UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-21301-GAYLES

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.
_____/

PLAINTIFF'S RESPONSE TO DEFENDANT ARIEL QUIROS' EMERGENCY MOTION TO LIFT OR MODIFY ASSET FREEZE ORDER

I. Introduction

For eight years, Ariel Quiros lied to hundreds of investors in the Jay Peak EB-5 offering projects about what he was doing with their money. His deceit enabled him to raise more than $350 million from unsuspecting investors. But even after being caught red-handed, Quiros is not deterred. In his Emergency Motion to Lift or Modify Asset Freeze Order (DE 39) ("Motion"), Quiros has continued his pattern of lying, this time to the Court. The Motion is bereft of a single fact justifying his brazen attempt to modify the asset freeze so he can take even *more* investor money for himself, which is what will happen if the Court lifts the freeze.

Quiros ignores the mountain of evidence against him, not even *mentioning*, let alone attempting to rebut, documentary evidence showing he stole approximately $50 million in investor funds. He has misrepresented what the EB-5 offering limited partnership agreements allowed him to do in claiming he didn't break the law, and fabricated a claim that a prominent accounting firm determined his net worth to be $178 million in an attempt to take frozen funds that otherwise may go to defrauded investors. Furthermore, Quiros cites incorrect and inapplicable case law throughout his Motion. The Court should deny it as factually and legally insufficient.

There are six primary lies Quiros has set forth in his Motion, and hence six primary reasons the Court should deny it.

First, Quiros falsely claims the limited partnership agreements in each EB-5 offering allowed him to take the "substantial" amount of investor funds that he did. As purported proof, he cites to a single provision of each EB-5 offering's limited partnership agreement that says the general partner may enter into agreements with an affiliate and the general partner may obligate the partnership to pay compensation; "provided, however, such compensation shall be at costs to the Partnership not in excess of those disclosed in the" partnership agreement. Motion at 9. But the only evidence he provides of how "substantial" an amount of investor funds he allegedly was allowed to take is the evidence the Commission cited in our Emergency Motion for Temporary Restraining Order, Asset Freeze and Other Relief (DE 4) ("TRO Motion") – the Source and Use of Funds documents showing Quiros took far more than he was entitled to. He ignores additional evidence in the TRO Motion – other provisions of the limited partnership agreements, the testimony of Co-Defendant William Stenger *and his own admissions under oath* – showing he improperly used investor funds. Furthermore, he fails to mention the provision he cites did

not apply to him for the first six offerings, because he was not the general partner of the first six projects.

Second, Quiros falsely states he could not have taken an improper amount of investor funds and violated the law because the Jay Peak companies built the first five projects. Once again, this ignores a mountain of evidence that the only way Quiros managed to complete construction on the first five phases after he stole almost $22 million of Suites Phase I and Hotel Phase II investor funds to buy Jay Peak was to take money from each successive project to finish the earlier ones. Unfortunately for later investors, as always happens in a Ponzi scheme, Quiros left them holding the bag. As detailed in the Declaration of Michael I. Goldberg (attached as Exhibit A), the Court-appointed Receiver in the case, and in the TRO Motion, Quiros raised $150 million from Stateside Phase VI and Biomedical Phase VII investors. However, Jay Peak is far from finishing Phase VI and has barely started construction on Phase VII. As Mr. Goldberg's Declaration shows, both projects have little money left, and nowhere near the tens of millions of dollars needed to finish construction as a result of Quiros' fraud.

Third, Quiros wrongly asserts his disgorgement is limited to a $50 million maximum. This statement misapprehends the nature of disgorgement. Quiros is, at a minimum, liable for more than $170 million in disgorgement and prejudgment interest, and potentially liable for as much as the full $350 million he raised from investors through his fraud.

Fourth, Quiros lies by making a far-fetched claim that he has a net worth of $200 million. In contrast to his representation in his sworn declaration, attached as Exhibit 2 to the Motion, the Berkowitz Pollack Brant accounting firm did not determine his net worth. *See* Declaration of Richard Berkowitz, attached as Exhibit B. The firm merely compiled figures *Quiros himself* provided. Furthermore, as Mr. Goldberg's declaration shows, the appraisal Quiros filed under seal stating Jay Peak is worth $87 million is based on inaccurate operating results for Jay Peak and baseless projections. Moreover, it is based on bank accounts he no longer has and limited partnership and LLC interests that are vastly overstated.

Fifth, Quiros cites incorrect case law. For example, the law in the Eleventh Circuit is clear that injunctions and disgorgement are equitable remedies not subject to any statute of limitations. In addition, the federal securities laws expressly state the Commission does not have to post a bond.

Sixth, Quiros has not met his burden of proof to show he is entitled to use frozen investor

funds to pay his living expenses and attorneys' fees.

We address each of these issues in turn in the remainder of this response. We incorporate by reference and rely on our detailed factual statements in the TRO Motion. DE 4 at 4-40.

II. Quiros Misappropriated and Misused Investor Money

Quiros asserts he is not liable for violating the federal securities laws because the limited partnership agreements in each offering allowed him to take an undefined amount of "substantial compensation" in the form of investor funds. Motion at 3, 7-10. This claim is demonstrably false. Quiros misrepresents the wording, meaning of, and effect of the one clause of the limited partnership agreements he cites in support of his claim.

The portion of the limited partnership agreements Quiros asserts allowed him to take an apparently unlimited sum of money from each limited partnership is set forth on Pages 8 and 9 of the Motion. In relevant part, it states that the *general partner* may enter into agreements with affiliates of the *general partner to perform services to build the particular project*. Motion at 8-9. Each provision goes on to state the general partner may oblige the limited partnership to pay compensation *for such services*. *Id.* Last, the provisions go on to state that the compensation shall be *at cost* to the limited partnership and *shall not exceed the specific amounts disclosed in each Private Placement Memorandum*.

Quiros alleges this provision applied to him as the general partner of each offering. Motion at 9: "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 . . ." This assertion is false. Quiros was not the general partner of any of the first six offerings. The general partner of each of the first six offerings was an entity in which Stenger was the officer or director. Quiros is nowhere to be found as having any position with those general partners. *See* Exhibits 15-19 to the Commission's TRO Motion.

In addition, even assuming Quiros or his affiliates were entitled to compensation from the limited partnerships, the language in the clause he cites expressly states the compensation was to be for *services* and *work constructing the project*. Motion at 8-9. No reasonable definition of work includes buying a luxury condominium, paying off and paying down margin loans, paying income taxes, collateralizing a personal line of credit, or stealing money to buy Jay Peak – all things Quiros actually did with investor funds as documented in our TRO Motion. TRO Motion at 14-25 and 34-38.

In an admission that is fatal to his claim that the provision he cites allowed him to take all the money he did, Quiros admits the amounts he could receive from these affiliate agreements were specifically set forth in the Private Placement Memorandum in each offering in the form of construction and supervision services. Motion at 9. The Commission extensively discussed that issue in the TRO Motion, setting forth the *exact* amount of construction, supervision, and land fees the Private Placement Memoranda set forth that Quiros and his affiliate companies could take. TRO Motion at 12, 18-19, 25, 27-31, and 35-39.

For example, in Suites Phase I, at the time he acquired Jay Peak he was entitled at most to take around $60,000 from investors in fees.[1] TRO Motion at 18. Yet Quiros used $12.4 million in investor funds to improperly pay for Jay Peak. *Id.* at 14-18 and Ex. 30 to TRO Motion at ¶24. Quiros provides no explanation for this huge discrepancy, and does not even mention the evidence showing he was only entitled to take $60,000 at the time of the acquisition, let alone try to rebut it.

There is similar evidence in other Phases that Quiros does not address:

- In Hotel Phase II, Quiros used $9.5 million of investor funds to pay for the purchase of Jay Peak in 2008. At the time, he was not entitled to take *any* portion of investor funds for construction, service, developer, or other fees. TRO Motion at 14-19.

- In Biomedical Phase VII, Quiros stole nearly $30 million of investor money to buy a condominium, pay taxes, collateralize a personal line of credit, buy Q Burke, and pay off a margin loan, among other things. At the time, construction on Phase VII had barely begun, and Quiros was only entitled to minimal construction fees. As discussed below, the only thing constructed in Phase VII is a warehouse-type building worth at most $500,000,[2] and so Quiros is not entitled to anywhere near the $18 million (still far below $30 million) in fees he could have taken from investor money had he built the project.

This evidence is undisputed. Quiros has not addressed it in his Motion. Furthermore, his bald-faced lie that there was nothing improper about using investor funds to collateralize, pay off, and pay down margin loans (Motion at 5-7) is again contradicted by evidence he fails to acknowledge. For example, as set forth in the TRO Motion, each limited partnership agreement contains a section expressly prohibiting the general partner from commingling limited partnership (investor) funds, borrowing those funds, or using limited partnership funds to

[1] Even at the conclusion of the Suites Phase I development, years later, the most Quiros could *ever* have taken in fees was $4.3 million, far less than the $12.4 million he did. TRO Motion at 18.

[2] Ex. A at ¶22.

collateralize obligations, including loans. TRO Motion at 12-13, 18-19, and 25-39. Even Stenger admitted it would be improper for the Jay Peak limited partnerships to use investor funds to back or pay down or pay off margin loans. Ex. 32 to TRO Motion (Stenger Testimony, Vol. I, at 59-60 and 67); Ex. 20 to TRO Motion (Stenger Testimony, Vol. II, at 543-544). Yet Quiros did, in fact, use tens of millions of dollars of investor funds to pay down and pay off margin loans, including paying $2.5 million of margin loan interest. TRO Motion at 19-25 and Ex. 30 at Ex. XX.

Finally, Quiros ignores the fact that he himself admitted in his sworn investigative testimony that it would have been improper to use investor funds to finance the purchase of Jay Peak in 2008. Ex. 10 to TRO Motion (Quiros Testimony, Vol. I, at 178, L.11-19):

> Q: But you do agree that it's not permissible to use monies that the investors contributed to construct the project, it's not permissible to then use that money to acquire Jay Peak?
>
> A: Of course, of course.
>
> Q: Okay.
>
> A: And that's common sense. That's a common sense. And for sure it's a common sense.

The Commission traced $21.9 million of investor money Quiros improperly used to acquire Jay Peak in the TRO Motion. TRO Motion at 14-19. On the one hand, Quiros admitted under oath he could not do that, and on the other, he tells the Court in his Motion there was nothing wrong with how he used investor money. The reality is the undisputed evidence shows Quiros was not entitled to misappropriate and misuse investor funds as he did, and because he misrepresented to investors how he would and did use their money, he is liable for violating the anti-fraud provisions of the securities laws. The evidence overwhelmingly supports the Court's issuance of the Temporary Restraining Order.

III. Quiros' Misuse and Misappropriation Has Caused Significant Harm

Quiros also spends a significant portion of his motion emphasizing the fact that the Jay Peak entities built the first five projects. Motion at 2, 4-7, and 10. Therefore, his reasoning goes, he could not have misappropriated or misused investor funds. *Id.* at 10. While it is true the Jay Peak entities built Phases I-V, Quiros ignores the reams of evidence showing the Jay Peak entities were only able to accomplish this by commingling funds from all the projects in

violation of the limited partnership agreements, and using funds from later projects to fill in the holes in earlier projects created by his misuse and misappropriation. TRO Motion at 14-39.

Incredibly, Quiros represents to the Court in his Motion that: (1) the completed projects are generating revenue and providing returns to investors; and (2) that the remaining two projects are under construction. He ignores the uncontroverted evidence that his theft left major shortfalls in Stateside Phase VI and Biomedical Phase VII, that neither project is currently anywhere completion or has the money to continue construction (possibly leaving the approximately 300 investors in those projects to suffer a loss of much of their $500,000 investments), and that the Jay Peak Resort is on the verge of running out of money to operate.

Both the TRO Motion and Exhibit A, the attached Declaration of Mr. Goldberg, provide overwhelming evidence of how wrong Quiros' Motion is on both points, and further evidence of his fabrications. For example, the review of Jay Peak's financial records by Mr. Goldberg and his staff show Quiros lied when he swore under oath in 2015 that Jay Peak's profits were anywhere between $8 million and $13 million for the 2014-15 fiscal year. Ex. A at ¶¶8-9. In reality, the Jay Peak Resort turned only a $3 million profit last year, and is only on track to make a $1.8 million profit in the 2015-16 fiscal year. *Id.*

Even worse, as Mr. Goldberg states in his declaration, the Resort has very little cash and mounting debts. Ex. A at ¶¶7 and 10-17. If the Receiver does not arrange a cash infusion, he faces the distinct possibility of having to shut down Resort operations and the equally likely prospect that the nearby Q Burke Resort hotel will not open. *Id.* Even before the Receiver was appointed, the Jay Peak Resort was experiencing financial difficulties – a far cry from the rosy picture Quiros painted in his 2015 sworn testimony. Jay Peak had to secure a $2 million line of credit to have enough cash flow to finance operations through last off season – May through October 2015 (Mr. Quiros testified about Jay Peak's purportedly healthy financial picture in September 2015!). *Id.* at ¶11.

The situation is even worse now. The Resort had been attempting to obtain a $4 million loan to make it through the May-October 2016 off season immediately before the Receiver was appointed, which Quiros knew. *Id.* at ¶12. The Resort now needs between $7 million and $11.5 million to finance its operations and remain open through the current off season. *Id.* Furthermore, as Mr. Goldberg details, the only gondola system that carries skiers to the top of Jay Peak Mountain requires a $4.15 million repair to meet the State of Vermont safety standards

and remain operational. *Id.* at ¶13. The Resort will not survive without the repairs. *Id.*

In addition, the Resort is facing a daily barrage of demands for payment from numerous vendors. *Id.* at ¶14. On April 20 alone, Mr. Goldberg's management team had conversations with soft drink, internet service, gasoline and food services suppliers, all of whom in one fashion or another threatened to cut off service or require cash payments. *Id.* There are hundreds of vendors whom Jay Peak owes money, and if the Resort does not come up with additional funds soon, it will cease operating. *Id.*

Against this mounting debt, the Commission and the Receiver have been able to freeze and locate only about $4.7 million in cash which the Jay Peak Resort can use immediately to finance operations. *Id.* at ¶15. Mr. Goldberg's declaration makes clear that this cash will be insufficient to meet the operating needs of the Resort. *Id.* at ¶16. This is hardly the picture of a profitable, thriving ski resort that Quiros falsely portrays in his Motion. It is clear that he left the Resort in dire financial straits.

The contrast between Quiros' lies and reality is equally stark when it comes to the status of Stateside Phase VI and Biomedical Phase VII. Stateside Phase VI raised $67 million from 134 investors. TRO Motion at 30. The offering is fully subscribed, meaning the project cannot raise any more funds from investors. *Id.* Despite raising all of the money available to it, and promising in offering documents to use that money to build the entirety of the Stateside Phase VI project, the Stateside Phase VI Defendants, including Quiros, have not delivered. *Id;* Ex. A at ¶¶19-20. The Defendants completed construction on the scheduled hotel, but have finished nothing else. TRO Motion at 31, Ex. A at ¶¶19-20.

There are 84 cottages scheduled to be built; work on only 36 of them has progressed in any significant manner. Ex. A at ¶19. The project still owes $2.1 million to the contractor for that work. *Id.* Construction on scheduled recreation and medical centers has not yet begun. *Id.* Instead of finishing the cottages and building the recreation and medical centers, the undisputed evidence shows Quiros misused at least $8.3 million of Stateside Phase VI money to pay off Margin Loans III and IV, and his misappropriation and misuse in prior projects caused a huge shortfall. Furthermore, Quiros and the other Stateside Phase VI Defendants commingled $63 million of the $67 million total Stateside Phase VI funds with other projects' funds by putting them into a JCM account.

As a result, the Receiver would need approximately $13 million to complete the cottages

(including the $2.1 million Stateside Phase VI owes to the contractor for constructing the cottages). Ex. A at ¶20. The Receiver estimates it would cost an additional $5.2 million to build the recreation center and $1.3 million to build the medical center. *Id.* Yet as of the date the asset freeze was entered in this case, Stateside Phase VI had less than $20,000 in its accounts. *Id.* JCM, which was the project manager for Stateside Phase VI, only has $484,116.70 in its accounts. *Id.* This is nowhere near the amount needed to finish Stateside Phase VI. In short, despite raising all the money the Stateside Phase VI offering documents said was needed to build the project, Quiros and the other Defendants did something other than build the Stateside Phase VI project with the money raised, because Stateside Phase VI, JCM, and the other Jay Peak entities no longer have it. *Id.*

There are even more significant financial problems with Biomedical Phase VII. Incredibly, all Quiros has to say about Biomedical Phase VI is that "construction is ongoing." Motion at 7. Nothing could be further from the truth. Despite raising $83 million from investors ($69 million of which the Biomedical Phase VII Defendants, including Quiros, had available for construction), all the Biomedical Phase VII investors have to show for their investment is a warehouse-type building worth no more than $500,000 (which may, in fact, have already been on the property before Biomedical Phase VII started construction), and the vacant land on which the proposed biomedical research center is to be built. Ex. A at ¶22; TRO Motion at 38-39. Quiros sold the land to Biomedical Phase VII for an exorbitant and unjustified mark-up at $6 million, but as the Commission showed in the TRO Motion, its true value is only $620,000. TRO Motion at 36.

Construction is not ongoing, and of the $69 million in investor funds released to Quiros, he used only approximately $10 million in accordance with the Source and Use of Funds document. Currently, less than $1 million remains in the JCM or Biomedical Phase VII accounts available for construction ($14 million sitting in a restricted escrow account at People's United Bank in Vermont was never released to Quiros because the State of Vermont had informed Biomedical Phase VII management it could not use that money until it passed a comprehensive financial review). Ex. A at ¶¶21-22. Hence for every dollar Quiros actually spent on project construction ($10 million), almost six additional dollars released to him for construction ($59 million disappeared)! There is more than $84 million needed for construction of the project, and only $14.7 million currently available. *Id.*; TRO Motion at 39. Clearly it is highly unlikely the

Biomedical Phase VII project will ever be built.

Instead of building the biomedical research center, Quiros took at least $30 million of investor funds directly for his own use. As set forth in great detail in our TRO Motion, he used that money improperly to collateralize a personal line of credit to pay $6 million in taxes, pay off Margin Loan IV that he used to purchase Q Burke, pay JCM's taxes, and buy a luxury condominium, among other things. TRO Motion at 35-36. Plainly, Quiros did not deliver what he promised to the Jay Peak investors, and the existing ski resort is in no position to provide investment returns to investors. Quiros' assertions to the contrary in his Motion are outright fabrications.

IV. Quiros' Potential Disgorgement Is More Than $50 Million

Quiros wrongly states in his motion that his disgorgement total is limited to a maximum of $50 million, based on the Commission's allegations in the Complaint that he misappropriated approximately $50 million from investors in Suites Phase I, Hotel Phase II, and Biomedical Phase VII. Motion at 10-14; TRO Motion at 14-19 and 34-39. However, this argument represents a fundamental misunderstanding of the scope of potential disgorgement. While Quiros certainly is liable for the nearly $50 million of investor funds he directly stole, he also is potentially liable for additional amounts out of which he defrauded investors, both individually and on a joint and several basis with the corporate Defendants in this case. That additional amount is at least another $106 million (for a total of $156 million), representing the amounts out of which he defrauded Stateside Phase VI and Biomedical Phase VII investors, and as much as the entire $350 million raised from all investors in all seven EB-5 offerings.

As discussed in our TRO Motion, and as Quiros agrees in his Motion, the Eleventh Circuit in *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005), set forth the basic standards for imposing an asset freeze, which is the amount necessary to preserve funds for the equitable remedy of disgorgement. *Id.* The "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 . . . Exactitude is not a requirement . . . ." *Id.* at 735; *see also FTC v. IAB Marketing Associates, LP*, 746 F.3d 1228, 1234 (11th Cir. 2014).

The mistake Quiros makes is assuming the Commission is limited to seeking the $50 million that the evidence documents he directly took in investor money. The standard for what constitutes disgorgement is much broader. In this case, the evidence establishes (and Quiros

freely admits in his Motion) that he controlled the operations of the Defendant entities that raised money from investors. Motion at 7-10; TRO Motion at 4-39. Quiros owned Q Resorts, and through it purchased and owned the Jay Peak Resort. Motion at 7-14. Therefore, he is potentially jointly and severally liable along with the corporate Defendants – Jay Peak, Q Resorts, the Relief Defendants, and the limited partnerships – for their prospective disgorgement. *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004) ("it is a well settled principal that joint and several liability is appropriate in securities law cases where two or more individuals or entities have close relationships engaging in illegal conduct" and finding founder and owner of partnership was jointly and severally liable for all of partnership's gains where he was a "substantial factor" in illegal securities sales); *SEC v. JT Wallenbrock & Assoc.*, 440 F.3d 1109, 1117 (9th Cir. 2006) (holding architect of fraud and his associated companies jointly and severally liable for all amounts fraudulently raised from investors); *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1474-75 (2nd Cir. 1996) (owner of securities firm was jointly and severally liable for firm's profits, not just his own ill-gotten gains, where he participated in and profited from illegal conduct).

Here, Stateside Phase VI and Biomedical Phase VII fraudulently raised funds from investors with the promise to use investor funds in very specific ways. In Stateside Phase VI, it was to build a hotel, 84 cottages, a recreation center, and a medical center. TRO Motion at 30. Investors were also promised returns. *Id.* at 11. However, Stateside Phase VI did not deliver on its promises. Some 134 investors contributed $67 million, but the limited partnership did not build the promised project, only one part of it (the hotel). *Id.* at 30-31; Ex. A at ¶¶19-20. There is almost no money to build the remainder of the promised project, and no prospect for returns promised to investors. TRO Motion at 30-31; Ex. A at ¶¶19-20.

Quiros was a substantial participant in the fraud perpetrated on the Stateside Phase VI investors. He controlled the investor funds and determined how to spend them after Stenger transferred them to Raymond James accounts. TRO Motion at 13-14. He had reviewed the Stateside Phase VI offering materials, and was familiar with them. *Id.* at 13. He was responsible for commingling and misusing almost all of the Stateside Phase VI money to pay down and pay off margin loans, and for the shortfalls he created through his misappropriation and misuse of investor funds in prior projects. *Id.* at 30-31.

Thus, under the case law, Quiros is jointly and severally liable along with the Stateside

Phase VI corporate defendants for the $67 million out of which they defrauded investors. *Wallenbrock*, 440 F.3d at 1113-14 (District Court has broad discretion in calculating disgorgement, which "should include 'all gains flowing from the illegal activities'") (citation omitted); *SEC v. United Monetary Servs., Inc.*, 1990 WL 91812 at *9 (S.D. Fla. May 18, 1990) (courts "have routinely required wrongdoers in securities frauds to disgorge the gross sums received from investors"); *SEC v. Robinson*, 2002 WL 1552049 at *6-*9 (S.D.N.Y. July 16, 2002) (appropriate to order disgorgement of the entire proceeds received in connection with the offering); *SEC v. Friendly Power Co., LLC*, 49 F. Supp. 2d 1363, 1374 (S.D. Fla. 1999) (defendants ordered to disgorge the total value of funds received from the investing public).

The situation is identical in Biomedical Phase VII. The corporate Defendants in this phase raised at least $83 million from 166 investors by promising them a $110 million biomedical research center and returns. TRO Motion at 11 and 31-39. As a co-principal in the general partner of Biomedical Phase VII, Quiros was responsible for the private placement memorandum, and actively participated in raising money for this project. TRO Motion at 31-39. The offering memorandum, over which Quiros had ultimate authority, made misrepresentations and omissions about the status of FDA approval of the research center products. *Id.* It also made baseless revenue projections. *Id.* And, as is well documented in the TRO Motion and in this response, Quiros misappropriated $30 million of investor money for his own use. *Id.*

So far, only minimal site preparation work has been done and possibly the small warehouse facility has been built, and there is not nearly sufficient money to continue construction. TRO Motion at 39; Ex. A at ¶¶21-22. There is no reasonable likelihood the facility will ever be built, and it appears the Biomedical Phase VII investors will lose at least $69 million (the $83 million raised minus the $14 million in escrow). We already alleged Quiros diverted nearly $30 million of the $69 million for his own use, leaving an additional $39 million he likely could be liable for in disgorgement under the cases cited above.

Thus, a reasonable approximation of Quiros' disgorgement at this stage of the case is the nearly $50 million he personally pocketed, and an additional $106 million ($67 million from Stateside Phase VI and $39 million from Biomedical Phase VII) for which he may be jointly and severally liable with the Phase VI and VII corporate Defendants – a total of $156 million.

Nor does Quiros' potential liability stop there. A District Court should also freeze assets to cover an award of prejudgment interest on disgorgement. *SEC v. Unifund SAL*, 910 F.2d

1028, 1041-42 (2nd Cir. 1990). As demonstrated in Exhibit C, the Declaration of Robert K. Levenson, Quiros' prejudgment interest on his fraud is approximately another $15.8 million, meaning that, at a minimum, his potential disgorgement and prejudgment interest liability is $171.8 million,[3] more than three times the $50 million he claims in his Motion is the maximum. Under the prevailing case law, the Commission has provided more than a reasonable approximation of Quiros' ill-gotten gains from the fraud, and the burden now shifts to him to demonstrate it is not reasonable to freeze assets of up to $171.8 million to cover his potential disgorgement and prejudgment interest liability. *Robinson*, 2002 WL 1552049 at *5-*6.

V. Quiros' Net Worth Is Nowhere Near $200 Million

Perhaps the biggest misrepresentation in Quiros' Motion is his preposterous claim that he has a personal net worth of $200 million. Quiros uses that unsubstantiated assertion to argue that the scope of the asset freeze is overbroad, and that the Court should therefore lift the freeze.

Quiros has filed two sealed documents to support his claim of his personal net worth. He has misstated and overstated what both documents say. The first document is a Statement of Financial Condition ("Financial Statement")[4] compiled by the South Florida accounting firm of Berkowitz Pollack Brant. *See* Ex. J to Quiros Motion; Ex. B (Berkowitz Declaration). Quiros falsely represents what the Financial Statement is in his declaration (Exhibit 2 to the Motion). He claims Berkowitz Pollack Brant *prepared* the Financial Statement, as if the accounting firm put its imprimatur on the figures in it. Ex. 2 to Quiros Motion at ¶11 (the Financial Statement prepared by Berkowitz Pollack Brant "confirms this value.").

---

[3] That figure is only as of this stage of the case. There are indications: (a) Jay Peak (which Quiros owns and controls) received $14 million from investors; (b) Quiros, or entities he controls, owe the projects tens of millions of dollars for developer contributions that were not made; and (c) he took for money than he was entitled to in other projects. If proven, those facts would increase Quiros' potential disgorgement and prejudgment interest liability.

[4] Because the Court has sealed the Financial Statement, a redacted copy is not attached to Mr. Berkowitz's declaration and we are not filing a redacted copy. However, to fully explain why the Financial Statement is not competent evidence of Quiros' net worth and provides no grounds for the Court to modify or lift the asset freeze, we must refer to certain information in it. Quiros himself has opened the door to this by claiming the Financial Statement shows he was worth $178 million as of September 30, 2014, but then hiding the document from public view by requesting permission to file it under seal so the public cannot see what it really shows. He should not be allowed to use the filing under seal process as both a sword and a shield. By referring to information in the Financial Statement, we are still in compliance with the Southern District of Florida Local Rules, which provide only that certain limited information must be redacted from documents. We do not include any of the information required to be redacted in this discussion.

However, as the declaration of Mr. Berkowitz, the CEO of Berkowitz Pollack Brant, shows, the Financial Statement confirms nothing of the kind. As Mr. Berkowitz explains, the Financial Statement is a *compilation*, meaning the accounting firm simply added up the numbers *Quiros* provided, and put them in a specific format. Ex. B at ¶¶5-6. The accounting firm prepared none of the information in the Financial Statement. *Id.* at ¶¶5-7. Quiros provided every single figure in the Financial Statement, including the unsubstantiated claims, for example, that his interest in Biomedical Phase VII was worth $25 million, his interest in Q Burke was worth $28 million, and that Jay Peak was worth $87 million (we discuss immediately below why the appraisal attached as Exhibit J to Quiros' Motion stating Jay Peak is worth $87 million is not credible). *Id.; see also* Ex. I to Quiros Motion at 7.

Berkowitz Pollack Brant did not review, analyze, or audit the figures Quiros provided (because it was not within the scope of the work Quiros hired the firm to perform) to attempt to provide any assurances that they were accurate. Ex. B at ¶7. The accounting firm simply added up what Quiros provided. *Id.* at ¶5. In addition, the Financial Statement was compiled as of September 30, 2014, almost 19 months ago. It is no longer a valid measure of anything. It was good only as of September 301, 2014. *Id.* at ¶4. And, as Mr. Quiros no doubt knows, the accounting firm specifically stated in its letter the Financial Statement was not to be used by anyone other than Quiros and Merrill Lynch (for whom the firm compiled the Financial Statement). *Id.* at ¶8. Certainly under those circumstances, the Court should not rely on the Financial Statement as any measure of Quiros' net worth.

There is evidence that the information in the Financial Information is no longer valid. For example, Quiros reported to Berkowitz Pollack Brant that he had cash on hand of approximately $1.7 million in financial institutions. Ex. I to Quiros Motion at 4. However, in enforcing the Court's asset freeze order earlier this month, the Commission only located and froze about $366,000 in accounts belonging to Quiros. That is a prime example of why the accounting firm cautioned Quiros that the Financial Statement should not be relied on after September 30, 2014. Ex. B at ¶8. Quiros offers no evidence to show what he is actually worth *today* beyond his own unsupported assertion that he believes his net worth has increased to $200 million. Ex. 2 to Quiros Motion at ¶11.

Furthermore, it is crucial to note that of Quiros' purported $178 million net worth as of September 30, 2014, only approximately $1.8 million was liquid – i.e., cash. The rest of it was

approximately $27 million he claims in personal real estate holdings (for which he has provided no appraisals), and a purported $152 million in "other partnership interests," which included the alleged values of $87 million for Jay Peak, $25 million for Biomedical Phase VII, $28 million for Q Burke, $2.1 million for a company called Q Development,[5] $1.34 million for an entity called Q Family Farm,[6] and $7.8 million for GSI.[7] Ex. I to Quiros Motion at 7. None of those assets would be readily available to satisfy a disgorgement judgment against Quiros – they would have to be seized (if that were legally possible) and sold (if that were practical under the circumstances). The reality is that as of September 30, 2014, Quiros only had $1.7 million in liquid assets to satisfy a disgorgement judgment of $169.8 million, and he appears to have even less than that today.

Furthermore, substantial evidence indicates those values are significantly overstated. For example, as Mr. Goldberg notes in his declaration, the claim in the Financial Statement that Quiros' interest in Biomedical Phase VII is worth $25 million is ridiculous. Ex A ¶24. The project is essentially bankrupt, and Phase VII and the related entities (the project sponsor and the general partner) had only about $200,000 cash in the bank as of the date the Court entered the asset freeze (this does not include the $14 million in investor funds and $3.8 million additionally in the restricted escrow account). Ex. A at ¶22. There is only vacant land worth $620,000 and a small warehouse worth approximately $500,000 on the property. *Id.* at ¶24; TRO Motion at 36. The project likely will never be built. As Mr. Goldberg states, there is no evidence Quiros' interest in Biomedical Phase VII is worth $25 million. Ex. A at ¶24.

Equally absurd is the notion that Quiros has an interest in Q Burke worth $28 million. As shown in Mr. Goldberg's declaration and recent motion seeking to borrow funds from the Jay Peak entities to pay Q Burke expenses, that resort is in financial shambles, and needed an emergency loan from other entities just to keep the lights on. Ex. A at ¶23. The hotel is not even open yet, the contractor claims it is owed $3.9 million, and the frozen Q Burke accounts did not have sufficient funds to pay expenses to keep the hotel from "going dark." *Id; see also* Ex. A to DE 50 at ¶10.

---

[5] Q Development now only has $42,549 in the bank.

[6] Q Family Farm now only has $10,204 in the bank.

[7] GSI has only $277,555.90 in the bank. Ex. A at ¶15.

Last, the appraisal attached as Ex. J to Quiros' Motion, the appraisal of the Jay Peak Resort as of July 2, 2015, is similarly suspect.[8] The appraisal is incomplete, almost 10 months old, and cannot possibly have accounted for the truth of the Resort's financial condition exposed in the last few weeks, which doubtless has had a significant effect on the value of the Resort. Additionally, the picture the appraisal paints of a thriving Resort is completely at odds with the financial problems documented earlier in this response that Mr. Goldberg encountered at the Resort after the Court appointed him as Receiver. Ex. A at ¶¶10-17.

But most significantly, there is a fatal flaw in the appraisal. Ex. A at ¶25. As Mr. Goldberg notes, the appraisal is based primarily on *projected* future EBITDA (profits). *Id.* The appraisal inaccurately states that Jay Peak realized EBITDA of $5 million in 2014-15, when the actual EBITDA was only approximately $3 million. *Id.* In addition, the appraisal is based in part on an estimate that Jay Peak will realize an EBITDA of $5 million in 2015-16. *Id.* However, that figure is also vastly overstated, as Jay Peak's financial statements show it is on track for only approximately $1.8 million in profits in 2015-16. *Id.* Given these significant errors, the current operator of the Resort, Mr. Goldberg, has no idea whether the future EBITDA projections on which the appraisal is based have any basis. *Id.* Accordingly, just as with the Financial Statement, there is no basis to give the appraisal any credibility, and therefore no reliable basis for Quiros to claim Jay Peak is worth $87 million.

In addition, the appraisal fails to account for the fact that Quiros obtained Jay Peak originally by fraud. As set forth in our TRO Motion, Quiros improperly used $21.9 million of Suites Phase I and Hotel Phase II investor funds to purchase Jay Peak from its prior owners. TRO Motion at 14-19. This is highly significant to Quiros' claim that he has an interest in Jay Peak. He apparently takes the position that he is entitled to profit from his fraud by claiming whatever Jay Peak is worth now as a personal asset.

However, that position is contrary to law. *SEC v. Lauer*, 2009 WL 812719 at *3 (S.D. Fla. March 26, 2009). In *Lauer*, a defendant seeking to modify an asset freeze claimed he was entitled to unfreeze the value of property that had appreciated in value over time, even if he had obtained it through fraud. *Id.* at 2. He argued that money was "untainted." *Id.* But the *Lauer* Court denied that claim, holding that because the defendant had obtained the property with

[8] Quiros did not even submit the entire appraisal as an exhibit. He only submitted the first 88 pages of a 118-page document.

fraudulently obtained funds, the entire value of the property was "tainted" and the Defendant was not entitled to profit off his fraud. *Id.* at 3. This Court should reach the same conclusion. To the extent Jay Peak has any value, Quiros is not entitled to claim it for himself because but for having fraudulently obtained the Resort, he would have no interest in it.

As a result of all these facts, the Court should discount and discredit Quiros' claims that he is worth $200 million.

VI. Quiros' Statements Of The Applicable Law Are Wrong

A. Statute Of Limitations

Quiros also argues the Commission's freeze order is overbroad because he cannot be held liable for disgorgement for any acts before April 12, 2011, five years before the date the Commission filed suit. He alleges the five-year statute found in 28 U.S.C. § 2462 bars all Commission claims more than five years old. Motion at 16-17. Quiros bases his infirm claim on a single District Court decision (that is on appeal) that is contrary to binding Eleventh Circuit precedent and which numerous other District Courts in this Circuit and elsewhere have rejected.

In *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) the Supreme Court held that the five-year statute of limitations in 28 U.S.C. § 2462 barred the Commission from seeking a *civil penalty* for acts committed more than five years before the Commission brought suit. *Id.* However, *Gabelli* itself made clear that its holding did *not* extend to injunctive relief and disgorgement claims: "The SEC also sought injunctive relief and disgorgement, claims the District Court found timely on the ground that they were not subject to § 2462. *Those issues are not before us*." *Id.* at 1220 n.1 (emphasis added).

Notwithstanding *Gabelli's* clearly limiting language, Judge King in *SEC v. Graham*, 21 F. Supp. 3d 1300 (S.D. Fla. 2014) extended *Gabelli*'s holding to rule that 28 U.S.C. § 2462 bars *all* claims brought by the Commission more than five years old. *Id.* at 1310-11. *Graham* is on appeal, and it contravenes binding Eleventh Circuit precedent holding that the five-year statute of limitations does *not* apply to equitable remedies such as disgorgement. *Nat'l Parks and Conversation Ass'n, Inc. v. Tenn. Valley Auth.*, 502 F.3d 1316, 1326 (11th Cir. 2007) (28 U.S.C. § 2462 "applies only to claims for legal relief, it does not apply to equitable remedies"); *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997) (disgorgement and injunctive relief are equitable remedies and government claim for injunctive relief was therefore not subject to five-year-statute of limitations in 28 U.S.C. § 2462); *SEC v. Monterosso*, 756 F.3d 1326, 1337 (11th

Cir. 2014) ("disgorgement is an equitable remedy intended to prevent unjust enrichment").

In addition, numerous District Courts have ruled the opposite of *Graham*, and held the five-year-statute of limitations does not apply to disgorgement or injunctive relief. *SEC v. LeCroy*, 2014 WL 4403417 at *1 n.1 (N.D. Ala. Sept. 5, 2014) (denying motion to dismiss Commission injunctive claim and noting that *Gabelli* applied only to civil penalty claims); *SEC v. Geswein*, 2014 WL 861317 at *9 (N.D. Ohio March 5, 2014) (declining to reconsider decision that 28 U.S.C. § 2462 does not apply to disgorgement because that issue was not before the *Gabelli* court); *SEC v. Syndicated Food Serv. Int'l*, 2014 WL 1311442 at *25 (E.D.N.Y. March 28, 2014) (*Gabelli* noted that unlike claims for injunctive relief and disgorgement, civil penalty claims were subject to the five-year statute of limitations); *SEC v. Radius Capital Corp.*, 2013 WL 3716394 at *2 n.2 (M.D. Fla. July 15, 2013) (doubting whether five-year statute of limitations applied to disgorgement claims); *SEC v. Stoecklien*, 2015 WL 6455602 at *3 (S.D. Cal. Oct. 26, 2015) (rejecting *Graham* in light of many contrary cases holding disgorgement claims not subject to the five-year statute of limitations).

Overwhelming case law, including binding Eleventh Circuit precedent that neither *Gabelli* nor *Graham* overruled, holds that the Commission's disgorgement claims are not subject to the five-year statute of limitations.

B. There Is No Bond Requirement

Equally incorrect is Quiros' contention that the Commission is required to post a bond to secure its asset freeze. Quiros cites a provision of Florida law that is inapplicable to this case, which is governed by federal law. More importantly, he overlooks or ignores the express language of both Section 20(b) of the Securities Act of 1933 ("Securities Act") and Section 21(d)(1) of the Securities Exchange Act of 1934 ("Exchange Act"), both of which state the Commission is not required to post a bond to obtain a temporary restraining order:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulations prescribed under authority thereof, the Commission may, in its discretion, bring an action in any district court of the United States, or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted *without bond*." 15 U.S.C. § 77t(1).

The Exchange Act contains identical language. 15 U.S.C. § 78(u)(d)(1). Because the express language of the federal securities laws states the Commission does not have to post a

bond, Quiros' argument is baseless.

VII. The Court Should Not Modify The Freeze For Attorneys' Fees Or Living Expenses

In the alternative to a blanket lifting of the asset freeze, Quiros asks the Court to modify it to release funds to pay for his attorneys' fees and living expenses. While Quiros is correct that the Court has the discretion to issue such an order, he makes two legally incorrect arguments – that he has a Fifth and Sixth Amendment right to counsel in this case and that he is entitled to use so-called "untainted" assets for legal fees. Motion at 14-16. He is not. Additionally, he has not met his burden for demonstrating what his *reasonable* legal fees and living expenses would be. In fact, he has not provided an amount of any legal fees or living expenses he is seeking. Accordingly, the Court should deny both requests.

A. Attorneys Fees

1. The Commission Is Not Required To Show Quiros' Assets Are "Tainted" To Freeze Them

Quiros claims the Commission cannot demonstrate that all his assets are "tainted," and therefore the Court should release funds to pay for his attorneys' fees. Motion at 14-15. However, the Commission is not required to demonstrate whether Quiros' assets are "tainted" by tracing them to the fraud. As discussed above, and as Quiros admits in his motion, the Court can freeze *all* of a Defendant's assets up to the amount of potential disgorgement and prejudgment interest to preserve them for those equitable remedies. *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 987 (11th Cir. 1995) ("district court may exercise its full range of equitable powers, including a preliminary asset freeze, to ensure that permanent equitable relief will be possible"). *See also SEC v. Spear & Jackson, et al.*, Case No. 04-80354-CIV, Slip Op. at 3 (S.D. Fla. Aug. 19, 2004) ("there is no requirement that frozen assets be traceable to the fraudulent activity underlying a lawsuit") (attached as Exhibit D); *SEC v. A.B. Financing and Investment, Inc.*, Case No. 02-23487-CIV, Slip. Op. at 2 (S.D. Fla. Feb. 10, 2003) ("a district court may freeze assets not specifically traced to illegal activity") (attached as Ex. E); *SEC v. Current Fin. Servs.*, 62 F. Supp. 2d 66, 68 (D.D.C. 1999) (refusing to release personal funds not traceable to the fraud because Defendant's liability exceeded total funds frozen); *SEC v. Grossman*, 887 F. Supp. 649, 661 (S.D.N.Y. 1995) ("It is irrelevant whether the funds affected by the Asset Freeze are traceable to the illegal activity") *SEC v. Glauberman*, 1992 WL 175270 at *2 (S.D.N.Y. July 16, 1992) (rejecting defendant's argument that funds subject to disgorgement must be traced "dollar for dollar" to the illegal activity).

As discussed in Sections IV and V above, Quiros cannot demonstrate that his frozen assets exceed his potential disgorgement and prejudgment interest liability. The Commission has demonstrated that, at a *minimum*, a reasonable approximation of Quiros' disgorgement and prejudgment interest liability is $171.8 million. *See* Section IV. The Commission has further shown that Quiros' *liquid* assets available to satisfy a disgorgement and prejudgment interest judgment are no more than $366,000 at the current time, and that his claim of a $200 million, or even a $178 million, net worth is preposterous. *See* Section V. Accordingly, Quiros has not met his burden of demonstrating there are funds beyond his potential disgorgement and prejudgment interest liability available for attorneys' fees.

2. Quiros Has No Constitutional Right To Counsel In This Case

Second, Quiros has no Fifth or Sixth Amendment Constitutional right to pay for counsel of his choice in a civil case. The cases he cites discussing a constitutional right to counsel are all in criminal cases. Motion at 15-16. Here, however, no such right exists. *SEC v. Comcoa*, 887 F. Supp. 1521, 1524-25 (S.D. Fla. 1995) (citing cases) ("in all of [those] cases, the court have essentially held that a defendant has no right to spend another's money for services rendered by an attorney, even if those funds are the only way the defendant will be able to retain counsel of his choice" and denying motion to release frozen funds to pay attorneys' fees); *SEC v. Quinn*, 997 F.2d 287, 289 (7th Cir. 1993) ("just as a bank robber cannot use the loot to wage the best defense money can buy, so a swindler in securities markets cannot use the victims' assets to hire counsel who will help him retain the gleanings of crime"); *SEC v. Roor*, 1999 WL 553823 at *2 (S.D.N.Y. July 29, 1999) (defendant "may not use income derived from alleged violations of the securities laws to pay for legal counsel"); *SEC v. Coates*, 1994 WL 455558 at *3 (S.D.N.Y. Aug. 23, 1994) ("defendant is not entitled to foot his legal bill with funds that are tainted by his fraud").

Roor, in particular, is instructional here. In that case, the court refused to release even funds not directly attributable to the fraud to pay attorneys' fees, explaining that "while money borrowed against the equity in [defendant's] home may not be the proceeds of fraud, there exists a likelihood that [defendant] will soon have significant personal liabilities to the government and to the victims of fraud he is alleged to have perpetuated." *Roor*, 1999 WL 553823 at *3.

Under the circumstances, it would not be fair for the Court to release any frozen assets to pay Quiros' attorneys' fees. Quiros has not even attempted to demonstrate what those fees are or

why they are reasonable. Furthermore, given the very limited amount of Quiros' liquid assets, and the fact that he is facing a potential disgorgement and prejudgment interest judgment more than *400 times* the amount of those liquid assets, it would significantly harm already defrauded investors to allow Quiros to use what limited liquid funds are available for a potential judgment to pay attorneys' fees.

B. The Court Should Not Release Funds For Living Expenses

To justify the release of any funds to pay reasonable living expenses, Quiros is required to produce evidence of those expenses in the form of a sworn statement accompanied by detailed and complete documentation. *Spear & Jackson*, Ex. D, at 5-6 (denying defendant's motion to release frozen funds for living expenses because she had produced neither a sworn statement nor detailed documentation of expenses); *A.B. Financing*, Ex. E, at 4 (denying defendant's motion to modify asset freeze because he failed to document his reasonable living expenses); *SEC v. Starcash, Inc.*, Case No. 02-80456-CIV, Slip Op. at 2 (S.D. Fla June 18, 2002) (denying defendants' motion to modify asset freeze because they had not submitted sworn statements showing their expenses or documentary evidence of them) (attached as Ex. F); *CFTC v. Prism Fin. Corp.*, 1996 WL 523349 at *4 (D. Col. April 5, 1996) (defendant wishing to modify asset freeze ordered to so under oath and with all proposed expenses "*fully substantiated by all relevant financial documentation*") (emphasis added).

Quiros has not stated what living expenses he is seeking and what they are for, much less provided the required sworn statement and documentation. In the face of that case law and the limited funds available for release to pay any living expenses, the Court should deny Quiros' request to release frozen funds to pay living expenses unless and until he submits a sworn statement and sufficient documentation.

VIII. Conclusion

For all of the reasons set forth in this response, the Court should deny Quiros' motion to lift or modify the asset freeze in any way.

April 23, 2016

By: s/Robert K. Levenson
Robert K. Levenson, Esq.
Senior Trial Counsel
Florida Bar No. 0089771
Direct Dial: (305) 982-6341
Email: levensonr@sec.gov

By: s/ Christopher E. Martin
Christopher E. Martin, Esq.
Senior Trial Counsel
SD Fla. Bar No. A5500747
Direct Dial: (305) 982-6386
Email: martinc@sec.gov

Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
801 Brickell Avenue, Suite 1800
Miami, Florida 33131
Telephone: (305) 982-6300
Facsimile: (305) 536-4154

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 23, 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 or pro se parties identified on the below 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 electronically Notices of Electronic Filing.

s/Robert K. Levenson
Robert K. Levenson, Esq.

SERVICE LIST

SEC v. Ariel Quiros, et al.
Case No. 16-CV-21301-GAYLES

Jonathan S. Robbins, Esq.
AKERMAN LLP
Las Olas Centre II, Suite 1600
350 East Las Olas Blvd.
Fort Lauderdale, FL 33301-2229
Telephone: (954) 463-2700
Facsimile: (954) 463-2224

Email: jonathan.robbins@akerman.com
Counsel for Court-appointed Receiver

Naim S. Surgeon, Esq.
AKERNIAN LLP
Three Brickell City Centre
98 Southeast Seventh St., Suite 1100
Miami, Florida 33131
Telephone: (305) 374-5600
Facsimile: (305) 349-4654
Email: naim.surgeon@akerman.com
Counsel for Court-appointed Receiver

Charles Lichtman, Esq.
Pamela C. Marsh, Esq.
Nicole L. Levy, Esq.
BERGER SINGERMAN LLP
350 E Las Olas Blvd.
Suite 1000
Fort Lauderdale, FL 33301-4215
Phone: 954-525-9900
Direct line (954) 712- 5138
Fax: 954-523-2872
Email: clichtman@bergersingerman.com
Email: pmarsh@bergersingerman.com
Email: nlevy@bergersingerman.com
Attorneys for Defendant Ariel Quiros

Roberto Martinez, Esq.
Stephanie Anne Casey, Esq.
Colson Hicks Eidson
255 Alhambra Circle, Penthouse
Coral Gables, FL 33134
Telephone: (305) 476-7400
Email: bob@colson.com
Email: scasey@colson.com
Counsel for Defendant William Stenger

DECLARATION OF MICHAEL I. GOLDBERG, ESQ.

Pursuant to 28 U.S.C. Section 1746, the undersigned states as follows:

1. My name is Michael I. Goldberg. I am over twenty-one years of age and have personal knowledge of the matters set forth herein.

2. I am a licensed attorney in Florida, and a partner in the firm of Akerman LLP. I also have an MBA in finance. I have served as a Court-appointed Receiver or as counsel to Court-appointed Receivers in federal equity receiverships for 25 years. I have been appointed as a Receiver in approximately 20 receiverships by judges in the Southern and Middle Districts of Florida. A portion of my CV is attached as Exhibit A to this declaration.

3. On April 13, 2016, I was appointed as Receiver by the Hon. Darrin Gayles in the case of SEC v. Jay Peak, Inc., Case No. 16-CV-21301-GAYLES, in the Southern District of Florida. The receivership included the 15 corporate entities that are Defendants in this case, as well as the four Relief Defendants (collectively "the Receivership Entities").

4. That same day, I worked with a team of approximately 15 lawyers, accountants, and hospitality management experts to carry out the terms of the Order appointing me ("Receiver Order"). I took possession of the premises and operations of the Receivership Entities at the Jay Peak and Q Burke Mountain Resorts in Vermont, as well as offices in Miami, Florida. *See* Receiver Order at ¶1. The Receiver Order also granted me authority over all bank and other financial institution accounts under the direct or indirect control of the Receivership Entities. *Id.* at ¶7.

5. Since that time, I have, among other things, investigated to the best of my ability the manner in which the affairs of the Receivership Entities were conducted (*see* Receiver Order at ¶2); and attempted to understand the complicated and convoluted manner in which the

EXHIBIT A

Receivership Entities conducted financial transactions.

6. In coordination with the Securities and Exchange Commission, I and lawyers and accountants under my direction obtained information from several different financial institutions about amounts in accounts belonging to the Receivership Entities as well as Defendant Ariel Quiros (over whom the Court entered an asset freeze, *see* D.E. 11) and accounts in the names of entities under the control of Quiros. In addition, I and accountants and management personnel working under my direction obtained numerous financial statements from the CFO of Defendant Jay Peak, Inc. as of the date I was appointed.

7. The combination of the account and financial statements paint a very bleak financial picture. The Receivership entities have very little cash, and numerous upcoming expenses that will quickly use up available cash and, if additional money is not obtained, force the Receiver to shut down operations at Jay Peak and eliminate any possibility of Q Burke opening. This is a very different situation than the one claimed by Ariel Quiros in his sworn investigative testimony before the SEC.

8. For example, I note Quiros testified in September 2015 at the SEC under oath that Jay Peak's EBITDA (generally a measure of pre-tax profits) "this year" were approximately $12 million to $13 million. DE 4 at Ex. 13 (Quiros Testimony at 391 L.22-25). A short time later, Quiros stated EBITDA, or profits, were about $8 million. *Id.* at 394 L.11-20. It is unclear exactly what Quiros meant by "this year," but I have not seen any financial statement showing Jay Peak made EBITDA of anywhere near $8 million, much less $12 million to $13 million.

9. I have learned through my investigation that Jay Peak operates on a May 1 through April 30 fiscal year. Quiros' testimony was given in September 2015. I learned that the Jay Peak financial statements show that in FY 2015 (May 1, 2014 through April 30, 2015), Jay

Peak's profits EBITDA was approximately $3 million. For FY 2014, that figure was $2.6 million. Through February 2016, it appears Jay Peak is on track for EBITDA (profits) of $1.8 million for FY 2016.

10. My assessment of the ski resort operations after examining the financial records available to me and meeting with former CFO George Gulisano and the accountants and management company I retained to examine and manage Jay Peak, is that the ski resort operations are currently losing money and in danger of not having sufficient funds to continue operating beyond the very immediate future.

11. The majority of the revenue for the Jay Peak Resort is generated from October through April, when the mountain is open for skiing. From May through October, the off season, the Resort does not generate sufficient revenue to cover its expenses. For example, I have learned that Jay Peak had to secure a $2 million line of credit from a bank to have enough cash flow to finance operations through last off season. That line of credit was secured by the Jay Peak ski resort.

12. Furthermore, I learned that due to reduced revenues during the 2015-16 winter ski season because of warm weather and little snow, the Jay Peak Resort did not generate as much cash as last year, and not nearly enough to meet its expenses for the upcoming off season. I believe that Quiros was aware of this – in fact the Jay Peak Resort had been attempting to obtain a line of credit or bridge loan of at least $4 million with the same bank so Jay Peak would have sufficient cash flow to finance operations through the upcoming off season. Under the terms of that proposed agreement (which was not executed before the Court appointed me as Receiver), the assets of Jay Peak would secure it. I have been informed by the Resort managers that the Resort needs between $7 million and $11.5 million to finance its operations and be kept open

through the current off season.

13. Moreover, I have been informed that the gondola system, which is needed to transport skiers to the top of the Jay Peak mountain, requires major and immediate repairs to meet the State of Vermont's safety standards. The system is 52 years old. The gondola's manufacturer, which is the only company in the world capable of properly repairing the gondola, has quoted the Jay Peak Resort a $4.15 million price to complete the repairs. This requires an immediate 30 percent down payment – approximately $1.3 million – and an additional $800,000 later in the summer, with the balance due early next year. If the gondola becomes non-operational, the Resort will not be able to transport skiers to the top of the mountain, and will not survive.

14. In addition, we are facing a daily barrage of demands for payment from numerous vendors. On April 20 alone, my management team had conversations with soft drink, internet service, gasoline and food services suppliers, all of whom in one fashion or another threatened to cut off service or require cash payments. There are hundreds of vendors whom Jay Peak owes money, and if we do not come up with additional funds soon, the Resort will cease operating.

15. Because of the poor financial condition in which I found the Receivership entities under Quiros' management, there is insufficient cash in the Jay Peak and related accounts for me to meet Jay Peak's operational needs through the off season. Documents provided by People's United Bank, Citibank, and Merrill Lynch, show that about $4.7 million were either frozen or available in the account of each entity as of April 13, 2016:

- Jay Peak -- $1,149,198.65
- Jay Peak Hotel Suites Phase II LP (Phase II) -- $1,480,861.72
- Jay Peak Penthouse Suites (Phase III) -- $1,955.37
- Jay Peak Golf and Mountain Suites (Phase IV) -- $6,991.17
- Jay Peak Lodge and Townhouses (Phase V) -- $16,743.37

- Jay Peak Hotel Suites Stateside (Phase VI) -- $19,545.85[1]
- Q Resorts -- $1,283,690.22
- Jay Construction Management -- $484,116.70[2]
- GSI of Dade County -- $277,555.90

16. There is an additional $1.35 million currently in a Canadian bank which is not subject to the Court's jurisdiction and will take some time to secure. Therefore, the total amount of money in those accounts available to me to finance Jay Peak operations is about $4.7 million.[3] This is insufficient to meet the operating needs of the Resort. As discussed above, I need $7 million to $11.5 million for operating expenses and an additional $4.15 million for the gondola repairs. On this basis alone, if I am unable to borrow money to cover the off season operating losses, the Jay Peak Resort will not make it to the ski season.

17. Because we are entering the slow season, we expect very little in the way of cash from ongoing guests. By way of example, there were only seven rooms occupied at the Jay Peak Hotel when I was there on April 14, 2016.

18. Furthermore, as part of an exit strategy for Phase I investors, Quiros and his companies re-purchased each of the 35 Phase I investors' $500,000 interest (a total of $17.5 million) and issued them promissory notes. Records show Phase I has paid each investor at most $75,000 of the $500,000. That means in total Phase I has only paid at most $2,625,000, and

---

[1] I detail the extreme shortfall in money needed to complete the Stateside project in Paragraphs 19 and 20 below.

[2] I discuss the amounts found in the JCM accounts in more detail in Paragraphs 20 and 22 below.

[3] This total does not include approximately $17.8 million held at People's United Bank in a restricted account in the name of Jay Peak Biomedical Research Park – the Phase VII limited partnership. Because that money was invested by investors for the specific purpose of constructing Phase VII, absent the Court's authorization, I cannot use that money to fund Jay Peak's operations under the terms outlined in the Phase VII offering documents and the limited partnership agreement. This total also does not include about $366,000 frozen in accounts in the name of Quiros or under his control. Finally, it does not include about $800,000 frozen in the name of various Q Burke accounts. As discussed in the Receiver's Emergency Motion For Authorization To Loan Funds (DE 43) and in Paragraph 21 below, Q Burke has its own significant financial problems.

owes the remaining $14,875,000 to the 35 investors. Clearly Phase I does not have the resources to make good on these payments, and neither do any of the other Jay Peak entities.

19. In its Complaint (DE 1) and Emergency Motion for Temporary Restraining Order, Asset Freeze, and Other Relief ("TRO Motion") (DE 4), the SEC detailed significant misuse of investor funds in Jay Peak Hotel Suites Stateside (Phase VI), and resulting shortfalls that have prevented construction from being completed. I found that to be true upon my investigation of Stateside's financial affairs. Stateside is fully subscribed, having raised $67 million from 134 investors, but apparently has spent all the money without coming anywhere close to completing construction. The Stateside Hotel is done, but construction on the 84 cottages is nowhere near finished, and construction on the recreation center and the medical center has not even begun. Only 36 of the 84 cottages are even close to being done.

20. I am informed that it will cost approximately $11 million to complete the cottages (not including the $2.1 million Stateside allegedly owes to the contractor for constructing the cottages). It is estimated to cost an additional $5.2 million to build the recreation center and $1.3 million to build the medical center. As set forth above, there was only $19,545.85 in Stateside's accounts. JCM, which was the project manager for Stateside, and where Quiros testified he sent investor funds, only has $484,116.70 in its accounts. Q Resorts has only about $1.2 million. This is nowhere near the amount needed to finish Stateside. In short, despite raising all the money the Stateside offering documents said was needed to build the project, the Receivership Defendants did something other than build the Stateside project with the money raised, because the Jay Peak entities no longer have it.

21. There are even more significant financial problems with Phase VII, the Jay Peak Biomedical Research Center. As set forth in the SEC's Complaint and TRO Motion, Phase VII

was attempting to raise $110 million from 220 investors to build a biomedical research center near the ski resort. At the time I was appointed, the SEC's evidence showed Phase VII had raised $83 million of that money from 166 investors. DE 4 at Ex. 30. Some $14[4] million of that $83 million remains in a restricted account at People's United Bank. However, prior to the SEC filing its case, the State of Vermont Regional Center had informed Phase VII management it could not use that money until it passed a comprehensive financial review. So that money is frozen at the current time.

22. That leaves approximately $69 million that should have been available for construction of the biomedical research center, but as the SEC's Complaint and TRO Motion detail, $30 million of that money was diverted for other purposes. DE 4 at 34-38. Furthermore, the vast majority of the remaining funds were sent from Phase VII to three of the Relief Defendants – JCM, GSI, and North East Contract Services ("Northeast) – according to my accountants' analysis of company records. There is little to show for this money – the only thing constructed on the Phase VII property is a warehouse estimated to be worth no more than $500,000. And other than the $17.8 million in a restricted account, the Phase VII accounts only have about $200,000 in them. The JCM accounts have $484,116.70, and we are unable to determine how much Northeast has. There is tens of millions of dollars of construction to be done, and no money to pay for it.

23. Finally, as set forth in my Emergency Motion for Authorization to Loan Funds, Q Burke has almost $700,00 of financial needs over the next three months that there may or may not be sufficient funds in the Q Burke accounts to pay for. DE 43 at ¶¶11-12. To preserve the hotel from "going dark" and losing significant value, I have been forced to ask the Court to let me borrow funds from Jay Peak in order to pay the absolute essential expenses such as

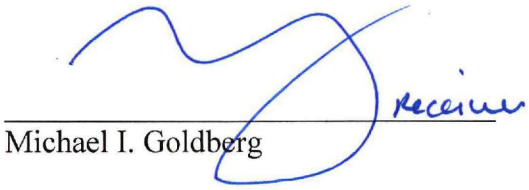
[4] The rest of the $17.8 million consists of administrative fees.

insurance, utilities and minimal payroll, which will only further exacerbate the financial problems the Jay Peak resort is facing.

24. I have reviewed Exhibits I and J to Quiros' Emergency Motion to Lift or Modify the Asset Freeze (DE 39). Exhibit I is a document entitled Ariel and Okcha Quiros Statement of Financial Condition as of September 30, 2014 ("Financial Statement"). I note that on Page 7 of the Financial Statement "Investments in Partnership Interests," Quiros' investment in Phase VII (listed as ANC Bio VT, LLC) is valued at $25 million. I do not know how this valuation was arrived at, but based on my review of the finances of Phase VII, I do not see evidence that it is worth $25 million at the present time.

25. Furthermore, I have had my management team review Exhibit J, an appraisal of the Jay Peak Resort, which appraises Jay Peak at an estimated value of $87 million. The appraisal is based on part on its conclusion that Jay Peak realized EBITDA of $5 million in 2014-15. However, the actual EBITDA was only approximately $3 million. I note the appraisal is further based in part on an estimate that Jay Peak will realize an EBITDA of $5 million in 2015-16. However, as stated earlier in this declaration, the actual EBITDA for 2015-16 is on track to be only approximately $1.8 million. Based on the information I have learned in the eight days since assuming control of Jay Peak and the inaccurate numbers for the 2014-15 and 2015-16 EBITDA, I cannot say whether the estimates for future years EBITDA in the appraisal (Page 87) are accurate. My management staff notes that the $87 million EBITDA is based on the projected EBITDA in future years.

I declare under penalty of perjury that the foregoing is true, correct, and made in good faith.



Michael I. Goldberg

Executed on this 22nd day of April, 2016

DECLARATION OF RICHARD A. BERKOWITZ, CPA

Pursuant to 28 U.S.C. Section 1746, the undersigned states as follows:

1. My name is Richard A. Berkowitz. I am over twenty-one years of age and have personal knowledge of the matters set forth herein.

2. I am a certified public accountant licensed in the State of Florida. I am also the Chief Executive Officer and Director-in-Charge of Management Consulting for Berkowitz Pollack Brant, an accounting and advising firm with offices in Miami, Fort Lauderdale, and Boca Raton, Florida.

3. Berkowitz Pollack Brant performed certain services for Ariel Quiros in 2014, including compiling the Ariel And Okcha Quiros Statement Of Financial Condition as of September 30, 2014 ("the Financial Statement"). A redacted copy of the Financial Statement is attached as Exhibit A to this declaration.

4. As stated in the first sentence of Page 3 of the Financial Statement, it is compiled as of September 30, 2014, and is not a compilation of the financial condition of Ariel and Okcha Quiros as of any other date before or after September 30, 2014.

5. As stated in the first paragraph of Page 3 of the Financial Statement, the Financial Statement is a compilation, meaning Berkowitz Pollack Brant compiled the figures in the statement from information provided by Ariel Quiros.

6. Mr. Quiros provided the information listed on Page 7 of the Financial Statement. He further provided the figures for all of the assets listed on Page 4 of the Financial Statement, including the listing of "Other Partnership Interests" of $152,567,000. The listing of Ariel and Okcha Quiros' Net Worth of $178,785,624 on Page 4 is based entirely on figures provided by Mr. Quiros. Berkowitz Pollack Brant compiled the figures Mr. Quiros provided to prepare the

Financial Statement.

7. As further stated in the first paragraph of Page 3, Berkowitz Pollack Brant did not review any of the figures provided in the Financial Statement to analyze them. Berkowitz Pollack Brant did not audit the Financial Statement and accordingly did not express an opinion or provide any assurance on the Financial Statement.

8. As further stated on Page 3, the Financial Statement is intended solely for the Quiroses and Merrill Lynch, and is not intended to be and should not be used by anyone other than these specified parties.

I declare under penalty of perjury that the foregoing is true, correct, and made in good faith.

Richard A. Berkowitz, CEO
Berkowitz Pollack Brant
Advisors and Accountants LLP

Executed on this 20 day of April, 2016.

DECLARATION OF ROBERT K. LEVENSON, ESQ.

Pursuant to 28 U.S.C. Section 1746, the undersigned states as follows:

1. My name is Robert K. Levenson. I am over twenty-one years of age and have personal knowledge of the matters set forth herein.

2. I am a licensed attorney in the States of Florida and Colorado and admitted to practice in several United States District Courts and the Eleventh Circuit Court of Appeals. I have been employed as a trial lawyer at the Securities and Exchange Commission for 14 years, and currently am a Senior Trial Counsel in the Miami Regional Office.

3. The Commission has a tool called the Prejudgment Interest Calculator on an internal database that I have used numerous times during my career at the Commission. I accessed it on Friday, April 22, 2016, for the purpose of computing prejudgment interest amounts on potential disgorgement judgments against Ariel Quiros. The results are attached as three separate sheets to this Declaration.

4. For each sheet, I entered the amount of disgorgement, the starting date for the calculation (the Violation Date), the ending date of April 22, 2016 (the Payoff Date). The tool then calculated the amount of prejudgment interest, by quarter, based on the IRS underpayment rate in 26 U.S.C. § 6621(a)(2) (defined as the Federal Reserve short-term interest rate plus three percentage points). *SEC v. Lauer*, 478 Fed. Appx. 550, 557 (per curiam, not published) (11th Cir. April 19, 2012).

5. For the first sheet, I entered $21,900,000 as the disgorgement amount, representing the amount Quiros used in Suites Phase I and Hotel Phase II investor funds to purchase Jay Peak from June through September 2008. I entered a Violation Date of September 30, 2008, after the date of the last payment Quiros made. I entered a Payoff Date of April 22,

EXHIBIT C

2016. The result is prejudgment interest of $6,470,191.44

6. For the second sheet, I entered $67,000,000 as the disgorgement amount, representing the amount the Commission contends Quiros fraudulently raised from Stateside Phase VI investors. I entered December 31, 2012 as the Violation Date, because the Stateside Phase VI offering closed in December 2012. I entered April 22, 2016 as the Payoff Date. The result was $6,831,694.60 in prejudgment interest.

7. For the third sheet, I entered $69,000,000 as the disgorgement amount, representing the amount the Commission contends Quiros fraudulently raised from Biomedical Phase VII investors. I entered December 31, 2014 as the Violation Date, because it was after that time the State of Vermont stopped Biomedical Phase VII from raising investor funds while it reviewed the offering. I entered April 22, 2016 as the Payoff Date. The result was $2,623,690.37 in prejudgment interest.

8. The total of the three prejudgment interest calculations is $15,925,586.51.

I declare under penalty of perjury that the foregoing is true, correct, and made in good faith.

Robert K. Levenson, Esq.

Executed on this 22nd day of April, 2016.

U.S. Securities and Exchange Commission

Division of Enforcement

Prejudgment Interest Report

Phase I and Phase II Misappropriation

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$21,900,000.00
10/01/2008-12/31/2008	6%	1.51%	$330,295.08	$22,230,295.08
01/01/2009-03/31/2009	5%	1.23%	$274,072.13	$22,504,367.21
04/01/2009-06/30/2009	4%	1%	$224,427.11	$22,728,794.32
07/01/2009-09/30/2009	4%	1.01%	$229,156.06	$22,957,950.38
10/01/2009-12/31/2009	4%	1.01%	$231,466.46	$23,189,416.84
01/01/2010-03/31/2010	4%	0.99%	$228,717.54	$23,418,134.38
04/01/2010-06/30/2010	4%	1%	$233,539.75	$23,651,674.13
07/01/2010-09/30/2010	4%	1.01%	$238,460.71	$23,890,134.84
10/01/2010-12/31/2010	4%	1.01%	$240,864.92	$24,130,999.76
01/01/2011-03/31/2011	3%	0.74%	$178,503.29	$24,309,503.05
04/01/2011-06/30/2011	4%	1%	$242,429.02	$24,551,932.07
07/01/2011-09/30/2011	4%	1.01%	$247,537.29	$24,799,469.36
10/01/2011-12/31/2011	3%	0.76%	$187,524.75	$24,986,994.11
01/01/2012-03/31/2012	3%	0.75%	$186,378.40	$25,173,372.51
04/01/2012-06/30/2012	3%	0.75%	$187,768.60	$25,361,141.11
07/01/2012-09/30/2012	3%	0.75%	$191,247.95	$25,552,389.06
10/01/2012-12/31/2012	3%	0.75%	$192,690.15	$25,745,079.21
01/01/2013-03/31/2013	3%	0.74%	$190,443.05	$25,935,522.26
04/01/2013-06/30/2013	3%	0.75%	$193,983.50	$26,129,505.76
07/01/2013-09/30/2013	3%	0.76%	$197,582.02	$26,327,087.78
10/01/2013-12/31/2013	3%	0.76%	$199,076.06	$26,526,163.84
01/01/2014-03/31/2014	3%	0.74%	$196,220.94	$26,722,384.78
04/01/2014-06/30/2014	3%	0.75%	$199,868.80	$26,922,253.58
07/01/2014-09/30/2014	3%	0.76%	$203,576.49	$27,125,830.07
10/01/2014-12/31/2014	3%	0.76%	$205,115.87	$27,330,945.94
01/01/2015-03/31/2015	3%	0.74%	$202,174.12	$27,533,120.06
04/01/2015-06/30/2015	3%	0.75%	$205,932.65	$27,739,052.71
07/01/2015-09/30/2015	3%	0.76%	$209,752.84	$27,948,805.55
10/01/2015-12/31/2015	3%	0.76%	$211,338.91	$28,160,144.46
01/01/2016-03/31/2016	3%	0.75%	$210,046.98	$28,370,191.44

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
10/01/2008-03/31/2016	**$6,470,191.44**	**$28,370,191.44**

U.S. Securities and Exchange Commission

Division of Enforcement

Prejudgment Interest Report

Phase VI Misappropriation

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$67,000,000.00
01/01/2013-03/31/2013	3%	0.74%	$495,616.44	$67,495,616.44
04/01/2013-06/30/2013	3%	0.75%	$504,830.23	$68,000,446.67
07/01/2013-09/30/2013	3%	0.76%	$514,195.16	$68,514,641.83
10/01/2013-12/31/2013	3%	0.76%	$518,083.32	$69,032,725.15
01/01/2014-03/31/2014	3%	0.74%	$510,653.04	$69,543,378.19
04/01/2014-06/30/2014	3%	0.75%	$520,146.36	$70,063,524.55
07/01/2014-09/30/2014	3%	0.76%	$529,795.42	$70,593,319.97
10/01/2014-12/31/2014	3%	0.76%	$533,801.54	$71,127,121.51
01/01/2015-03/31/2015	3%	0.74%	$526,145.83	$71,653,267.34
04/01/2015-06/30/2015	3%	0.75%	$535,927.18	$72,189,194.52
07/01/2015-09/30/2015	3%	0.76%	$545,868.98	$72,735,063.50
10/01/2015-12/31/2015	3%	0.76%	$549,996.64	$73,285,060.14
01/01/2016-03/31/2016	3%	0.75%	$546,634.46	$73,831,694.60

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
01/01/2013-03/31/2016	**$6,831,694.60**	**$73,831,694.60**

U.S. Securities and Exchange Commission

Division of Enforcement

Prejudgment Interest Report

Phase VII Misappropriation

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$69,000,000.00
01/01/2015-03/31/2015	3%	0.74%	$510,410.96	$69,510,410.96
04/01/2015-06/30/2015	3%	0.75%	$519,899.79	$70,030,310.75
07/01/2015-09/30/2015	3%	0.76%	$529,544.27	$70,559,855.02
10/01/2015-12/31/2015	3%	0.76%	$533,548.49	$71,093,403.51
01/01/2016-03/31/2016	3%	0.75%	$530,286.86	$71,623,690.37

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
01/01/2015-03/31/2016	**$2,623,690.37**	**$71,623,690.37**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-80354-CIV-MIDDLEBROOKS/JOHNSON

EXHIBIT D

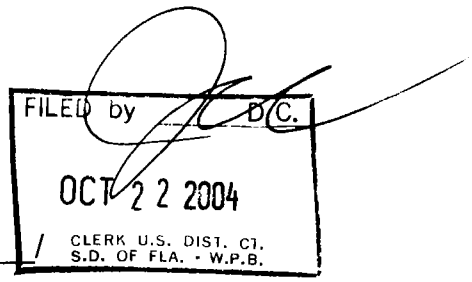
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

DENNIS CROWLEY, *et al.*,

Defendants.



NOTICE OF SECOND RE-FILING

THIS CAUSE is before the Court on Defendants International Media Solutions, LLC, and Yolanda Velazquez' Motion for Partial Relief from, and Clarification of Freeze Order [DE #134]. Upon review of the docket, the Court notes the following:

1. On or about August 19, 2004, this Court filed it's Order ruling on the aforementioned motion.

2. On September 2, 2004, upon review of the docket, this Court noted that the subject Order had not been filed and docketed. On this same date, the Court filed it's Notice of Re-filing with a copy of its Order for filing and docketing.

3. Review of the docket today reveals that the re-filing notice along with the attached order has not been docketed. Despite the Court's two attempts, this Order continues to be absent from the record.

PA
178

4. Accordingly, the Court is submitting this Second Re-filing Notice with attached August 19, 2004 Order for filing and docketing purposes.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 22nd day of October, 2004.

LINNEA R. JOHNSON
UNITED STATES MAGISTRATE JUDGE

Copies furnished:

Judge Donald M. Middlebrooks
Nate Mancuso, Esq.
Allan M. Lerner, Esq.
William Nortman, Esq.
Myles Malman, Esq.
*Robert K. Levenson, Esq. [via fax by chambers 305-536-4154]
Steven M. Greenberg, Esq. [via fax by chambers 954-767-8343]
CSC Services of Nevada, Registered Agent
Martha Gordon, Registered Agent

*Attorney Robert Levenson shall fax this notice with attached order to all parties upon receipt.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-80354-CIV-MIDDLEBROOOKS/JOHNSON

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

DENNIS CROWLEY, SPEAR & JACKSON, INC., et al.,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court on Motion of Defendant Yolanda Velazquez for Partial Relief from, and Clarification of Freeze Order (D.E. #134). This matter was referred to this Court by the Honorable Donald M. Middlebrooks, United States District Judge for the Southern District of Florida, after the parties consented to trial before the undersigned United States Magistrate Judge. In view of said consent, the above-stated motion shall be disposed of by order rather than by report and recommendation.

By this motion Defendant Yolanda Velazquez ("Velazquez") seeks to "clarify" or modify a prior asset-freeze Order in a way which would allow her to access funds currently covered by said Order. On April 15, 2004, the District Court entered an Ex Parte Temporary Restraining Order ("TRO") against Velazquez and other

Defendants and Relief Defendants, which, among other things, froze Velazquez' assets pending further order of the Court. Velazquez subsequently consented to the entry of a Preliminary Injunction against her, which included an order extending the asset freeze pending resolution of this action.

In support of their TRO Motion, the Securities and Exchange Commission (the "Commission") submitted the Declaration of Commission accountant Michelle Lama which, together with supporting exhibits, showed that somewhere between February 2002 and August 2003, entities controlled by Defendants Crowley and Spear & Jackson transferred 350,000 shares of Spear & Jackson stock to International Media Solutions' ("IMS") brokerage accounts and that IMS received $1,660,421 from selling those shares. The Commission has submitted in support of their Response to the instant Motion, a Second Declaration of Michelle Lama showing that during the same February 2002 through August 2003 time period, IMS disbursed to Velazquez $606,300. The Asset Freeze Order, as it pertains to Velazquez, has managed to freeze three bank accounts in Velazquez' name with a combined total of $11,200. When served with discovery requests seeking information regarding the whereabouts of the $606,300 Velazquez received from IMS, she has responded by asserting her Fifth Amendment privilege against self-incrimination.[1]

---

[1] Velazquez asserted her Fifth Amendment privilege when, prior to the Commission filing this action, she was subpoened to testify concerning her employment with and compensation from IMS, when, in both the TRO and the Preliminary Injunction, she was ordered to provide a sworn accounting of her assets and all funds received from IMS, and

Now, having repeatedly refused to disclose what happened to the money she made in commissions off of Spear & Jackson investors, Velazquez asks the Court to give her unchecked control over even more money that could be used to repay those investors by allowing her to keep a salary she apparently is earning. She justifies her request by contending that this new income is not connected to IMS and therefore, according to her logic, should not be subject to the asset freeze. As the Commission correctly observes, Velazquez' request to exempt from the scope of the asset freeze any new income received from her flies in the face of the purpose behind the asset freeze, and runs contrary to well-established case law concerning the scope and propriety of asset freezes entered as equitable relief.

Contrary to Velazquez' belief, the asset freeze in effect is not limited to assets connected to her activity at IMS. The law is well-established that a court may impose an interim asset on *all* of a defendant's assets up to the amount of the defendant's alleged ill-gotten gains to preserve funds for equitable remedies, including disgorgement. Levi Strauss & Co. v. Sunrise Int'l Trading, Inc., 51 F.3d 982, 987 (11th Cir. 1995). There is no requirement that frozen assets be traceable to the fraudulent activity underlying a lawsuit. SEC v. AB Financing and Inv., Inc., Case No. 02-23487-CIV-UNGARO-BENAGES, Slip Op. at 2 (S.D. Fla. Feb. 10, 2003)("a district court may freeze assets not specifically traced to illegal activity.");

---

when confronted with Production Requests from the Commission in this action.

SEC v. Current Fin. Servs., 62 F.Supp.2d 66, 68 (D.D.C. 1999)(refusing to release personal funds not traceable to the fraud because defendant's liability exceeded total funds frozen); SEC v. Grossman, 887 F. Supp. 649, 661 (S.D. N.Y. 1995)("[i]t is irrelevant whether the funds affected by the asset freeze are traceable to the illegal activity.") (aff'd, 101 F.3d 109 (2d Cir. 1996)); SEC v. Glauberman, 1992 WL 175270 at *2 (S.D. N.Y. July 16, 1992)(rejecting defendant's argument that funds subject to disgorgement must be traced "dollar for dollar" to the illegal activity). Indeed, courts frequently freeze assets a defendant owned even before the fraud began to preserve them for potential disgorgement. SEC v. Belmonte, 1991 WL 214252 (S.D. Fla. April 25, 1991)(J. Roettger)(refusing to release funds from sale of home, even though home had been acquired prior to the alleged fraud, because there had been no showing that ill-gotten funds had not been used to subsidize mortgage payments or improve home); SEC v. Roor, 1999 WL 553823 at *2 (S.D. N.Y. July 28, 1999)(denying motion to release so-called "untainted" funds from mortgage of property that pre-existed alleged fraud).

The cases cited by Velazquez, Rosen v. Cascade Int'l, Inc., 21 F.3d 1520 (11th Cir. 1994) and Mitsubishi Int'l v. Cardinal Textile Sales, 14 F.3d 1507 (11th Cir. 1994), are not to the contrary. One year after those two cases were decided, the Eleventh Circuit handed down its decision in Levi Strauss, 51 F3d at 987, which specifically upheld the district court's imposition of an interim asset freeze to satisfy the potential disgorgement of profits. In so ruling the Eleventh Circuit distinguished

Rosen and Mitsubishi which held a district court does not have authority to freeze all of a defendant's assets to satisfy a potential *money judgment*, from a district court's inherent authority to freeze all of a defendant's assets, even those unrelated to the underlying litigation, to ensure the availability of *equitable relief*. Thus, where, as here, a defendants potential liability far exceeds the amount of frozen funds, it is appropriate to refuse to release any funds, regardless of whether they emanated from the underlying fraud alleged, unless the defendant can provide evidence of assets worth the minimum of the potential judgment. With Velazquez having failed to offer any proof of this sort, her request to modify the asset freeze is denied.

Velazquez' request to modify the asset freeze is rejected for another reason as well, namely, her failure and refusal to provide this Court with any evidence of her living expenses. Generally, a defendant wishing to exclude from an asset freeze, monies to pay reasonable living expenses is required to produce evidence of those expenses. A.B. Financing, Slip Op. at 4 (denying defendant's motion to modify the asset freeze in part because he failed to document his reasonable living expenses); S.E.C. v. Starcash, Inc., Case No. 02-80456-CIV-MIDDLEBROOKS, Slip Op. at 2 (S.D. Fla. June 18, 2002)(denying defendants' motion to modify the asset freeze because they had not submitted sworn statements showing their expenses or documentary evidence of those expenses); CFTC v. Prism Fin. Corp., 1996 WL 523349, *1, *4 (D. Col. April 5, 1996)(defendant wishing to apply for modification of asset freeze ordered to do so under oath, and with all proposed expenses "fully

substantiated by all relevant financial information.")

Velazquez clearly has not met her burden in this regard. Indeed she has provided even less than the defendants in A.B. Financing and Starcash, who at least provided a list of their expenses. Here, Velazquez comes to Court requesting a modification with empty hands, providing neither a sworn statement of her expenses nor any documentation of them. In the absence of that required evidence, Velazquez is not entitled to any modification of the asset freeze.

One last point bears mention. Velazquez complains she cannot comply with the evidentiary requirements because to provide a sworn statement of her expenses or to document them would violate her Fifth Amendment rights. This Court is confident that documentation of the sort required could somehow be managed without violating Velazquez' Fifth Amendment rights. Even assuming such could not be accomplished, this is not a valid defense as it is improper to use the Fifth Amendment as both a shield and a sword. It may well be Velazquez' right to assert the Fifth Amendment in response to Commission discovery requests and court orders, but she must then accept the consequences. One of the consequences of not providing sworn statements of the funds at her disposal and the expenses she has is that she can not meet the well established evidentiary requirements for modifying the asset freeze. In summary, the Fifth Amendment does not relieve Velazquez of the obligation to provide proper evidence of her reasonable living expenses in order to gain access to frozen funds. A.B. Financing, Slip Op. at 3

(defendant's refusal to provide sworn accounting due to Fifth Amendment prevented court from ascertaining whether any frozen assets were from "legitimate" sources and therefore mandated denial of motion to modify asset freeze). In accordance with the above and foregoing it is hereby,

ORDERED AND ADJUDGED that Velazquez' Motion for Partial Relief from, and Clarification of Freeze Order (D.E. #134) is **DENIED**.

DONE AND ORDERED, this 19th day of August, 2004, in Chambers at West Palm Beach, Florida.

LINNEA R. JOHNSON
UNITED STATES MAGISTRATE JUDGE

CC: Hon. Donald M. Middlebrooks
Nate Mancuso, Esq.
Allan M. Lerner, Esq.
William Nortman, Esq.
Myles Malman, Esq.
Robert K. Levenson, Esq.
Steven M. Greenberg, Esq.
CSC Services of Nevada, Registered Agent
Martha Gordon, Registered Agent

EXHIBIT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 02-23487-CIV-UNGARO-BENAGES

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

A.B. FINANCING AND INVESTMENTS, INC., and ANTHONY W. BLISSET,
Defendants,

and

BLISSCO PROPERTIES, INC. JAMROCK MARKETPLACE, INC., and CARIBBEAN CULTURAL ART &EXHIBITION CENTRE, INC.
Relief Defendants.
_____/

ORDER DENYING MOTION TO MODIFY ASSET FREEZE TO ALLOW FOR THE PAYMENT OF REASONABLE LIVING EXPENSES

THIS CAUSE is before the Court upon Defendant Blissett's Motion to Modify Asset Freeze, filed January 6, 2003.

THE COURT has considered the Motion, the pertinent portions of the record, and is otherwise fully advised in the premises.

On December 6, 2002, Plaintiff filed an emergency action against Blissett, A.B. Financing and Investments, Inc., and three corporate entities as relief defendants alleging violations of federal securities laws. The Court thereafter granted an *ex parte* Temporary Restraining Order that, *inter alia*, froze Defendant Blissett's personal assets. *See* Order of December 6, 2002. On December 13, 2002, with the consent of Defendant Blissett, the Court entered a preliminary injunction which continued the asset freeze imposed by the TRO. *See* Order of December 16, 2002. The instant motion followed on January 6, 2003, requesting modification of the asset freeze to allow for

53

reasonable living expenses and attorneys' fees.

On January 27, 2003, the Court entered an Agreed Order on Modification of Asset Freeze entitling Defendant Blissett to $20,000.00 of the frozen funds to be used solely for his defense in this action. *See* Order of January 27, 2003 at 2. Thus, the only remaining issue before this Court is the question of Defendant Blissett's entitlement to additional funds to be used for living expenses.

Defendant submits three bases upon which he contends modification of the asset freeze is warranted: "(a) the extremely broad parameters of this asset freeze, (b) the unduly harsh consequences of its application ... [and], (c) Mr. Blissett's prior and ongoing cooperation."[1] Motion at 5. Plaintiff opposes the motion contending: (1) the asset freeze is lawful and appropriate, (2) Blissett has not produced appropriate evidence of his expenses, and (3) Blissett has refused to participate in discovery and provide a sworn accounting. *See* Response at 6-10.

First, contrary to Defendant's assertion that the asset freeze is "extremely broad" and "arguably unlawful," a "district court may exercise its full range of equitable powers, including a preliminary asset freeze, to ensure that permanent equitable relief will be possible." *Levi Strauss & Co. v. Sunrise Intern. Trading Inc.*, 51 F.3d 982, 987 (11th Cir. 1995) (citing *Federal Trade Commission v. United States Oil and Gas Corp.*, 748 F.2d 1431, 1433-34 (11th Cir. 1984)). Additionally, the contention that the asset freeze is too "broad" is negated by the fact that a "district court may freeze assets not specifically traced to illegal activity." *Id.* (citing *Kemp v. Peterson*, 940 F.2d 110, 113-14 (4th Cir. 1991)). Thus, any suggestion by Defendant that his personal assets are outside the parameters of the asset freeze is without merit. *See, e.g.*, Motion at 2-3, Reply at 3. In

[1] Defendant's fourth contention, his need to retain counsel, has been obviated by the Court's Order of January 27, 2003, releasing funds for that purpose.

fact, Defendant Blissett's refusal to submit to an accounting prevents this Court from ascertaining the legitimate source of any of the funds, should one exist. *See Commodity Futures Trading Com'n v. American Metals Exchange Corp.*, 991 F.2d 71, 79 (3d Cir. 1993).

In that vein, Plaintiff dismisses Defendant's representation that he is fully cooperating with the investigation noting that he has declined to submit to a sworn accounting of his assets or participate in discovery electing instead to assert his rights under the Fifth Amendment. *See* Response at 4. Consequently, "until the [] court has had an opportunity to determine whether [Defendant's allegedly] ill-gotten gains can be quantified, it is premature to consider the propriety of the extent of the asset freeze." *American Metals Exchange Corp.*, 991 F.2d at 79. "Because a freeze is designed to preserve the status quo by preventing the dissipation and diversion of assets, [the undersigned] will allow the freeze to remain in effect until [the Court can] determine[] whether it can make an informed determination of the amount of unlawful proceeds retained by [Defendant] and, if it can, what that amount may approximate." *Id.* (citing *Commodity Futures Trading Com'n v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 582-83 (9th Cir. 1982)).

Second, Defendant Blissett has failed to demonstrate that sufficient funds will be available in the event this Court finds disgorgement is necessary to repay the allegedly defrauded investors. *See International Controls Corp. v. Vesco*, 490 F.2d 1334, 1347 (2d Cir. 1974), *cert. denied*, 417 U.S. 932 (1974) ("an asset freeze may be appropriate to assure compensation to those who are victims of a securities fraud") (citing *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105-1106 (2d Cir. 1972)). Consequently, in light of the undisputed facts of this case, the asset freeze is neither too broad nor too harsh. *See* Response at 2-5.

Third, Defendant Blissett has failed to document sufficiently his living expenses enabling this

Court to determine a reasonable amount for release. *See American Metals Exchange Corp.*, 991 F.2d at 79 (modifying asset freeze only upon proof of "sufficiently documented" expenses); *S.E.C. v. Starcash, Inc.*, Case No. 02-80456-Civ-Middlebrooks (slip op. at 2) (S.D. Fla. June 8, 2002) (denying defendants' motion to modify asset freeze for failure to provide "the Court with any supporting documentation upon which to make a determination as to their actual monthly living expenses"). Instead, Defendant Blissett only has submitted a declaration with estimated, undocumented cost amounts. *See* Blissett Decl. at. 2. In fact, Defendant Blissett concedes this point requesting permission to belatedly submit the necessary proof. *See* Reply at 4. Additionally, Defendant now avers that he has reduced his living expenses in light of the asset freeze but does not reveal by how much. *See id.* Nevertheless, in light of the above, absent the ability to make a determination as to the source of the funds or their sufficiency for possible restitution, the Court finds any modification of the asset freeze would be premature. *See American Metals Exchange Corp.*, 991 F.2d at 79; *Co Petro Mktg. Group, Inc.*, 680 F.2d at 582-83; *S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1042 (2d Cir. 1990), *reh'g denied*, 917 F.2d 98 (2d Cir. 1990) (A court has the authority to freeze assets at an amount that will cover the maximum civil penalty available under applicable law should securities law violations be proven at trial); *Levi Strauss & Co.*, 51 F.3d at 987.

Finally, Defendant Blissett maintains that assertion of his rights under the Fifth Amendment, precluding a sworn accounting or his participation in discovery, does not foreclose modification of the asset freeze to allow for reasonable living expenses. *See* Motion at 6; Reply at 5. Interestingly, Plaintiff cites to the same case for the proposition that assertion of the Fifth Amendment instead permits the inference "that all of Defendant's accounts [are] traceable to the fraud" substantiating a complete freeze. Response at 9 (citing *S.E.C. v. Schiffer*, 1998 WL 307375 (S.D.N.Y. 1998)

("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.") (quoting *Baxter v. Palmigiano,* 425 U.S. 308, 318 (1976))). In fact, in *SEC v. Schiffer*, to which both parties cite, the court noted that as a result of the defendant's "invocation of the Fifth Amendment (rather than objection and proof as to the legitimacy of certain funds) .... considerable care must be taken to assure that assets properly subject to disgorgement are not depleted in an inadvertently or deliberately created murkiness of identification." 1998 WL 307375 at *6-7. Ultimately, therefore, the court assumed that all of the defendant's funds were "suspect in nature" and elected to *reduce* the amount of funds available for living expenses and attorneys' fees. *See id.* at *7. Faced with the same constraints in the case *sub judice*, it is hereby

ORDERED AND ADJUDGED that the Motion is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 10 day of February, 2003.

URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 02-80456-CIV-MIDDLEBROOKS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

STARCASH, INC., INFINITY CONSULTING SERVICES, INC., JEAN B. LECLERCQ, KIP MARSIQUE and FREDERICK J. SHAPIRO,

Defendants, and

STARCASH CONSULTING, INC., STARCASH INDUSTRIES, INC. and STARCASH MEDIA, INC.,

Relief Defendants.
_____/

EXHIBIT F

ORDER

This Cause comes before the Court upon the Emergency Motions to modify the Freeze Order (DE # 45, 47, 48), filed by Defendants Jeanne Leclerq, Kip Marsique and Fred Shapiro on June 5, 2002. Plaintiff filed a Response to the Motions on June 13, 2002 and the Receiver filed a Notice of Joinder in the Plaintiff's Response on June 14, 2002. The above named Defendants seek an order modifying the asset freeze orders entered in this matter. On May 28, 2002, the Court issued Orders of Preliminary Injunction and for other relief (DE # 40, 41, 42) upon the consent of Defendants Jeanne Leclerq, Kip Marsique and Fred Shapiro. Each Order includes an asset freeze provision which, among other things, prevents the Defendants from transferring, receiving, withdrawing or otherwise accessing any assets or funds owned by the Defendants.

The asset freeze encompasses the personal accounts of the Defendants and they now seek an order modifying the order to allow them access to reasonable living expenses. Specifically, Jeanne Leclerq seeks a monthly allowance of $15, 000.00 to cover her living expenses, Kip Marsique seeks a monthly allowance of $4,100.00 to cover his living expenses and Fred Shapiro seeks an allowance of $6,500.00 to cover his monthly living expenses. The Defendants also request that the freeze order be modified to allow them to deposit newly earned funds into a bank account and to ensure that such funds will not be subject to the freeze order. The Securities and Exchange Commission ("SEC") counter that the Defendants have failed to make the necessary evidentiary showing that the expenses are reasonable living expenses. The SEC further contends that although the Defendants may be entitled to future income from legitimate sources to pay reasonable living expenses, they are not entitled to unlimited access to funds that are possibly the funds of the Receivership.

The Court agrees that evidentiary support is required in order to modify the freeze order. *See e.g. CFTC v. American Metals Exchange Corp.*, 991 F.2d 71, 79 (3d Cir. 1993)(noting that district court properly exercised its discretion by modifying a freeze order based on sufficiently documented expenses). The Defendants have listed their monthly expenses in their Motions, but have not provided the Court with any supporting documentation upon which to make a determination as to their actual monthly living expenses. As such, the Court declines to modify the freeze order at this time.

Upon consideration of the record and for the reasons discussed above, it is hereby ORDERED AND ADJUDGED that the Emergency Motions (DE # 45, 47, 48) to modify the freeze order are DENIED without prejudice to re-file. The parties are encouraged to reach a

mutually agreeable resolution of this issue.

DONE and ORDERED in chambers at West Palm Beach, Florida, this 18 day of June, 2002.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to Counsel of Record