

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.

Q BURKE MOUNTAIN RESORT, HOTEL
AND CONFERENCE CENTER, L.P.
Q BURKE MOUNTAIN RESORT GP SERVICES, LLC,

Additional Receivership Defendants¹

¹ See Order Granting Receiver's Motion to Expand Receivership dated April 22, 2016 [ECF No.: 60].

**RECEIVER'S RESPONSE AND OBJECTION TO DEFENDANT
ARIEL QUIROS' SECOND MOTION FOR AN ORDER PERMITTING
PAYMENT OF ATTORNEY'S FEES AND COSTS AND SUPPORTING
MEMORANDUM OF LAW [D.E. NO. 192]**

Michael I. Goldberg (the "Receiver"), through undersigned counsel, hereby files his Response and Objection to Defendant Ariel Quiros' Second Motion For An Order Permitting Payment of Attorney's Fees and Costs And Supporting Memorandum of Law [D.E. 192](the "Second Fee Motion"). In support of this Response and Objection, the Receiver states as follows:

1. On May 6, 2016, Mr. Quiros filed Motion of Ariel Quiros Permitting Payment of Attorney's Fees and Costs And Supporting Memorandum of Law [D.E. 109] (the "Fee Motion"). In the Fee Motion, Mr. Quiros ("Quiros") sought authorization to pay \$204,852 to the law firm of Mitchell Silberberg & Knupp LLP ("MSK") (for services provided through April 30, 2016); \$50,000 to retain an accounting expert; \$25,000 to retain substitute Florida counsel, Gray Robinson; and an undisclosed amount sufficient to permit retention of Vermont counsel.²

2. By Order dated May 27, 2016, the Court authorized Quiros to sell or mortgage his multimillion dollar New York condominium and to deposit the proceeds in the Receiver's trust account pending further order of the Court approving the reasonableness of his attorney's fees. [D.E. No. 148]. The Receiver has been informed that Quiros placed a \$1.2 million mortgage on the New York condominium. This afternoon, the Receiver received a wire transfer in the amount of \$1,184,000 and is holding these funds in trust.

² The Receiver has learned that the receivership entities maintain a directors and officers liability insurance policy with a \$10 million limit of liability. However, for some unknown reason, it appears that MSK did not notify the insurance carrier when it was first retained by Quiros, Stenger and certain receivership entities in connection with the SEC's investigation. MSK's alleged failure to notify the insurance company may have waived any claims to the very insurance which might have paid Quiros' defense costs.

3. On July 25, 2016, Quiros filed the Second Fee Motion pursuant to which he now requests **an additional** \$573,589.93 in fees and costs to pay MSK for the months of May and June, 2016.³ Thus, MSK alone has billed Quiros more than \$775,000 in less than three months. This does not include its work for July and August and more than one hundred and fifty thousand dollars in fees sought by his numerous other professionals.⁴ The Receiver believes that this amount is completely excessive and is further victimizing the investors that were defrauded by Quiros.⁵

4. In support of the Second Fee Motion, Quiros states that MSK's rates are reasonable. Specifically, he notes that MSK's partners are billing between \$600 and \$805 per hour and MSK's associates rates are between \$340 and \$600 per hour. To justify these rates, Quiros alleges that other New York firms charge partner rates in excess of \$1,000 per hour and associate rates in excess of \$700 per hour. However, this is not a New York case, it is a Florida case and standard rates in Florida are significantly less.⁶

5. Quiros statements that MSK's rates also compare favorable to Florida rates is equally non-persuasive. The Receiver who has more than 25 years' experience in dealing with receiverships is billing this matter at the extremely discounted rate of \$395 per hour. Other lawyers representing the Receiver with more than 20 years' experience are also billing at

³ Importantly, as discussed, *infra*, a great deal of these fees were not incurred in connection with the preliminary injunction hearing which was fully briefed as of May 27, 2016.

⁴ Based on this, the Receiver believes that the amount Quiros owes to his professionals for just over three months of work is more than the entire proceeds of the mortgage.

⁵ In comparison, the Receiver's attorneys incurred substantially less fees for the same time period for handling the complete administration of this receivership—including dozens of meeting with investors and numerous trips to Vermont.

⁶ Quiros states that average partner rates for securities litigators in Miami are \$751 per hour and average associate rates in Miami are \$466 per hour. The Receiver has employed dozens of attorneys and has paid tens of millions of dollars in legal fees over the past 25 years and believes these numbers are significantly overstated.

extremely discounted rates between \$260 and \$395 per hour. This is simply not the kind of case where lawyers can expect to be paid their top rate—especially when they represent the individual that created this mess who desires to pay them with money directly traceable to the fraud.⁷

6. Moreover, as the Court is well aware, the receivership estate is in a precarious financial position. In fact, the Receiver has spent most of his time since the inception of the receivership attempting to locate funds to keep the Jay Peak hotel fully operational. These dire financial circumstances are directly attributable to Mr. Quiros. The Court heard and received evidence and testimony at the hearing on SEC's Motion for Preliminary Injunction and Quiros' Emergency Motion to Lift or Modify Asset Freeze Order [DE 39] of Quiros' systematic looting of the receivership entities account for his personal benefit which left the receivership entities in an extremely illiquid state and that the Receiver needs all available cash to satisfy the necessary expenses of the receivership. In fact, due to the current state of the receivership entities' financial affairs, the Receiver may be forced to lien receivership assets to generate sufficient cash to be able to continue to operate the receivership entities' hotels.

7. Further compounding the receivership entities' illiquidity is the fact that the receivership entities owe at least \$5 million to the contractors that worked on the Q Burke hotel, the Stateside Project and the AnC Biomedical project. Many of these contractors are small mom and pop operations who in turn are experiencing their own financial crisis caused by Quiros' diversion of funds from the receivership entities. The receivership entities also owe approximately \$5 million to trade creditors who provided goods and services to the receivership entities while under Quiros' control. It is simply not right to allow Quiros to pay his counsel

⁷ At the hearing on the preliminary injunction, the SEC presented evidence that the condominium was purchased with funds directly traceable to investors.

hundreds of thousands of dollars at excessive rates while contractors, trade creditors and investors remain unpaid.

8. The Receiver believes it is more appropriate to defer ruling on the Second Fee Motion until such time as the Court determines Mr. Quiros' liability. At a minimum, however, the Court should substantially reduce the fees Quiros is requesting to pay to be more in line with the rates being charged by the very professionals charged with cleaning up his mess. The Receiver respectfully suggests that the Court may consider setting a brief evidentiary hearing to consider the reasonableness of the rates being charged by MSK and its overall bill.⁸

9. The Receiver acknowledges that the Court has discretion to release some frozen assets for payment of reasonable attorney's fees in civil cases, although the court is not automatically required to do so. *S.E.C. v. Duclaud Gonzalez de Castilla*, 170 F. Supp. 2d 427, 429 (S.D.N.Y. 2001); *see also CFTC v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 775 (9th Cir. 1995) (holding that "[a] district court may, within its discretion, forbid or limit payment of attorney fees out of frozen assets," but that a district court may grant such relief "in light of the fact that wrongdoing is not yet proved when the application for attorney fees is made"); *CFTC v. Am. Metals Exch. Corp.*, 991 F.2d 71, 79 (3d Cir. 1993) (stating the decision to release frozen funds to pay attorney's fees "is entrusted to the discretion of the district court").

10. If the Court has the discretion not to release frozen funds in the first place to pay reasonable attorney's fees, it certainly has the discretion to substantially reduce the amount requested to comport with the equities of the situation. In this case, where hundreds of creditors are owed hundreds of millions of dollars, where the Receiver's attorneys are billing at rates

⁸ Due to the *di minimis* amount of Quiros' other counsels' fees relative to those of MSK, the Receiver has not directly objected to their fees, but believes the Court should similarly reduce their rates based on the case law cited herein and the equities of this case.

significantly below their regular rates, and where the assets being used to fund the payment of legal fees are directly traceable to stolen investor funds, equity dictates that the Court should substantially reduce the amount of funds Quiros can pay to his counsel.

11. Moreover, Quiros seeks money to pay MSK and other counsels' fees not just in connection with defending the preliminary injunction, but also for numerous unrelated matters and actions against him in other courts. While it may be appropriate for the Court to unfreeze a reasonable amount of money for Quiros to pay his counsel to defend the entry of the preliminary injunction, it is completely inappropriate to unfreeze assets to allow Quiros to pay counsel for matters unrelated to the preliminary injunction hearing or pending in other courts.

12. In *Federal Trade Commission v. IAB Marketing Associates, LP*, Case No. 12-61830-Civ-SCOLA, Judge Scola was faced with a situation where a defendant accused of fraud requested the court to unfreeze assets to pay legal fees to his counsel after the entry of the preliminary injunction. In denying the motion, Judge Scola stated, "[t]he Court believed it was fair to provide this money because in deciding whether to enter a preliminary injunction, the Court must evaluate the likelihood that the FTC will prevail on the action's merits and balance the equities. . . .In other words, the preliminary-injunction hearing and the legal work leading up to it is a chance for a defendant to show that the FTC is not likely to prevail on its merits." *FTC v. IAB* at p. 2. Thus, Judge Scola specifically linked the unfreezing of funds solely to permit the defendant to defend the preliminary injunction. It is clear, however, based on this reasoning that money should only be unfrozen, if at all, in connection with the preliminary injunction hearing and not for work done after May 27, 2016 or the multiple other lawsuits not pending before this Court.

WHEREFORE, the Receiver respectfully requests the Court to (i) deny the Second Fee Motion; (ii) or in the alternative substantially reduce the amount of fees awarded to more equitably reflect the circumstances of this case; (iii) conduct a brief evidentiary hearing on the reasonableness of MSK's rates and its overall bill to the extent it deems it necessary; and (iv) grant such further relief as is just and proper.

Dated: August 11, 2016.

Respectfully submitted,

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Counsel to the Receiver

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on August 11, 2016 via the Court's notice of electronic filing on all CM/ECF registered users entitled to notice in this case as indicated on the attached Service List.

By: /s/ Michael I. Goldberg
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