UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants, and

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

Relief Defendants.
_______________________________________/

DEFENDANT ARIEL QUIROS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND APPOINTMENT OF A RECEIVER

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This case involves foreign investment in six construction projects in Jay, Vermont and a separate biotechnology center in Newport, Vermont that were intended to stimulate growth in the state. Five of the seven projects have been completed and are fully operational, and the others have been on track to be completed. The incontrovertible facts demonstrate that the sponsors of these projects delivered exactly what was promised to investors and committed no wrongdoing.

Nevertheless, the SEC seeks preliminary injunctive relief and requests that a Receiver assume full control of the completely legitimate businesses of defendant Ariel Quiros ("Quiors"). The SEC's motion not only reflects a fundamental misunderstanding of such businesses, but also ignores key language in the relevant contracts, investment offering documents, critical financial materials, and affidavits. Compounding its error, the SEC disregards applicable law. More specifically:

- The SEC sues for federal securities fraud even though it cannot demonstrate that Quiros made a representation to investors that was false. As a matter of law, this is fatal to the SEC's claims. Indeed, the SEC bases its claims against Quiros on documents distributed to investors ***before*** he even owned Jay Peak and/or that he had ***no role*** in preparing.
- The SEC concedes that each of the first five Jay Peak projects (Phases 1-5) are complete and operating. It is beyond dispute that each investor received exactly what it was supposed to receive. Accordingly, any claim for relief based on events involving these projects would be meritless. Yet, the SEC's motion fails to recognize this critical fact.

- The SEC apparently claims that Quiros commingled "investor funds" belonging to different investment partnerships and used those funds for himself. However, the SEC's argument proceeds from a false assumption: what the SEC mischaracterizes as "investor funds" in fact belonged to entities that Quiros owned or controlled, and these entities had an absolute right to receive these funds.
- Critical to the SEC's claim of impropriety is the assertion that Jay Construction Management, Inc. ("JCM"), which now is owned by Quiros, served as a conduit for commingling funds. In fact, under contract, these funds belonged to JCM and not to investors. Indeed, the agreements and investing documents fully disclosed this to potential investors—sophisticated individuals as a matter of fact and law. JCM had no obligation to segregate ***its own funds*** in any respect, nor was there any limitation on what it could do with the money that it earned.
- The SEC contends that Quiros diverted funds to his own personal use. A proper accounting shows precisely the opposite, as the accompanying declarations of William Kelly and George Gulisano establish unequivocally.
- The SEC's contentions that funds belonging to Phases 6 and 7 are missing, and supposedly were used to complete Phases 1-5, fail to account for evidence in its own possession that squarely refutes its position. For example, affidavits from officers of a third-party seller of technology, Dr. Won Gyu Jang and La Kyun Kim, demonstrate that a significant part of the supposedly "missing funds" is not missing at all.

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- Similarly, with respect to Phase 6, the SEC ignores the facts that JCM has a commitment to complete the project and ample resources to do so.

The SEC's inaction for three years further demonstrates that there is no basis for immediately stripping Quiros of the right to control his own businesses. The SEC investigated for three years, yet never said one word to indicate that it believed anything illegal had occurred. It never urged, or even suggested, any change in conduct. Plainly, if the SEC truly believed that appointment of a Receiver was necessary to protect investors, it would not have sat silently as it did for three years.

In short, the SEC has "cherry picked" evidence and ignored proof that exonerates Quiros and demonstrates that he has not violated any federal securities law. There is no ground for the issuance of a preliminary injunction or the appointment of a Receiver, and Quiros should be permitted to return to operating his businesses.

STATEMENT OF FACTS

This case involves seven limited partnerships in which foreign nationals seeking EB-5 visas invested. The first six partnerships all involved construction of hotels, condominiums, townhouses and other improvements at the Jay Peak Resort in Jay, Vermont. The seventh partnership involves development of a state-of-the art biomedical research and manufacturing facility in Newport, Vermont.

The first partnership, Jay Peak Hotel Suites, L.P. (the "Phase 1 Partnership"), was formed, offered and sold between December 2006 and May 2008. (Doc. 1, Complaint "Cmpl.", ¶ 15.) It is a built hotel, which is completed and operating. *Id.*

On June 23, 2008, Ariel Quiros, through Q Resorts Inc., purchased Jay Peak Inc. ("JPI"), the owner of the Jay Peak Resort and Jay Peak Management Inc., the general partner of the

Phase 1 Partnership. Cmpl. 58. The Phase 1 Partnership offering documents were prepared, distributed and sold ***before*** Quiros purchased Jay Peak, (*id*. ¶¶ 15, 58, 59), and there is no evidence that he had any involvement in preparing the offering documents or selling Phase 1 Partnership interests. $17.5 million was raised from 35 EB-5 investors, and the project was successfully completed and is in operation. *Id*. ¶ 15; Declaration of William Kelly, hereafter "Kelly Decl.", ¶ 8. Indeed, this Court recently approved the sale of one of 35 units for $520,000, which was $20,000 more than the amount invested to construct it. Doc. 79.

The second partnership, Jay Peak Hotel Suites, L.P. (the "Phase II Partnership"), was formed and its offering documents drawn up ***before*** Quiros purchased JPI. Cmpl. ¶¶ 16, 58, 60. Again, there is no evidence that Quiros had any involvement in preparing the Phase II offering documents or in selling Phase II Partnership interests. $75 million was raised for the project, which was completed and is in operation. *Id*. ¶ 16; Kelly Decl. ¶ 8.

The next three Jay Peak EB-5 partnerships were formed and sold between July 2010 and November 2011. Cmpl. ¶¶ 18, 20, 22. Each has as its general partner a company whose only member/principal is ***not*** Ariel Quiros.[1] Cmpl. ¶¶ 18-23. Jay Peak Penthouse Suites, L.P. (the "Phase 3 Partnership") raised $32.5 million to build a luxury suites hotel, activities center, bar and restaurant. *Id*. ¶ 18. Jay Peak Golf and Mountain Suites, L.P. (the "Phase 4 Partnership"), raised $45 million to build golf cottage duplexes, a wedding chapel and other facilities. *Id*. ¶ 20. Jay Peak Lodge and Townhouses, L.P. (the "Phase 5 Partnership") raised $45 million to build rental townhouses, rental cottages, a café and a parking garage. *Id*. ¶ 22. Phases 3, 4 and 5 are also completed and operating. *Id*. ¶¶ 18, 20, 22; Kelly Decl. ¶ 8. The SEC offers no evidence that Quiros had any involvement in the preparation of the offering documents for these projects.

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[1] It is William Stenger.

Because he believed that mismanagement by contractors and others for the Phase 1 and Phase 2 projects was responsible for cost overruns on those projects, Quiros hired William Kelly as chief operating officer of JPI, and asked him to assist in overseeing ongoing projects. He also hired Jay Construction Management, Inc. ("JCM"), a company then owned and operated by Alex Choi, to act as the general contractor for Phases 4 through 6. Kelly Decl. ¶¶ 6, 7. JCM contracted in turn with JPI to use certain of its construction and development department staff and resources to assist in the construction of Phases 4 through 6. Kelly Decl. ¶ 6.

Jay Peak Hotel Suites Stateside, L.P. (the "Phase 6 Partnership") raised $67 million to construct a hotel, rental cottages, a guest recreation center and a medical center at the Jay Peak Resort. Cmpl. ¶ 24. Once again, the general partner was a company whose only director and principal is ***not*** Quiros.[2] *Id*. Unsurprisingly, then, there is no evidence that Quiros had any role in the preparation of the Phase 6 Partnership. The project is well under way, with the hotel completed and operating, and the cottages under construction. Approximately $20 million of work remains to be completed on the Phase 6 project. Kelly Decl. ¶ 9.

The final partnership, Jay Peak Biomedical Research Park L.P. (the "Biomedical Partnership") has raised approximately $83 million of the $110 million sought for development and construction of state-of-the-art biomedical research and manufacturing facility in Newport, Vermont. Cmpl. ¶ 26; Declaration of George Gulisano, "Gulisano Decl." ¶ 3. and Ex. B thereto; Kelly Decl. ¶ 13. Unlike the other six partnerships, the Biomedical Partnership project is a high-tech project, and the equipment for the project, not the building that houses it, is the key to its success. Kelly Decl. ¶ 13.

While the SEC has suggested that the Biomedical project is a fraud, Frost & Sullivan, an

[2] Again, it is William Stenger.

international market research and consulting firm that focuses on new and emerging technologies, was retained by the Biomedical Partnership to analyze the Biomedical Partnership project and the technologies that are at its core.[3] Among other things, it said this about the project:

> "Frost & Sullivan believes that AnC Bio's technology is unmatched by existing devices. The company's organ-assist productions will not only be highly competitive in the global market, but will be leaders in setting new standards for the industry." Doc. No 46-147 at 84 ((Frost & Sullivan Strategic Analysis of AnC Bio Products and Services)
>
> "There is great demand for new stem cell therapy products, especially in the areas of cardiovascular disease and cancer. In the United States, cardiovascular disease is the leading cause of death, with 600,000 Americans dying of some form of heart disease annually. Because of Dr. Ike Lee's extensive knowledge and experience in this area of cardiovascular stem cell therapy, his 16+ years in the biomedical industry, and his leadership position with AnC Bio, the company is well positioned to provide new, leading-edge stem cell therapies for cardiovascular disease." *Id.*
>
> "By meeting the standards of excellence, Jay Peak/AnC Bio will be positioned as leaders in the Stem Cell Therapy industry. Not only are they conducting the necessary studies and due diligence, they are hiring the right experts to develop ideas, construct and then operate one of the first stem cell manufacturing facilities of its kind. They are carefully considering all aspects of product development and manufacturing as they relate to the following: (a) stem cell therapy market demand that includes market size and disease type, (b) small verses large scale manufacturing requirements, (c) the Hotel Model verses the CMO Model as it relates to regulation, client needs and requirements, (d) FDA approval, compliance and regulation, (e) labor needs and work force development, and (f) quality management systems and cost control. In these ways, Jay Peak/AnC Bio is creating a hub for biotechnology that will bring jobs and educational programs to the area, stimulate the local economy and allow Vermont residents to stay in Vermont." *Id.* at 95.
>
> "By building the manufacturing facility now, Jay Peak/AnC Bio is positioning itself to capture the market. And by launching a progressive marketing campaign and maintaining a high level of industry intelligence and market presence, Jay Peak/AnC Bio will succeed and be recognized as global thought leaders." *Id.* at 96.

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[3] The Biomedical project is being built to host manufacturing and research relating to AnC BioPharm's Twin Pulsatile Life Support System (a mechanical blood pump), C-PAK Dialysis System (a compact system suitable for use in a dialysis center, a hospital or at home), E-Liver Artificial Organ System (a system for treating the blood of patients with liver failure) and Stem Cell Culturing and Factoring Processes. Doc. 46-147 at 82-96.

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To date, the Biomedical Partnership has acquired the real property for the project ($6 million), has acquired the intellectual property rights necessary to manufacture and sell the biomedical products it anticipates building and selling ($10 million), and has paid nearly $36.5 million of the $44 million purchase price due to the Korean company, AnC BioPharm Inc., that is designing and building the equipment necessary for the project. Gulisano Decl. ¶ 3 and Ex. B thereto; Kelly Decl. ¶¶ 14-15; Exs. 3-6, 8. It has also paid design fees of over $1.8 million to NNE Pharmaplan, a Nova Novartis company, for designing the building to house the Biomedical Partnership project, approximately $3.3 million to PeakCM for demolition and site preparation costs, and approximately $8 million in project and construction management costs to NECS.[4] Kelly Decl. ¶ 22; Ex. 3; Gulisano Decl. ¶¶ 3-4 and Exs. B and D thereto.

The SEC claims that Quiros and his companies misused investor funds based in part on the false premise that money paid to Jay Peak and Quiros related companies like JCM and AnCBio Vermont LLC for their services somehow remained investor money. However, as disclosed above, that is not so. JCM and AnC Bio Vermont LLC were entitled to be paid for their services, and the offering statements made it clear that the partnerships could and would enter into agreements with companies related to the sponsors. Doc. 39-2, ¶¶ 6-7.

Moreover, contrary to SEC's assertions, no money is missing. As shown above and in the Kelly and Gulisano declarations submitted herewith, the documents produced to SEC establish where all funds are and were expended. Given the limited time that Quiros has had to

[4] The amended offering statement for the Biomedical Project disclosed that construction and project management fees of 20% of procurement and construction costs would be charged by North East Construction Services ("NECS"). Indeed, the NECS contract for such services was attached to the amended offering statement, and specifically disclosed that 68% of the fees collected by NECS would be paid to AnC Bio Vermont LLC, the sponsor of the Biomedical Partnership project. Kelly Decl. ¶ 11; Ex. 3, Doc. 46-147 pp. 116-120, 46-148, pp.1-6.

respond to SEC assertions that have been years in the making,[5] and lack of resources available because of the freeze order obtained by SEC, Quiros has not been able to prepare similar accountings for Phases 1 through 6, but the fact that Phases 1 through 5 were completed and are operating and Phase 6 is partly completed and was, until the SEC intervened, in progress supports Quiros in this regard.

ARGUMENT

As the movant for a preliminary injunction, the SEC bears the burden of proving*, inter alia*, the it is likely to succeed on the merits of its claims. *SEC v. Unique Fin. Concepts, Inc*., 196 F.3d 1195, 1199 n.2 (11th Cir. 1999). Similarly, the SEC bears the burden of establishing that appointment of a Receiver is warranted. *See generally United States v. Bradley*, 644 F.3d 1213, 1310 (11th Cir. 2011); *Rosen v. Siegel*, 106 F.3d 28, 34 (2d Cir. 1997) ("[T]he appointment of a receiver is considered to be an extraordinary remedy, and ...should be employed cautiously and granted only when clearly necessary to protect plaintiff's interests in the property.") (internal citations omitted). As shown below and through the accompanying declarations of William Kelly and George Gulisano and affidavits of Dr. Won Gyu Jang and La Kyun Kim (Ex. 6 to Kelly Decl.), the SEC cannot meet its burden of proof in either instance.

I. INJUNCTIVE RELIEF IS IMPROPER, BECAUSE THE SEC HAS NOT ESTABLISHED A PRIMA FACE CASE OF PAST SECURITIES VIOLATIONS

To obtain injunctive relief, the SEC must make a "proper showing." It must establish both: (i) a prima facie case of past securities law violations and (ii) a reasonable likelihood that

[5] As the Court's records show, financial documents were produced and examinations of key witnesses like Quiros, Stenger and Kelly were conducted in 2014. Doc. Nos. 46-20, 46-24, 46-31, 46-47, 46-53. Indeed, some of the declarations submitted by the SEC in support of its motion were dated as early as 2014. Doc. Nos. 46-121 and 46-131. That the SEC chose to wait two years after learning many if not all of the facts on which it bases in its motion is a strong indicator that there is no real emergency here justifying the draconian relief it seeks and has been at least temporarily granted.

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the wrong will be repeated absent injunctive relief. *SEC v. Unique Fin. Concepts, Inc*., 196 F.3d at 1199. Moreover, where the preliminary injunction is mandatory, the SEC must make a "clear showing." *SEC v. Unifund SAL*, 910 F.2d 1028, 1039 (2d Cir. 1990) ("Thus, even when applying the traditional standard of "likelihood of success," a district court, exercising its equitable discretion, should bear in mind the nature of the preliminary relief the SEC is seeking, and should require a more substantial showing of likelihood of success, both as to violation and risk of recurrence, whenever the relief sought is more than preservation of the status quo.").

Although in this case the SEC's proposed preliminary injunction's prohibition against future securities law violations is prohibitory in form, rather than mandatory, it accomplishes significantly more than preservation of the status quo. *Id*. at 1040 ("Such an order subjects the defendant to contempt sanctions if its subsequent trading is deemed unlawful and also has serious collateral effects."). For this form of relief, the SEC must make a ***substantial*** showing of likelihood of success as to both a current violation and the risk of repetition. *Id.*

A. The SEC Must Show That Quiros Made Misrepresentations in Offering and Selling Securities.

The securities in this case were offered exclusively to "accredited" investors within the meaning of Rule 501 of Regulation D promulgated under the Securities Act of 1933, as amended (the "1933 Act"). Doc. No. 46, Notice by SEC re Motion Temporary Restraining of Filing Exhibits in Support, Exhibits 2-7 (Doc. Nos. 46-2 to 46-17), 56 (Doc. No. 46-139 to 46-143), 57 (Doc. Nos. 46-144 to 46-148); Exhibit 30 (Doc. Nos. 46-43 to 46-45), Declaration of Mark Dee ("SEC Dee Declaration").

Within the United States, the offers and sales of securities were made in reliance on Rule 506 of Regulation D, and outside the United States in reliance on Regulation S promulgated by the SEC. *Id*. Regulation S is not an exemption from registration but rather is a codification of

the SEC's position that the Securities Act was designed only to protect U.S. securities markets and investors who acquire securities in such markets. *See* 17 CFR 230.901 - 230.905 and Preliminary Notes.

The "accredited investor" definition is a central component of Regulation D. It is "intended to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act's registration process unnecessary." *See* Report on the Review of the Definition of "Accredited Investor," U.S. Securities and Exchange SEC (Dec. 18, 2015). The policy that accredited investors have the ability to "fend for themselves," is reflected in Regulation D, which makes inapplicable the information requirement under Regulation D for accredited investors. 17 CFR 230.502(b). There is no specific disclosure requirements when sales are exclusively to accredited investors. *See* 17 CFR 501-506.

Notably, the SEC does not allege that Defendants violated any of the conditions of the requirements of Regulation D or that it violated the registration provisions under Section 5 of the Securities Act. The SEC's Complaint is grounded only in fraud, alleging violations of Section 10(b) of the Securities Exchange Act of 1934 (15 USC § 78j(b)) and Section 17 of the Securities Act of 1933 (15 USC § 77q(a)).

In order to establish a section 10(b) or Rule 10b–5 violation, the SEC must prove (1) a material misrepresentation or materially misleading omission; (2) in connection with the purchase or sale of securities; (3) made with scienter. *SEC v. Merch. Capital, LLC*, 483 F.3d 747, 766 (11th Cir. 2007) (citing *Aaron v. SEC*, 446 U.S. 680, 695 (1980)). Section 17(a) of the Securities Act requires substantially similar proof, and "[t]o show a violation of section 17(a)(1), the SEC must prove (1) material misrepresentations or materially misleading

omissions, (2) in the offer or sale of securities, (3) made with scienter." *Id.* (citing *Aaron*, 446 U.S. at 697). To show a violation of section 17(a)(2) or 17(a)(3), the SEC must demonstrate (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities, (3) made with negligence. *Id.* (citing *Aaron*, 446 U.S. at 702); *SEC v. Monterosso*, 756 F.3d 1326, 1333-34 (11 Cir. 2014).

B. <u>The SEC Fails to Offer Evidence that Quiros Committed Securities Fraud in the Jay Peak Suites LP Offering ("Phase 1") and Jay Peak All Suite Hotel & Ancillary Projects ("Phase 2")</u>.

The SEC purports to offer evidence that Quiros used investor funds from partnership Phases 1 and 2 to fund his purchase of Jay Peak in a manner inconsistent with disclosures in the offering memorandum for each of the offerings. SEC Dee Decl., ¶¶ 23-25. (Doc. 46-21).

Yet, the SEC offers no evidence, nor even alleges, that Quiros made the allegedly false statements in the offering memoranda or otherwise misled investors. Although the SEC alleges Quiros reviewed the contents of offering documents for partnership Phases 1-6, it fails to allege when he did so. Cmpl., ¶ 51.

The Complaint does not – and cannot – allege that Quiros made the allegedly false statements in the offering memorandum for Phase 1 and Phase 2 – Quiros did not even acquire Jay Peak until June 23, 2008, ***after*** the memoranda were drafted and the investor funds raised. (Cmpl., ¶ 58) The offering memorandum for Phase 1 is dated December 22, 2006, and Phase 1 raised its $17.5 million from December 2006 through May 2008. (Cmpl., ¶ 57.) Similarly, the offering memorandum for Phase 2 is dated March 2008. Doc. 46-7.

The fact that Quiros could have had no role in the preparation of the offering documents precludes any federal securities fraud claim based on them.

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Perhaps more importantly, it is beyond dispute that Phases 1 and 2 are complete and operating, and that investors received exactly what they were supposed to receive. Quiros invested in treasury bills $11 million – an amount that matched the $11 million of Phase 1 investor funds transferred to the Phase 1 investor account at Raymond James. SEC Declaration of Michelle Lama, ¶ 29 (Doc 46-21). The SEC alleges that Quiros used this account as collateral to secure a margin loan, which, no one disputes, was used to acquire, construct and operate the Phase 1 hotel project. Put differently, investor assets were used on behalf of investors. While the SEC's allegations and evidence in support of its motion, at best, may serve as a basis for an allegation of a breach of fiduciary duty (which would be completely baseless), it does not state a prima facie case of securities fraud.[6]

C. The SEC Fails to Offer Evidence that Quiros Committed Securities Fraud in Jay Peak Penthouse Suites LP ("Phases 3"), Jay Peak Golf and Mountain Suites L.P. ("Phase 4"), Jay Peak Lodge and Townhouses L.P. ("Phase 5"), and Jay Peak Hotel Suites Stateside L.P. ("Phase 6")

After an investigation spanning over three years, the SEC's prima facie showing that Quiros committed securities fraud in partnership Phases 3 through 6 is evidence that purportedly shows that funds were "co-mingled," used to pay down margin loans, and therefore, allegedly used in a manner inconsistent with the use of funds disclosures to investors. SEC Dee Declaration, ¶¶ 32 – 34 (Phase 3), ¶¶ 35 – 37 (Phase 4), ¶¶ 38 – 41 (Phase 5), and ¶¶ 42 – 45 (Phase 6).

As a starting point, there is no evidence that Quiros had, or even could have had, any role in the preparation of the offering documents for these projects. That he may have read (portions of) the offering documents at some point in time does not show that he had any such role or even

[6] The SEC's contention that funds of Phase 1 and 2 investors were used to acquire Jay Peak fails on multiple levels. The SEC overlooks millions of dollars that these projects owed Jay Peak. It also overlooks the facts that both projects were completed and, indeed, cost far more than investors invested. Most importantly, if funds were used as the SEC asserts, then the seller of Jay Peak, MSSI, was far overpaid, which, of course, would make no sense.

read the materials before investors made their investments. Again, absent proof that Quiros made the statements through the offering documents, a claim of federal securities fraud against him is unsustainable.

Moreover, it is undisputed that Phases 3-5 are complete and operating. Investors, again, received exactly what they were supposed to receive. Accordingly, for this additional reason, there can be no federal securities claim based on these projects.

The SEC's main argument with respect to these projects is that funds that the SEC mischaracterizes as "investor funds" were co-mingled and used to repay margin loans. *Id.* The funds at issue were not "investor funds" because the they had been paid, pursuant to contracts, to JCM. Thus, the money at issue belonged to JCM, not investors, and JCM had every right to use the funds as it saw fit.

The SEC ignores the facts that: (1) transactions with JCM (and other affiliates of the sponsor) were fully disclosed to investors in the partnership offering documents (Doc. Nos. 46-2 to 46-17, 46-139 to 46-143 and 46-144 to 46-148); (2) such transactions resulted in the authorized and lawful transfer of funds in significant amounts to JCM; (3) Phases 4 through 6 entered into agreements with JCM to act as the general contractor for Phases 4 through 6 (Kelly Decl. ¶ 7); and (4) JCM contracted in turn with JPI to use certain of its construction and development department staff and resources to assist in the construction of Phases 4 through 6 (Kelly Decl. ¶ 6.)

D. Jay Peak Biomedical Research and Development Center L.P. ("Phase 7").

The SEC fails to make a prima facie showing that Quiros made a material misrepresentation or materially misleading omission through the Phase 7 offering documents. Further, the financial analysis of Phase 7 provided by the SEC to the Court is deeply flawed and

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wrong in virtually every respect. As shown through the four affidavits and declarations submitted by Quiros, the transactions involving Phase 7 have been in accordance with the disclosures contained in the offering document.

As with its allegations and evidence related to partnership Phases 3 through 6, the SEC assumes that any use of funds by affiliates of the general partner is improper if the source of those funds was derived from investors – without regard to whether the transactions with affiliated parties were disclosed (they were) and lawful (they were). Hence, the SEC simply ignores whether Quiros and his affiliates were entitled to receive the funds allegedly improperly used by Quiros. Instead, the SEC merely traces funds used by Quiros or his affiliates to purchase a condominium and pay taxes, for example, to funds that were derived from investors. *See* SEC Dee Declaration, ¶¶ 46 – 59. This tracing exercise shows nothing. Quiros and his affiliates were entitled to use the funds that they had been paid for their role in developing the Biomedical Project pursuant to their contracts with the Partnership.

Critical to the SEC's flawed analysis is its conclusion that there are purported "shortages" in partnership Phases 7. *See* SEC Dee Decl., ¶¶ 62 – 64. The SEC calculates the "shortage" by simply listing the structures that remain to be built and valuing them at the amounts Phases 7 paid for those structures. *See* SEC Dee Decl., ¶ 63, Ex. HH. The SEC ignores completely that these funds have been paid to affiliates of the partnerships' general partners and ignore whether those affiliates are performing their contractual commitments to complete the structures.

Quiros has submitted declarations of William Kelly and George Gulisano and affidavits of Dr. Won Gyu Jang and La Kyun Kim (Ex. 6 to Kelly Decl.) that conclusively show that every penny spent has been properly spent. Mr. Gulisano was the CFO for Phase 7. Mr. Kelly oversaw the operation of the project. Dr. Jang and Mr. Kim are officers of the South Korean

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company, AnC Biopharm, that has provided most of the technology necessary to effectuate the project. The affidavits and declarations of these witnesses are backed up by substantial documentation. In short, those who are most familiar with the operations of the project – independent of Quiros – have sworn and demonstrated that funds have been spent exactly as promised to investors.

The SEC has no substantive answer to these four witnesses. Perhaps even more importantly, the SEC has no answer to the analysis performed by Frost & Sullivan, which evaluated the business of Phase 7 and concluded that investors in the project have received enormous value.

The SEC has not even come close to showing any misconduct relating to Phase 7. Based on the sworn statements of four separate witnesses and the report of Frost & Sullivan, the SEC's meritless contentions regarding Phase 7 should be rejected.

II. APPOINTMENT OF A RECEIVER IS INAPPROPRIATE OR, IN THE ALTERNATIVE, A MONITOR SHOULD BE APPOINTED INSTEAD OF A RECEIVER

The SEC's request that a Receiver be appointed to control the corporate defendants is baseless and should be denied. In the alternative, if the Court believes that some level of supervision of the corporate defendants is warranted while this action is pending, the Court should appoint a monitor instead of a receiver.

First, the SEC's assertion that a receiver is necessary now to protect investors is belied by its own inaction over the past three years. The SEC conducted a three-year investigation during which period it did not, at any time, request, or even suggest, that Quiros or the corporate defendants alter their conduct in any respect. Throughout this period, the SEC knew that new investments were being solicited and made, and it knew exactly how such capital had been and

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was being spent. There is nothing the SEC knows now that it has not known for years. Plainly, if the SEC truly believed that there was any immediate danger to investors, it would have done – or at least said – something sooner.

Second, no basis for the appointment of a receiver exists. Appointment of a receiver is seen as an extraordinary remedy only to be applied with caution. *United States v. Bradley*, 644 F.3d 1213, 1310 (11th Cir. 2011) (reversing appointment of receiver where grounds justifying appointment did not exist). Here: (a) as explained above in Point I, the SEC has not established a violation of federal securities laws; (b) there is no danger that any properties will be lost, as they consist of real estate and/or operating businesses, including a well-known ski resort; (c) as explained below, a less severe remedy – appointment of a monitor rather than a receiver – exists; and (d) there is a likelihood that a receiver, with no experience operating EB5 projects or a biotechnology company, let alone both, is likely to do far more harm than good. Under circumstances such as these, the imposition of the "extraordinary" remedy of a receivership would be inappropriate. *See Fid. Bank v. Key Hotels of Brewton, LLC*, No. 15-0031-WS-M, 2015 U.S. Dist. LEXIS 48055, at *9 (S.D. Ala. Apr. 13, 2015) (setting forth non-exclusive criteria for appointment of a receiver as: "(1) whether fraudulent activity has or will occur, (2) the validity of the claim, (3) the danger that property will be lost or diminished in value, (4) inadequacy of legal remedies, (5) availability of less severe equitable remedy, and (6) the probability that a receiver may do more harm than good," as well as the balance of harms as between the parties seeking and opposing the appointment of a receiver).

In the alternative, a monitor rather than a receiver should be appointed. In this situation, Quiros would be permitted to exercise control over his own companies while under the

observation of a neutral third party.[7] The monitor would have the right to review any and all business records and would be able to bring to the attention of the SEC and Court any conduct that he or she believed to be unlawful. Under this arrangement, the SEC's ostensible goal, protecting the interests of investors, would be accomplished, while the adverse impact of the receivership on Quiros and his companies would substantially be avoided.

III. THE ASSET FREEZE CANNOT LAWFULLY EXTEND TO PROPERTY QUIROS HOLDS JOINTLY WITH HIS WIFE OR THAT IS HELD BY ENTITIES OVER WHICH QUIROS, IN WHOLE OR IN PART, EXERCISES CONTROL

By its terms, the asset freeze established by the Court's April 12, 2016 order extends to property held (a) jointly by Quiros with his spouse and (b) entities over which Quiros exercises control, in part or in whole.

To the extent that the Court believes that any assets should remain frozen, the asset freeze imposed should not extend to assets held jointly by Mr. Quiros and his wife. Such jointly held assets are not Mr. Quiros' sole property. Under Florida state law, one spouse cannot alienate or encumber the jointly held property without the consent of the other. *See Sitomer v. Orlan*, 660 So. 2d 1111, 1113 (Fla. Dist. Ct. App. 1995), *accord SEC v. Yun*, 208 F. Supp. 2d 1279, 1284 n.7 (M.D. Fla. 2002) ("Yun owns her home with her husband as a tenant by the entirety. Under Florida state law, one spouse cannot alienate or encumber the estate without the consent of the other. Thus, as distinguished from Yun's individual annuities, Yun does not truly own her home or have the sole power to encumber it. The Court declines to force Yun to disgorge her home." (citation omitted)

[7] Quiros would have no objection to Michael Goldberg serving as a monitor.

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Nor should any asset freeze extend to assets held in trust or by other non-party entities. *See, e.g., SEC v. Cherif*, 933 F.2d 403, 416 n.15 (7th Cir. 1991) ("[A]ny funds which are found to be [a third-party]'s rather than [the defendant]'s must be excluded from the freeze order."). Even if Quiros did have some control over trusts or other entities, "[t]he mere fact of control over assets whose title belongs to a third party does not justify freezing the third party's assets. If it did, the scope of third-party assets subject to freeze would be too broad." *SEC v. Hickey*, 322 F.3d 1123, 1133 (9th Cir. 2003).

CONCLUSION

Based on the sworn statements contained in the accompanying declarations of George Gulisano and William Kelly and affidavits of Dr. Won Gyu Jang and La Kyun Kim, as well as for the reasons set forth above, the SEC's motion for a preliminary injunction and appointment of a receiver should be denied.

Dated: May 5, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of May, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing electronically.

By: *_/s/ Charles H. Lichtman_*
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