

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARIEL QUIROS,
WILLIAM STENGER,
JAY PEAK, INC.,
Q RESORTS, INC.,
JAY PEAK HOTEL SUITES L.P.,
JAY PEAK HOTEL SUITES PHASE II L.P.,
JAY PEAK MANAGEMENT, INC.,
JAY PEAK PENTHOUSE SUITES L.P.,
JAY PEAK GP SERVICES, INC.,
JAY PEAK GOLF AND MOUNTAIN SUITES L.P.,
JAY PEAK GP SERVICES GOLF, INC.,
JAY PEAK LODGE AND TOWNHOUSES L.P.,
JAY PEAK GP SERVICES LODGE, INC.,
JAY PEAK HOTEL SUITES STATESIDE L.P.,
JAY PEAK GP SERVICES STATESIDE, INC.,
JAY PEAK BIOMEDICAL RESEARCH PARK L.P.,
AnC BIO VERMONT GP SERVICES, LLC,

Defendants, and

JAY CONSTRUCTION MANAGEMENT, INC.,
GSI OF DADE COUNTY, INC.,
NORTH EAST CONTRACT SERVICES, INC.,
Q BURKE MOUNTAIN RESORT, LLC,

Relief Defendants.
_____/

DEFENDANT ARIEL QUIROS' EMERGENCY MOTION TO LIFT OR MODIFY ASSET FREEZE ORDER AND INCORPORATED MEMORANDUM OF LAW

Defendant Ariel Quiros ("Quiros"), by and through undersigned counsel, files this Emergency Motion to Lift or Modify Asset Freeze and related to this Court's Order Granting

BERGER SINGERMAN
350 East Las Olas Boulevard, Suite 1000 Fort Lauderdale, Florida 33301 Telephone 954-525-9900 Facsimile 954-523-2872

Motion for Temporary Restraining Order and Asset Freeze[1] ("Freeze Order" or "Order")[D.E. 11], and states:

INTRODUCTION

The SEC acting ex-parte and contrary to due process, obtained from this Court a facially overbroad Freeze Order. Its effect imposes immediate liability on Quiros by completely freezing every dollar and asset in his or his companies' name. This overbearing Order literally deprives Quiros of any ability to feed his family or defend himself against the significant and misguided allegations in the Complaint. Worse, the Freeze Order violates clear law as it undeniably fails to establish that the broad scope of the Freeze Order directly relates to the amount of the disgorgement remedy it seeks.

Notably, the SEC conducted a three-year investigation into Quiros' role in seven EB-5 immigration investment projects (hereafter, a "Project" or, together, the "Projects") detailed in the Complaint, **– five of which are complete, fully operational, generating revenue and creating jobs in the State of Vermont.** During this investigation, Quiros fully cooperated, produced hundreds of thousands of pages of documents and appeared for live testimony on two occasions. Notwithstanding this full cooperation and an open phone line to Quiros' counsel, the SEC ran to Court seeking *ex parte* relief that immediately froze **all of Quiros' assets**, down to the penny. Literally, Quiros cannot purchase food or a cup of coffee, yet alone defend against the SEC's allegations. The SEC has revealed that its true intent is not to safeguard the integrity of the EB-5 immigration program. Rather, the SEC seeks to punish Quiros and his businesses for generating a profit in their construction, development, and operation of the Projects, **which**

[1] Pursuant to Local Rule 7.1(d), the Certification of Emergency is filed concurrently herewith as **Exhibit 1**.

role and payments were fully disclosed and authorized, despite the fact that much of the alleged misconduct occurred outside of the applicable five-year statute of limitations.

The SEC's entire case is premised on an incorrect argument that Quiros and his affiliates were only entitled to receive a limited amount of investor funds from each of the limited partnerships. When, through ordinary commercial real estate development transactions that the SEC misunderstands, Quiros and his affiliates received more than the amounts the SEC believes they were entitled to, the SEC concludes that Quiros misappropriated investor funds. Casting a wide indiscriminate net, the SEC names in its action as relief defendants affiliates of Quiros that participated legitimately in the various commercial operations related to Quiros' commercial development efforts on behalf of the partnerships.

Importantly, throughout the 82-page Complaint, the SEC mentions only in passing that express provisions of the investment agreements upon which it relies **permit and authorize Quiros and his affiliates to not only *use* significant investor funds towards the completion of the Projects, but to *receive* substantial compensation for their work on the Projects.** Notwithstanding these clear contractual provisions, the SEC incorrectly denounces every occasion on which Quiros or his affiliates received a dollar from the Projects, refusing to acknowledge that indeed, because Quiros and his affiliates provided resources to the Projects, they were entitled to be paid and to make profit. The SEC mischaracterizes the contents of the relevant agreements and purposefully omits reference to substantial evidence supporting the conclusion that Quiros has given investors exactly that which was provided for in the investment agreements.

Most alarming in the SEC's sudden rush to Court is that, despite the its claim that Quiros "looted" $50 million in investor funds, a claim Quiros will show to be demonstrably false, the SEC has now frozen assets in excess of three times that which it would ever be entitled to

recover under a theory of disgorgement. The SEC's burden in establishing the propriety of an asset freeze requires it to directly tie the amount of the asset freeze to the $50 million it claims Quiros allegedly received in "ill-gotten gains". Instead, the Freeze Order disregards its own allegations by depriving Quiros access not only to that which the SEC alleges he received improperly, but *all of Quiros' assets*, which vastly exceed $50 million. The effect, and undoubtedly the SEC's intent, of the overbroad Freeze Order is to cut off Quiros' ability to fund his living expenses and retain and pay legal counsel to defend against the SEC's unfounded allegations, eliminating the opportunity for Quiros to respond. Notably, the SEC provided this Court with no legal authority supporting this wholly unlawful seizure.

The SEC's analysis for each of the seven partnerships is stated below and Quiros will be able to demonstrably show this Court the SEC is wrong.

1. Jay Peak Hotel Suites L.P. ("**Suite Phase I**"): "There was nothing in the use of proceeds document allowing Quiros or Suites Phase 1 to use $12.4 million of Phase I investor money to purchase Jay Peak…at most Jay Peak was only entitled to take $4.3 million of investor money…[t]his is far short of the $12.4 million of investor money Quiros improperly used on the Jay Peak purchase." (Complaint, hereafter "Cmpl.", ¶74). In fact, from December 2006 to May 2008, Suite Phase I raised $17 million to build a luxury hotel; Quiros and his affiliates were authorized to receive, and did receive, a substantial part of these investor proceeds to acquire real estate and complete the hotel. The hotel is completed and operating. (Cmpl. ¶15);
2. Jay Peak Hotel Suites Phase II L.P. ("**Hotel Phase II**"): "There was nothing in this [use of proceeds] document that allowed Quiros or Hotel Phase II to use $9.5 million of Phase II investor funds to buy Jay Peak in 2008…" (Cmpl. ¶75). In fact, from March 2008 to January 2011, Hotel Phase II raised $75 million to build a hotel, indoor water park, ice

rink, and golf club house; Quiros and his affiliates were authorized to receive, and did receive, a substantial part of these investor proceeds to acquire real estate and construct these facilities. Construction on all is complete and they are operating. (Cmpl. ¶16);

3. Jay Peak Penthouse Suites L.P. ("**Penthouse Phase III**"): "At most Jay Peak and the other Defendants could receive approximately $3.7 million…" (Cmpl. ¶¶ 100-101). In fact, from July 2010 to October 2012, Penthouse Phase III raised $32.5 million to build a 55-unit penthouse suites hotel and activities center, bar and restaurant; Quiros and his affiliates were authorized to receive, and did receive, a substantial part of these investor funds to acquire real property interests and construct the penthouse suites. Construction is complete and the facilities are operating. (Cmpl. ¶18);

4. Jay Peak Golf and Mountain Suites L.P. ("**Golf and Mountain Phase IV**"): "Therefore, at most Jay Peak and the other Defendants could receive approximately $6.3 million… There was nothing in the use of proceeds document stating the Defendants could use investor funds to pay down a margin loan." (Cmpl. ¶104-105). In fact, from December 2010 to November 2011, Golf and Mountain Phase IV raised $45 million to build golf cottage duplexes, a wedding chapel and other facilities; Quiros and his affiliates wre authorized to receive, and did receive, a substantial part of these investor funds to acquire real property and construct the facilities. Contrary to the SEC's allegations, there was no restriction on Quiros or his affiliates ability to pay down loans. Construction is complete, and the facilities are operating. (Cmpl. ¶ 20);

5. Jay Peak Lodge and Townhouses L.P. ("**Lodge and Townhouses Phase V**"): "At most, Jay Peak and the other Defendants as the project developer could take approximately $7.4 million…There was nothing in the use of proceeds document stating the Defendants could use investor money to pay down and pay off margin loans." (Cmpl. ¶¶ 108-109).

In fact, from May 2011 to November 2012, Lodge and Townhouses Phase V raised $45 million to build 30 vacation rental townhouses, 90 vacation rental cottage, a café and a parking garage; Quiros and his affiliates were authorized to receive, and did receive, a substantial part of these investor funds to acquire real property and construct the townhomes, vacation rental cottage, café and parking garage. Contrary to the SEC's allegations, there was no restriction on Quiros or his affiliates ability to pay down loans. Construction is complete and the facilities are operating. (Cmpl. ¶22);

6. Jay Peak Hotel Suites Stateside L.P. ("**Stateside Phase VI**"): "Upon completing construction, at most Jay Peak and the other Defendants as the project developer could take $10.1 million…[the defendants] violated the use of proceeds document when Quiros and Q Resorts used $5.8 million of investor money to pay off Margin Loan III, and up to $2.5 million to pay down Margin Loan IV. There was nothing in the use of proceeds document indicating the Defendants could spend investor money on paying down or paying off margin loans." (Cmpl. ¶¶ 112-113) In fact, from October 2011 to December 2012, Stateside Phase VI raised $67 million to build an 84-unit hotel, 84 vacation rental cottages, a guest recreation center and a medical center; Quiros and his affiliates were authorized to receive, and did receive, a substantial part of these investor funds to acquire real property and construct the hotel, vacation rental cottages, guest recreation center and medical center. Contrary to the SEC's allegations, there was no restriction on Quiros or his affiliates ability to pay down loans. Construction is complete on the hotel. Construction has begun on the cottages and work has not yet begun on the recreation and medical centers. (Cmpl. ¶24);

7. Jay Peak Biomedical Research Park L.P. ("**Biomedical Phase VII**"): "Upon the project being fully funded and completed, at most Jay Peak and the other Defendants as project

350 East Las Olas Boulevard, Suite 1000 Fort Lauderdale, Florida 33301 Telephone 954-525-9900 Facsimile 954-523-2872

developer could take approximately $18.7 million…(Cmpl. ¶128). In fact, since Nov 2012, Biomedical Phase VII raised $83 million to construct a biomedical research facility; Quiros and his affiliates were authorized to receive, and did receive, a substantial part of these investor funds to build and for research and development of the biomedical research facility. An additional $27 million is scheduled to be raised. Construction is ongoing. (Cmpl. ¶26).

The construction, development and operation of the seven EB-5 investment Projects set forth in the Complaint resulted in the creation of hundreds of jobs and infusion millions of dollars of revenue into the State of Vermont. Moreover, all of the eligible EB-5 investors have thus far received permanent green cards and five of the seven Projects are complete and fully operational, generating revenue and increasing in value as time passes. The completed Projects include hotels, lodges and condos, all which continue to service the community in addition to achieving a key objective of Project investors: obtaining green cards. The SEC has abused its authority by failing to satisfy its burden to establish the proper scope of an asset freeze, and the Freeze Order must be lifted or, in the alternative, modified as a result.

STATEMENT OF RELEVANT FACT

A. The Projects and the Disclosed Provision of Investor Funds to Quiros and Affiliates

In June 2008, Quiros, through an affiliated entity, Q Resorts, acquired Jay Peak, Inc. ("Jay Peak"), the owner and operator of the Jay Peak, Vermont mountain resort (Cmpl.¶¶ 12, 58). Eighteen months earlier, in December 2006, Jay Peak created a wholly-owned subsidiary to act as general partner of Suite Phase I, a limited partnership formed to raise capital through the EB-5 visa preference immigration program. Jay Peak formed Suite Phase I to develop a new hotel in the Jay Peak resort. Jay Peak began raising funds for Suite Phase I in December 2006.

Like each of the seven limited partnerships that are the subject of this action (hereafter, a "Project" or, together, the "Projects"), Suites Phase I was structured to work and transact with affiliates of Jay Peak. The seven partnerships all acquired real property or real property interests from Jay Peak and used various affiliates to carry out the development of the Projects.

The intention to engage affiliates to sell real property and to provide various services to the limited partnerships is clearly disclosed in the Project Offering Documents in a number of ways. For example, pursuant to the express terms of the Offering Documents for each Project, Jay Peak (and after his acquisition of Jay Peak, Quiros directly, or through his affiliates) was entitled to collect certain fees and payments related to the construction, development and operation of the Projects, including supervision fees and expenses, administration fees and payment for land the Project's related limited partnership purchased from Quiros or one of his affiliates. (*See* Declaration of Ariel Quiros attached hereto as **Exhibit 2**, "Quiros Decl.", ¶ 6.). As set forth in the Business Plan for Jay Peak Lodge and Townhouses Project that each investor received prior to investing:

> THE GENERAL PARTNER MAY, IN THE NAME AND ON BEHALF OF THE PARTNERSHIP, ENTER INTO AGREEMENTS OR CONTRACTS FOR PERFORMANCE OF SERVICES FOR THE PARTNERSHIP **WITH AN AFFILIATE OF THE GENERAL PARTNER, INCLUDING WITHOUT LIMITATION SERVICES NECESSARY TO OVERSEE CONSTRUCTION OF THE BUILDINGS AND OTHER IMPROVEMENTS AND FOR THE LEASING OF THE TOWNHOUSES, COTTAGES AND THE ANCILLARY FACILITIES BUILDINGS, AND THE GENERAL PARTNER MAY OBLIGATE THE PARTNERSHIP TO PAY COMPENSATION FOR AND ON ACCOUNT OF ANY SUCH SERVICES**. . . .

(Quiros Decl. ¶ 6, Exhibit E, p. 89, capitalization in original)(emphasis added). This disclosure is repeated in similar or identical form in the Business Plans for each of the Offering Documents, as well as in the express terms of the Partnership Agreements. For example, the Partnership Agreement for investors in the Jay Peak Hotel Suites Phase II, L.P. provides:

> **Section 5.07. Dealing with Affiliates: Fees.**
> The General Partner may, in the name and on behalf of the Partnership, enter into agreements or contracts for performance of services for the Partnership with an Affiliate of the General Partner, including without limitation services necessary to construct the Building and other improvements and for the operation of the Hotel and the Ancillary Projects, and the General Partner may obligate the Partnership to pay compensation for and on account of any such services; provided, however, such compensation and services shall be at costs to the Partnership not in excess of those disclosed in the Confidential Memorandum. In addition, the General Partner shall pay the Resort Owner its development fees disclosed in the Confidential Memorandum.

(Quiros Decl. ¶ 6, Exhibit B, p. 99.) In addition to the express disclosures that work on the Projects would be undertaken by affiliates of the General Partner – *i.e.* affiliates of Quiros – the Offering Documents included itemized sections setting forth the exact amounts Quiros' affiliates would receive in consideration of their distinct contributions to the Projects, namely construction and supervision services.[2] (Quiros Decl. ¶ 7, Exhibit H.) The involvement of Quiros and his related entities was thus disclosed in the Offering Documents, thereby putting investors on notice that certain of their funds would be distributed to Quiros, directly or indirectly, as payment for his role in the construction, management, supervision and operation of the Projects. (Quiros Decl. ¶¶ 6-7.) Given the substantial amount of time, resources and manpower Quiros and his affiliate companies provided to the Projects, and the contractual provisions set forth above, the eventual transfer of investor funds to Quiros, directly and indirectly, were properly received payments as a result of his disclosed contributions to the Projects. (Quiros Decl. ¶¶ 6-8.)

In its analysis of the investor funds authorized to be paid to Quiros and his affiliates, the SEC assumes that only those fees payable directly to Quiros' affiliates are authorized and, therefore, concludes that any other investor funds transferred directly or indirectly to Quiros is unauthorized. This is wrong.

[2] As attached to Exhibits in the Quiros Declaration, each of the Offering Documents for each of the Projects included similar or identical disclosures to those set forth above.

As a result, the SEC asserts that investor funds received directly or indirectly by Quiros in excess of the amounts it believes is allowed under the limited partnership agreements is misappropriated. Its imprecise analysis, which is disconcerting after conducting a three-year investigation, leads the SEC to the erroneous conclusion that investor funds were improperly used by Quiros and his affiliates to pay the purchase price of Jay Peak, to pay margin loans and other uses for the benefit of Quiros. What the SEC fails to acknowledge is that these uses of funds for the benefit of Quiros and his affiliates were appropriate expenditures of funds derived by Quiros and his affiliates through profits generated in its transactions with the partnerships. Despite the SEC's insistence to the contrary, these profits were lawful, as they were authorized by the limited partnership agreements and fully disclosed to investors in offering materials.

Perhaps most tellingly, as a result of Quiros' contributions, and that of his affiliate companies, all except two of the EB-5 investment projects implicated in the Complaint that Quiros helped to build and develop for the Jay Peak mountain resort are, as set forth in the Complaint, **complete** and **fully operational**. (Cmpl., ¶¶ 15, 16, 18, 20, 22). Of the two EB-5 Projects that Quiros has not yet completed, one is substantially complete (Jay Peak Hotel Suites Stateside) and the remaining development is not yet scheduled for completion (Biomedical Phase VII). (Quiros Decl. ¶ 8.) The SEC's allegations that Quiros misused and/or misappropriated a substantial amount of the funds raised by investors is belied by the fact that five of the seven Projects implicated in the Complaint are fully operational developments that generate revenue and continue to provide returns to the State of Vermont and investors.

B. Quiros' Net Worth Far Exceeds the Allegations of Ill-Gotten Gains

Quiros' net worth as of September 30, 2014 was approximately $178 million, which worth has grown to more than $200 million. (Quiros Decl. ¶ 11.) Although Quiros holds certain liquid assets in cash and other securities, the majority of his holdings are in illiquid and not easily

transferable assets, primarily real estate holdings and partnership interests. (Quiros Decl. ¶ 11, Exhibit I.) Quiros' real estate holdings include Jay Peak, Inc., **which was valued at approximately $100 million in July of 2015**, and over which a Receiver now has total control pursuant to the terms of the Order. (Quiros Decl. ¶ 13, Exhibit J.)

The Complaint alleges that defendants "have systematically looted *more than $50 million* of the more than $350 million that has been raised" from EB-5 investors to develop and operate eight projects in Vermont. (Cmpl. ¶ 1.) Thus, the SEC alleges that, at most, Quiros has ill-gotten gains of approximately $50 million. However, the terms of the Freeze Order prevent Quiros, from:

> "[T]ransferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of, or withdrawing ***any assets or property***, including but not limited to cash, free credit balances, fully paid for securities, personal property, real property, and/or property pledged or hypothecated as collateral for loans, or charging upon or drawing any lines of credit, owned by, controlled by, or in the possession of, whether jointly or singly, and wherever located;

(ECF No. 11, p. 8, Section III(A), emphasis added). Thus, Quiros is prevented from accessing any part or aspect of any of his assets, despite the fact that the Complaint alleges only $50 million in ill-gotten gains.

ARGUMENT

A. The Scope of Freeze Order is Overbroad.

The scope of the Freeze Order is patently overbroad in relation to the amount of disgorgement the SEC has alleged it would ever be entitled to collect in the event it fully succeeds on all of its claims and Quiros' demonstrated net worth. (Cmpl. ¶ 1.) In *S.E.C. v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005), the Eleventh Circuit addressed the scope of an asset freeze to determine if the district court abused its discretion in freezing all of the Defendant's assets. The court held that the amount subject to the freeze was limited to the

amount of ill-gotten gains the SEC could demonstrate would be subject to disgorgement from the defendant, which the court found was $21 million. *Id.* The court held:

> "The SEC's burden for showing the amount of assets subject to disgorgement (and, therefore available for freeze) is light: a reasonable approximation of a defendant's ill-gotten gains [is required] . . . Exactitude is not a requirement. But, the "power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. ***Any further sum would constitute a penalty assessment.***"

Id. (citations omitted) (emphasis added); *see also SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972), citing *SEC v. Texas Gulf Sulpher Co.*, 446 F.2d 1301, 1308 (2d Cir.), cert. denied 404 U.S. 1005 (1971) ("the SEC may seek other than injunctive relief, 'so long as such relief is remedial relief and is not a penalty assessment.' "). Although in *ETS Payphones* the SEC continually cited to "$300 million as the total amount of ill-gotten gains", because neither the record before the court nor the finding of the district court supported that figure, the Eleventh Circuit confined the asset freeze order to a smaller amount of ill-gotten gains the SEC sufficiently identified. *Id*.

Similarly, in a related context involving a civil enforcement action by the Federal Trade SEC, and relying on the standard articulated in *SEC v. ETS Payphones, Inc.*, *supra*, the Eleventh Circuit vacated an order freezing all of a defendant's assets granted by the district court in *FTC v. Bishop*, "other than allowance for personal expenses." *FTC v. Bishop*, 425 Fed. Appx. 796, 798 (11th Cir. 2011). Recognizing that an asset freeze serves only as an equitable remedy intended to disgorge the defendant of any "ill-gotten gains" and does not take into consideration the plaintiff's losses, the court held that it was the FTC's burden to make a reasonable approximation of the alleged improper gains properly subject to a freeze order. *Id*. Because the FTC did not make any such showing and failed to limit the asset freeze to only those assets "ill-

gotten" by the defendant, the court remanded to the district court for a determination of the permissible scope of the freeze. *Id*.

Here, even taking the arguments in the Complaint as true (which they are not), the SEC has made absolutely no showing that all or even most of Quiros' assets, which total more than $178 million, are ill-gotten gains obtained through the Projects. To the contrary, the SEC has alleged that only $50 million of the more than $350 million invested by investors in the Projects were "ill-gotten" and that those alleged gains are spread across the accounts of all of the defendants, not just Quiros. (Cmpl. ¶ 11.) The value of assets encompassed by the Freeze Order exceeds by three and half times the SEC's approximation of any ill-gotten gains, and therefore operates as an improper penalty. It is a mathematical impossibility that all of Quiros' assets would be subject to disgorgement and therefore the Freeze Order exceeds the scope of the SEC's authority. **Jay Peak, Inc. alone, of which Quiros is the sole owner through Q Resorts, is worth approximately $100 million, and could more than satisfy the SEC's disgorgement claim if it succeeded in its case against Quiros.** When looked at through this lens, the disparity between the alleged ill-gotten gains and the value of assets subject to the Freeze Order is striking.

Because of the all-encompassing nature of the Freeze Order, without immediate modification, Quiros remains unable to pay his everyday living expenses, including the purchase of food, gasoline or health care expenses. (Quiros Decl. ¶¶ 10, 16). Moreover, without access to *any* of his assets, he is unable to pay the necessary legal fees in connection with his defense of this action, severely prejudicing him and essentially assessing liability without providing him the opportunity to counter the allegations asserted against him. (Quiros Decl. ¶ 10.) Indeed, the effect of the Freeze Order is to deny Quiros access to a single dollar, whether or not that money has any connection, to the Projects. This is patently unreasonable and inequitable. *E.g. SEC v.*

McGinnis, No. 13-CV-1047(AVC), 2013 U.S. Dist. LEXIS 173671, at *21 (D. Conn. Dec. 11, 2013) (modifying asset freeze order to provide for living expenses and payment of counsel fees, noting that "the court balances the equities in ruling on this preliminary injunction, and considers the extreme burden that the asset freeze places on the defendants and their families").

The Court should therefore lift the Freeze Order or, in the alternative, modify it to only the amount of assets that the SEC alleges would ever be subject to recovery under disgorgement.

B. The Release of Funds to Cover Attorneys' Fees and Expenses Is Appropriate.

In the alternative, the Court should modify the TRO to permit Quiros to access the funds necessary to pay for the legal fees associated with the defense of this action and provide for his living expenses.

This Court has broad discretionary power to grant requests for payment of reasonable living expenses and attorneys' fees from frozen assets. *See S.E.C. v. Asset Recovery & Management Trust, S.A.*, 340 F. Supp. 2d 1305, 1312 (M.D. Ala. 2004) (observing that a district court has the discretion to release funds from an asset freeze so the Defendant may pay for living expenses and attorneys' fees); *see also SEC v. Dowdell*, 175 F.Supp. 2d 850 (W.D. Va. 2001) (holding that courts have the authority, in an SEC enforcement action, "to release frozen personal assets, or lower the amount frozen" and modifying an asset freeze to permit the defendant funds for personal expenses and for the payment of attorney's fees). "Courts are called upon to weigh "the disadvantages and possible deleterious effect of a freeze [...] against the considerations indicating the need for such relief." *Id.* (citations and quotation mark omitted). In *Dowdell*, the court summarized the legal standard applied in cases that have dealt with requests for living expenses as follows:

> Courts which have addressed requests for living expenses look for evidence of the defendant's overall assets or income. *See SEC v. Duclaud Gonzalez de Castilla*, 170 F. Supp. 2d 427, 2001 WL

> 1346005 (S.D.N. Y. 2001). Where the courts have denied such requests, the defendants were found to have other sources of income or were requesting funds for luxuries, not necessities. *See id*. (finding that the defendant had voluntarily waived a $15,000 per month salary and was seeking money for a nanny, housekeeper, handyman and nurse); *see also SEC v. Coates*, 1994 U.S. Dist. LEXIS 11787, 1994 WL 455558 (S.D.N. Y 1994) (finding defendant failed to tell the court that the receiver was already paying monthly salaries to him and his family totaling almost $12,000 and that budget included lawn and pool service).

Id. Similarly, in *SEC v. Pinez*, 989 F.Supp. 325 (D. Mass. 1997) the court allowed an asset freeze subject to modifications to pay attorney's fees and essential household expenses.

Moreover, "pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments." *Luis v. U.S.*, 136 S. Ct. 1083 (2016). In distinguishing its prior cases, *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 631 (1989) and *United States v. Monsanto,* 491 U.S. 600, 616 (1989), based on the distinction between tainted and untainted assets of the defendant, the Supreme Court stated:

> [C]ases such as *Caplin & Drysdale* and *Monsanto* permit the Government to freeze a defendant's assets pretrial, but the opinions in those cases highlight the fact that the property at issue was "tainted," *i.e.*, it did not belong entirely to the defendant. ***We have found no decision of this Court authorizing unfettered, pretrial forfeiture of the defendant's own "innocent" property —property with no connection to the charged crime.*** Nor do we see any grounds for distinguishing the historic preference against preconviction forfeitures from the preconviction restraint at issue here. As far as Luis' Sixth Amendment right to counsel of choice is concerned, a restraining order might as well be a forfeiture; that is, the restraint itself suffices to completely deny this constitutional right.

Id. at 1094 (emphasis added).

As a matter of mathematics, the SEC cannot establish that all of Quiros assets are tainted, as the value of his assets are several multiples of the amount the SEC seeks to

have disgorged. A full asset freeze, under these circumstances, would be inconsistent with the Supreme Court's reasoning in *Luis v. U.S.*, 136 S. Ct. 1083 (2016).

C. The Statute of Limitations Has Expired for Most of the Alleged Misconduct

In addition to the SEC's failure to properly measure the disgorgement remedy it seeks against the scope of the Freeze Order, which is grounds alone to modify the Order, the very basis of the alleged wrongdoing suffers from a fundamental defect: the majority of the alleged misconduct occurred outside of the applicable five-year statute of limitations. *Gabelli v. SEC*, 133 S. Ct. 1216, 1222, (2013); *SEC v. Graham*, 21 F. Supp. 3d 1300, (S.D. Fla. May 12, 2014).

For example, the SEC alleges that beginning in June of 2008 – approximately eight years ago – Quiros improperly used investor funds to, in part, finance his purchase of Jay Peak, Inc. (Cmpl. ¶¶ 58, 64-67.) The SEC further alleges that in 2008, Quiros used investor money from the first two Projects to pay the law firm that assisted the seller, Mont Saint-Sauveur International, Inc. ("MSSI"), with Q Resorts' acquisition of Jay Peak, Inc. (*Id.*, ¶¶ 69-72.) However, pursuant to *Gabelli* and as recognized in this District in *Graham*, the SEC cannot base claims for, *inter alia*, disgorgement, on conduct occurring more than five-years from the date it eventually decides to bring an enforcement action. *Gabelli*, 133 S. Ct. at 1220-21 (finding that five-year statute of limitations in SEC enforcement action begins to run when a defendant's allegedly fraudulent conduct occurs); *Graham*, 21 F. Supp. 3d at 1310-11 ("the disgorgement of all ill-gotten gains realized from the alleged violations of the securities laws—i.e., requiring defendants to relinquish money and property—can truly be regarded as nothing other than a forfeiture (both pecuniary and otherwise), which remedy is expressly covered by § 2462 (providing for five-year statute of limitations)").

Thus, to the extent the "ill-gotten gains" the SEC alleges include Quiros acquisition of Jay Peak, Inc., which as Quiros will demonstrate was proper and not afoul of the applicable

investment documents, all such gains must be excluded from the amount recoverable under a theory of disgorgement and, therefore, permitted by an asset freeze. *Graham*, 21 F. Supp. 3d at 1310-11. Moreover, as Quiros will address comprehensively in opposition to the motion for a preliminary injunction, this Court lacks subject matter jurisdiction over claims related to any alleged misconduct occurring prior to April 12, 2011. *Id.* at 1316.

D. The Freeze Order is Effectively a Pre-Judgment Attachment of Quiros' Assets, to Which the SEC Must Post a Bond Under Florida Law.

In both the SEC's 59 page motion for entry of the Freeze Order, and in the 13 page Freeze Order itself, no case or statute was cited that permits (i) the SEC to seek ex-parte a freeze of a defendant's assets in a civil proceeding, or (ii) for this Court to enter an order, without the requirement of posting a bond in the event of damage resulting to the defendant from an improper seizure. The result of this draconian relief is that all of Quiros' cash and other assets have been frozen, leaving Quiros without the ability to buy food, pay general living and business expenses and pay counsel to protect his rights.

Indeed, however, there is a statute enacted to protect parties whose assets are effectively seized, as has occurred here. Under Florida law, a plaintiff seeking to freeze a defendant's assets is entitled to obtain a pre-judgment writ of attachment pursuant to Fla. Stat. §76.01 et. seq. Applying substance to form, it is clear that the SEC asserts a concern that Quiros is either going to dispose of or hide property for an alleged "debt that is due" as provided under Fla. Stat. §76.04. Any plain reading of the SEC's Complaint and its Motion for Freeze Order concludes that the SEC: (i) has pled that Quiros has committed a fraud, (ii) has a concern about grabbing Quiros' assets now to protect investors (or why else would they take that action), and (iii) that the debt is now due (although at best, most of what the SEC thinks it's entitled to assert is damage is yet to be pled or proved as constituting fraudulent conveyances).

Under these circumstances, the SEC must be required **to prove** precisely what the directly traceable "ill-gotten gains" are in this action. If the SEC can't do that, then the entire Freeze Order must be lifted. And if they can, then any funds or property that are frozen above those ill-gotten gains should be subject to the posting of an attachment bond pursuant to Fla. Stat. §76.12. That statute provides in pertinent part: *"No attachment shall issue until the person applying for it…makes a bond with surety…payable to defendant in at least double the debt demanded conditioned to pay all costs and damages which defendant sustains in consequence of plaintiff's improperly suing out the attachment."*

The posting of a sufficient bond pursuant to §76.12, Florida Statutes, is a "procedural threshold to relief." *Future Tech Int'l, Inc. v. Tae Il Media, Ltd.*, 944 F. Supp. 1538, 1554 (S.D. Fla. 1996); *see also Frio Ice, S.A. v. SunFruit, Inc.,* 724 F.Supp. 1373, 1379–80 (S.D.Fla.1989), *rev'd on other grounds,* 918 F.2d 154 (11th Cir.1990) (denying request for prejudgment attachment in part because the movant failed to prove compliance with the bond requirement of section 76.12). Specifically, "§ 76.12, requires an adequate bond, conditioned to pay all costs and damages which [the defendant may sustain] in consequence of the plaintiff's improperly suing out said attachment." *Florida Transp. Co. v. Dixie Sightseeing Tours, Inc.*, 139 So. 2d 175, 177, N. 5 (Fla. 3d DCA 1962) (internal citations and quotation marks omitted). "Because of the extraordinary nature of attachment proceedings, the terms of the statute must be narrowly construed." *Future Tech Int'l, Inc.*, 944 F. Supp. at 1554. "As such, the Court cannot permit Plaintiff to post a bond in an amount less than the amount stated in the statute." *Shandong Airlines, Co. v. CAPT, LLC*, 2009 WL 1861997, at *2 (M.D. Fla. June 25, 2009). Given the foregoing circumstances, this Court should require the posting of a bond in the amount of double the amount of all sums in excess of the "ill-gotten gains."

LOCAL RULE 7.1(A)(3) CERTIFICATION

Pursuant to Local Rule 7.1(a)(3), the undersigned certifies that he conferred with Plaintiff Securities and Exchange Commission in a good faith effort to resolve the issues raised in this motion and Securities Exchange Commission does not agree to the relief requested herein.

Respectfully submitted,

BERGER SINGERMAN LLP
350 E Las Olas Blvd.
Suite 1000
Fort Lauderdale, FL 33301-4215
Phone: 954-525-9900
Fax: 954-523-2872
Attorneys for Defendant

By: *Charles H. Lichtman*
Charles Lichtman
Florida Bar No. 501050
Direct line (954) 712- 5138
clichtman@bergersingerman.com
Pamela C. Marsh
Florida Bar No. 57400
Direct line (850) 521-3010
pmarsh@bergersingerman.com
Nicole L. Levy
Florida Bar No. 106995
Direct line (954) 712-5188
nlevy@bergersingerman.com

David B. Gordon
Jaclyn H. Grodin
(Pro Hac Vice Applications to be Submitted)
12 East 49th Street, 30th Floor
New York, New York 10017
Telephone: (212) 509-3900
Facsimile: (212-509-7239
dbg@msk.com
jhg@msk.com

Mark T. Hiraide
(Pro Hac Vice Application to be Submitted)

11377 West Olympic Boulevard
Los Angeles, CA 90064-1683
Telephone: (310) 312-2000
Facsimile: (310) 312-3100
mth@msk.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing electronically.

/s/ Charles H. Lichtman

SERVICE LIST

Robert K. Levenson, Esq.
levensonr@sec.gov
Christopher E. Martin, Esq.
martinc@sec.gov
SECURITIES AND EXCHANGE COMMISSION
801 Brickell Avenue, Suite 1800
Miami, FL 33131
Telephone: (305) 982-6300
Facsimile: (305) 536-4154
Attorneys for Plaintiff

Michael I. Goldberg, Esq.
Michael.goldberg@akerman.com
AKERMAN LLP
350 East las Olas Boulevard, Suite 1600
Ft. Lauderdale, FL 33301
Court Appointed Receiver

7077606-4