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' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ORDER PERMITTING PAYMENT OF ATTORNEY'S FEES AND COSTS

I. INTRODUCTION

In its opposition to Defendant Ariel Quiros' motion for release of funds to pay fees, the Securities and Exchange Commission ("SEC"), an arm of the federal government, seeks to deprive an individual of the right to defend himself in multiple lawsuits that have leveled serious, scurrilous charges. The SEC's inequitable position has no merit.

First, contrary to the SEC's contention, the Setai condominium could not have come from investor funds as the SEC claims. This conclusion derives from the testimony of the SEC's own witnesses and the allegations of the complaint.

Second, the SEC relies primarily on its Exhibit 133, which is demonstrably inaccurate, as the evidence at the hearing on the motion for preliminary injunction proved. Among other things, the SEC's $55 million claimed diversion of funds is really a $25 million (meritless) claim, an amount that is one-fourth of the value of the Jay Peak resort. Thus, the investors will be fully protected if the Court permits the release of funds sufficient to pay Quiros' fees.

Third, while the SEC asserts *ipse dixit* that defense counsel's hourly rates are unreasonable, in fact the rates are in line for attorneys in equivalent firms, and indeed, often lower. The only evidence that the SEC cites to the contrary – Mr. Goldberg's hourly rate – is irrelevant, because Mr. Goldberg is acting as a receiver, not as defense counsel in multiple lawsuits brought in diverse geographical locations.

Finally, the SEC is wrong in challenging the method by which Defendant's attorneys have staffed the litigation. To ensure a timely, effective response to the SEC's motions, Defendant has found it necessary to bring in attorneys with experience and expertise in the area. Separately, Defendant necessarily needed an experienced attorney to supervise the Vermont

litigation. As litigation proceeds in the normal course, Defendant's counsel intends to staff the lawsuits with attorneys who bill a lower rate than the partners currently involved.

As set forth in the Motion and below, the fees and costs requested are necessary and reasonable in light of the seriousness and the complexity of this case. Defendant therefore requests that this motion be granted.

II. THE SEC HAS FAILED TO PROFFER EVIDENCE THAT THE SETAI CONDOMINIUM WAS PURCHASED WITH INVESTOR FUNDS

The SEC asserts that Exhibit 133 shows that the Setai condominium was purchased with Phase IV investor funds. However, the SEC's own witnesses admitted that Phase IV—Jay Peak Golf & Mountain Suites--is complete and in operation, and the complaint admits that as well. Thus, investors in Phase IV received what they bargained for. Neither does Exhibit 133 purport to show that any funds from later phases were used for Phase IV. So, the SEC's assertion is belied by its own evidence. [1]

III. THE JAY PEAK RESORT CAN MORE THAN COVER ANY POTENTIAL RECOVERY THAT THE SEC SEEKS

In arguing that an order allowing payment of fees is inappropriate, the SEC relies exclusively on Exhibit 133, a document that purports to show that the potential disgorgement against Mr. Quiros is $55 million. Yet, as demonstrated at the hearing on the motion for a preliminary injunction, Exhibit 133 is fatally flawed. Cross-examination of the SEC's own witnesses established that the exhibit is overstated by at least approximately $30 million, capping the SEC's potential damages at approximately $25 million. Because, as the SEC admits, Phases

[1] Mr. Gordon referred in court to property at 400 Fifth Avenue, unaware that that property was also referred to as the Setai Condominium. The SEC apparently was unaware of that fact as well, because they did not raise the issue with the Court during the hearing.

I through V were completed and the investors received the hotels, lodges, condominiums and other projects that they expected, the $23,461,802 purported "excess fees" for those projects should be deducted from the SEC's $55 million. In addition, Exhibit 133 fails to acknowledge the $6 million paid to GSI of Dade County to purchase the land for Phase VII (disclosed in the offering statement), resulting in a total overstatement on Exhibit 133 of $29,461, 802, more than half of what SEC claims was taken. The evidence further established that the Jay Peak resort is worth four times that amount.

Second, even accepting SEC's erroneous $55 million number, Exhibit 133 caps the SEC's potential recovery at that sum. And, while the SEC's so-called "economist" attempted to devalue Jay Peak – ignoring, among other things, an unseasonably warm winter[2] – the resort's worth is more than sufficient to cover potential disgorgement even of $55 million. So, Exhibit 133 actually supports Mr. Quiros' position. An order releasing money for fees and costs could not conceivably jeopardize any hypothetical disgorgement.

Third, the flaws in Exhibit 133 revealed at the hearing cast doubt on the validity of any of the entries. It follows that just because the exhibit asserts that investor funds were used to purchase the Setai condominium does not make it so.

[2] To arrive at his diminished valuation, Dr. Jindra, the SEC's in house economist, "adjusted" the valuation of respected and experienced ski resort appraiser, Sno Valuation, by relying solely on depressed revenues from what even he was forced to admit on cross-examination was this year's all-time record warm winter to set the baseline for future revenue growth, ignoring the historical averages and long term growth trend of the Jay Peak Resort reflected in Sno Valuation's report. By taking depressed revenues from an atypical year as a starting point and projecting 5% growth from that abnormal low point, Dr. Jindra artificially and unjustifiably reduced Jay Peak revenues by 10% on a persistent basis for the remainder of the period considered in the valuation model. That improper tactic is what drove Dr. Jindra's conclusion that the Jay Peak Resort was worth far less than Sno Valuation reported. No weight should be given to Dr. Jindra's baseless valuation, particularly when the record shows the long term trend at Jay Peak: revenues grew from $13.6 million to $44.2 million per year from 2009-10 through 2014-15, and at an average growth rate of 6.2% for the last four years of that period Def. Ex. J at 68.

IV. DEFENDANT'S ATTORNEYS' FEES AND COSTS ARE OBJECTIVELY REASONABLE

Although the Motion includes as an exhibit the invoice from fees incurred, the SEC never seriously challenges the specific tasks that Defendant's counsel performed. Rather, the SEC merely sets forth generalities that have no factual support. For example, the SEC baldly asserts that defense counsel's rates exceed standard rates. However, defense counsel's rates are reasonable and arguably below market rate.[3] The SEC's reliance on Mr. Goldberg's billing rate is an archetypal "apples-to-oranges" comparison. Mr. Goldberg is serving as a receiver, not as litigation counsel. As noted above, the rates for litigation counsel in complex matters often far exceed those being charged by MSK. The more apt example is the rate of Defendant's former local counsel, Charles Lichtman, of Berger, Singerman. As shown on Exhibit B to Berger, Singerman's Motion for Fees, Mr. Lichtman's hourly rate is $695.

The SEC also asserts that Defendant improperly staffed the litigation with an excessive number of partners. This argument fails to account for the exigencies of a motion for preliminary injunction, the freeze order and the receivership order, the complexities of this litigation, and the parallel litigation in Vermont, which itself requires staffing and preparation. And yet again, the SEC fails to identify a single specific instance in which partner involvement was inappropriate. In any event, when the litigation proceeds in the normal course, the cases will be staffed with personnel at lower billing rates as is appropriate.

[3] By way of example, Law360 just reported that rates of attorneys at equivalent law firms have reached $2000 per hour. http://www.law360.com/ip/articles/794929?nl_pk=002a1db0-ac41-4d0f-88ae-e4f1f6a5df62&utm_source=newsletter&utm_medium=email&utm_campaign=ip.

Finally, the SEC nowhere challenges the sums requested for Vermont and Florida counsel and for an accounting expert. These, too, are reasonable sums that justify a release of funds.

V. THERE IS NO NEED OR JUSTIFICATION FOR FURTHER BRIEFING ON THIS MOTION

Clearly recognizing that it has no factual basis for its opposition, the SEC asks for further briefing on the motion as part of the final preliminary injunction papers. Their request should be denied: the SEC has had ample time to respond to the motion and to attempt to find legal and factual authorities for its bald assertions. It has utterly failed to do so. The request for further briefing is nothing but a further attempt to prevent Mr. Quiros from obtaining the defense to which he is entitled.

VI. CONCLUSION

For the foregoing reasons, Defendant Quiros requests that this Motion be granted and that the Court order that funds be released as follows: (i) $204,852 to pay MSK's legal fees through April 30, 2016; (ii) $50,000 to pay the retainer of Quiros' accounting expert; (iii) $25,000 to retain substitute Florida counsel, Gray Robinson; and (iv) a sum in an amount sufficient to permit Quiros to retain Vermont counsel.

WHEREFORE, Defendants respectfully request that this Honorable Court enter an Order awarding Defendants the requested fees and costs.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Clerk of the Court and furnished via CM/ECF to all participating recipients, on this 13th day of May, 2016.

By: /s/Karen L. Stetson