UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARIEL QUIROS, et al.,

Defendants, and

JAY CONSTRUCTION MANAGEMENT, INC., et al.,

Relief Defendants.
_____/

PLAINTIFF'S RESPONSE TO MOTION OF LEON COSGROVE AND MITCHELL SILBERG & KNUPP TO MODIFY ASSET FREEZE FOR THE PAYMENT OF ATTORNEYS' FEES BASED ON CHANGED CIRCUMSTANCES

I. Introduction

The current motion of Defendant Ariel Quiros' former lawyers to modify the asset freeze to be paid attorneys' fees (DE 384) represents their *eighth* attempt to be paid excessive and unsupported fees and costs – this time more than $3 million – at the expense of investors the Court already found in its Preliminary Injunction Order that Quiros defrauded. The Motion amounts to nothing more than another attempt to relitigate facts and legal issues the Court decided during the preliminary injunction proceedings and on the seven prior motions for attorneys' fees. As with their previous motions, Quiros' former lawyers ask the Court to modify the asset freeze to allow them to be paid instead of using the funds to benefit defrauded investors.

The Court should deny the current Motion first and foremost because it does not have jurisdiction over the Motion. The Court was divested of jurisdiction by virtue of the appeal of Leon Cosgrove and Mitchell Silberberg & Knupp of the Court's denial of their previous motion

seeking the same relief – that the asset freeze should not prevent payment of their fees from insurance proceeds (DE 324, Notice of Appeal). *See, e.g., Shewchun v. United States*, 797 F.2d 941, 942 (11th Cir. 1986) (per curiam) and Section III(A) below.

However, if the Court addresses the substance of the Motion, it should deny it for an additional five reasons. First, the law firms have not met the high burden they must demonstrate to modify a preliminary injunction, including showing a *significant* change in circumstances and that modification is in the best interest of investors. *See, e.g., In re Consolidated Non-Filing Ins. Fee Litig.*, 431 Fed. Appx. 835, 840 (11th Cir. June 22, 2011) (not published); *SEC v. Veros Partners, Inc.*, No. 1:15-cv-00659, 2015 WL 5821694 at *4 (S.D. Ind. Oct. 5, 2015).

Second, since the Court entered the Preliminary Injunction Order continuing the asset freeze, there have been no "changed circumstances" justifying the release of a single additional penny to Leon Cosgrove and Mitchell, Silberberg & Knupp as the two law firms contend. The firms misrepresent the effect of the Receiver's settlement with Raymond James, the only alleged changed circumstance they cite, on the asset freeze against Quiros. The settlement with Raymond James has not made investors whole, has not impacted the Commission's claims for disgorgement against Quiros, and has not lessened the need to continue the asset freeze to preserve frozen funds for disgorgement. Simply put, the settlement is not a "changed circumstance" that warrants modifying the asset freeze.

Third, although Quiros' former lawyers have never submitted the Interim Funding Agreement with Ironshore Indemnity to the Court for review, the declaration of Ironshore's lawyer, attached as Exhibit 1, demonstrates they have repeatedly misrepresented their entitlement to fees under the Agreement. The declaration shows the limited scope of that Agreement does not automatically entitle the lawyers to the $1 million they claim, and they may

not receive any funds under the Agreement. Fourth, the former lawyers have not cited any case law that justifies this Court reconsidering its prior ruling that any insurance proceeds Quiros obtains are subject to the asset freeze. As discussed below, their primary case, *SEC v. Morriss*, Case No. 4:12-cv-80, 2012 WL 1605225 (E.D. Mo. May 8, 2012), is inapplicable because the individual defendant in that case, unlike Quiros, was not subject to an asset freeze. Fifth, the lawyers ask this Court to release frozen Receivership funds to help pay $3 million in fees and costs – *double* the amount of their previous requests that this Court largely denied – without so much as a single time entry to justify the outlandishly increased request. For all those reasons, the Court should deny the Motion.

II. Factual And Procedural Background

A. The Court's Initial Fee Rulings

Quiros' former lawyers[1] first filed a motion to release frozen funds to pay fees on April 19, 2016, the same day they appeared in the case. DE 39. They sought no specific amounts in that motion. *Id.* However, on April 28, 2016, the Court approved the release of approximately $41,000 in frozen funds to pay a combination of Quiros' living expenses and attorneys' fees. DE 82. Approximately one week after that, Quiros' former lawyers filed another motion, this time seeking $204,852 in attorneys' fees for approximately two weeks of work and another $25,000 for future work. DE 109. The Commission opposed the two requests, both as to the legal basis for releasing any fees as well as the specific amounts the lawyers requested. DE 64, 117.

On May 27, 2016, the Court granted both motions in part. The Court held Quiros was

[1] Mitchell, Silberberg & Knupp represented Quiros from the beginning of this action until filing a notice of withdrawal on March 29, 2017 (DE 298), which the Court granted on April 6, 2017 (DE 309). Leon Cosgrove first appeared as Quiros' local counsel in mid-June 2016 (DE 192 at 17), and remained until they withdrew at the same time as Mitchell, Silberberg & Knupp. DE 298, 309. For ease of reference, we will refer to both firms as Quiros' former lawyers.

entitled to the release of some frozen funds to pay attorneys' fees, which was to be accomplished through the mortgage or sale of the Setai Condominium. DE 148. But the Court withheld ruling on the former lawyers' entitlement to any specific amount of fees, saving that for future rulings. The Court noted in its Order that *at that point* many of the facts were in dispute, including whether Quiros had purchased the Setai Condominium with investor funds. *Id.* at 3-4. However, the Court also made clear it did not want Quiros to "have unfettered access to the proceeds of the sale" to "help ensure that investors' funds are protected." *Id.* Thus, the repeated statements of Quiros' former lawyers in the Motion that the Court's May 27 Order "led LC and MSK to believe they would be compensated for their services," and that they were "relying on the Court's assurances" in that Order[2] that their exorbitant fees would be paid using investor funds, are preposterous. The Court approved no specific amounts in the May 27 Order.

B. The Landscape Changes

Over the next few months, Quiros' former lawyers filed their third and fourth motions seeking fees. On July 25, 2016, they sought more than $640,000 in fees and costs for two months of work (May and June 2016). DE 192. Two months later, on September 27, 2016, they sought another almost $575,000 in fees and costs for another two months of work (July and August). DE 219. That brought the grand total of fees and costs they sought to almost $1.5 million for just five months of work.

On October 20, 2016, the Court ruled on all the fee applications, determining that Quiros' former lawyers were entitled to only $80,000 of the fees and costs they sought (in addition to the previous $41,000 released). DE 232. A month later, the Court ruled on the Commission's motion for a preliminary injunction, finding in a 42-page order that substantial evidence

[2] Motion at 3, 7.

supported virtually all of the Commission's allegations against Quiros. DE 238. Among other things, the Court found Quiros had used investor funds to purchase the Setai. *Id.* at 18. The Court further stated:

> The weight of the evidence shows that Quiros's actions are egregious. Indeed, in addition to his misuse of $200 million of investor funds, he used over $50 million for his personal use. The fraudulent conduct has continued over a period of more than eight years and therefore is not isolated. The evidence also establishes a concerted effort by Quiros to perpetrate this fraud—clearly establishing a high level of scienter—despite his denial of wrongdoing. Finally, based on evidence currently before the Court . . . When the Receiver took control of the property, it was in poor financial condition, due in large part to Quiros's misuse of investor funds.

Id. at 33. The Court also ruled the asset freeze it had previously imposed should remain in place, rejecting numerous arguments against the freeze that Quiros had made for months, including: (1) the five-year statute of limitations barred most of the Commission's disgorgement claims; (2) the net worth of Jay Peak was much higher than the Commission's evidence showed; (3) Quiros had almost $200 million worth of frozen assets; and (4) the Commission's disgorgement claims were significantly overstated. *Id.* at 34-38.

Thus, the posture of the case had changed significantly since the Court's May 27 Order. No longer were the facts in dispute as the Court stated in the May 27 Order because the Court had determined every factual and legal argument Quiros' former attorneys had made in favor of using frozen funds to pay their attorneys' fees against them and Quiros.

C. The Lawyers' Additional Motions For Fees

The former lawyers' fifth attempt at seeking payment of their fees from the Court came in March 2017. They filed a motion seeking clarification or modification of the asset freeze to allow them to receive funds from a Director & Officers Liability insurance policy the Jay Peak corporate entities now under the control of the Receiver had maintained during the fraud. DE 288. The former lawyers claimed the asset freeze did not cover insurance proceeds, and that they

had an Interim Funding Agreement with the insurer, Ironshore Indemnity, to advance defense fees and costs while Quiros' lawsuit before Judge Cooke seeking coverage under the policy ("Coverage Action") was pending.[3] *Id.* The former lawyers did not submit a copy of the Agreement, so the Court, the Receiver, and the Commission could not review its terms. *Id.*

Before the time for the Commission to respond had passed, Quiros fired the former lawyers and retained a new firm to represent him. DE 298. The new attorneys withdrew the motion seeking clarification of the asset freeze, mooting it. DE 301. Quiros' former lawyers then sought to intervene to continue to assert their claim for attorneys' fees (the sixth motion), asserting the same arguments they had made in their previous motion. DE 303. After responses from the Commission and the Receiver, the Court denied that motion, holding the former lawyers' claim was a private fee dispute between them and Quiros, and that it was inappropriate for the Court to resolve that private dispute. DE 310.

Still, the former lawyers took one more bite at the apple (their seventh motion), moving for reconsideration. DE 311. That motion repeated all five of the major arguments the former lawyers had previously made: (1) insurance proceeds were outside the scope of the asset freeze; (2) Ironshore was obligated to pay them under the Interim Funding Agreement; (3) the funds belonged to them, not Quiros; (4) the Interim Funding Agreement was not dependent on the outcome of the Coverage Action; and (5) the Receiver had no valid claim on the insurance proceeds. *Id.* The Court once again denied the former lawyers' motion, rejecting all their arguments. DE 312. The Court held any insurance proceeds were subject to the asset freeze,

[3] Quiros' former lawyers state in their Motion that they "understand" the Commission had acquiesced months earlier to use of insurance proceeds to pay their fees. DE 384 at 9. Regardless of any purported understanding the lawyers had (for which they do not specify a basis), the Commission never agreed to the former lawyers using the insurance proceeds to pay their fees. The first we knew of any purported agreement by Ironshore to advance attorneys' fees was through the March 13 motion.

that any claim by the former lawyers for insurance proceeds was premature unless and until the Coverage Action was decided in Quiros' favor, and the former lawyers were attempting to assert arguments on behalf of Quiros even though they no longer represented him. *Id.* The former lawyers then appealed that denial to the Eleventh Circuit.[4] DE 324.

III. Memorandum Of Law

A. The Court Does Not Have Jurisdiction Over The Motion

As discussed above, Quiros' former lawyers have appealed the Court's denial of their motion for reconsideration to the Eleventh Circuit (DE 312, 324), which by definition includes the underlying motion to intervene that the Court also denied. DE 303, 310. It is well-settled in the Eleventh Circuit that "the filing of a notice of appeal divests the district court of jurisdiction over the aspects of the case involved in the appeal." *United States. v. Tovar-Rico*, 61 F.3d 1529, 1532 (11th Cir. 1995) (District Court was divested of jurisdiction to try defendant while government's appeal of motion to suppress evidence was pending); *Shewchun*, 797 F.2d at 942 (affirming trial court ruling it could not rule on defendant's motion to correct his sentence while the defendant was appealing his sentence); *Showtime/The Movie Channel, Inc. v. Covered Bridge Condominium Ass'n, Inc.*, 895 F.2d 711, 713 (11th Cir. 1990) (while a case is on appeal "the district court retains only the authority to act in aid of the appeal, to correct clerical mistakes or to aid in the execution of a judgment that has not been superseded"); *U.S. v. Westberry*, No. 3-98-cr-24, 2010 WL 2652459 at *1 (N.D. Fla. July 1, 2010) (court could not consider defendant's Rule 60(b) motion to vacate the judgment against him while the defendant was appealing previous denial of a motion to vacate the judgment); *Jones v. Miller*, 2012 WL 5416580 at *1 (Case No. 10-00495, S.D. Ala. Nov. 6, 2012) (court could not consider Rule 60 motion to vacate

[4] The former lawyers continue to prosecute their appeal and recently filed their initial brief.

judgment and obtain a new trial based on ineffective assistance of counsel when that argument was the grounds for the defendant's pending appeal); *FTC v. First Guarantee Mort. Corp.*, Case No. 09-61840, 2012 WL 591255 at *2 (S.D. Fla. Feb. 22, 2012) (Court could not rule on motion to release frozen assets while appeal of asset freeze and final judgment was pending).

Under this line of cases, this Court does not have jurisdiction to consider the former lawyers' instant Motion. They seek a Court order modifying the asset freeze to allow them to receive attorneys' fees from insurance proceeds and other frozen assets – the very subject of their pending appeal. As discussed in Section II(C) above, they make the same legal and factual arguments in the current Motion as they made in the motions now on appeal. And they continue to make those arguments in the appeal. We have attached as Exhibit 2 the former lawyers' initial appeal brief, which recites the same facts and legal arguments as they make in the Motion in front of this Court. Thus, the former lawyers' Motion addresses "matters at issue in the appeal," and the Court lacks jurisdiction to consider it as a result. The Court should, therefore, deny the Motion on those grounds.

B. The High Standards For Modifying Preliminary Injunctions And Asset Freezes

Turning to the substance of the Motion, as a threshold matter, the former lawyers argue they do not need to satisfy the requirements of Federal Rule of Civil Procedure 24 to intervene to seek modification of the asset freeze. Motion at 1-2, 16. Although the Commission does not agree with that assertion, to save judicial resources we will not spend time contesting that argument – for the simple reason that even if it is true, the former lawyers fall far short of the high standards necessary to show the Court should modify the preliminary injunction and the included asset freeze.

Motions to modify preliminary injunctions are evaluated under Rule 60(b)(5), which

provides that "on motion and just terms, the court may relieve a party" from an order when "applying it prospectively is no longer equitable." Fed.R.Civ.Pro. 60(b)(5); *In re Consolidated*, 431 Fed. Appx. at 840; *Veros Partners*, 2015 WL 5821694 at *3; *The Atlanta Journal and Constitution v. City of Atlanta Dept. of Aviation*, 6 F. Supp. 2d 1359, 1364 (N.D. Ga. 1998). The former lawyers bear the burden of proof. *Atlanta Journal*, 6 F. Supp. 2d at 1364. Rule 60(b)(5) was not meant to allow modification of a preliminary injunction "simply because 'it is no longer convenient to live with the terms'" of the injunction. *Consolidated*, 431 Fed. Appx. at 840. Rather, the former lawyers bear the burden of demonstrating "a *significant* change in circumstances warrants a revision of the decree." *Id.; quoting Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) (emphasis in original).

Among the factors the Court may consider is whether modification of a preliminary injunction would be adverse to the public interest. *Consolidated*, 431 Fed. Appx. at 840; *Atlanta Journal*, 6 F. Supp. 2d at 1364. In the context of modifying an asset freeze that is part of a preliminary injunction, the Court may consider whether releasing frozen assets is in the best interest of defrauded investors. *Veros Partners*, 2015 WL 5821694 at *4 ("In the context of releasing frozen assets, the Court will consider whether such a release is in the best interest of the defrauded investors"); *SEC v. McGinn, Smith & Co.*, No. 10-CV-457, 2014 WL 675611 at *3-*4 (N.D.N.Y. Feb. 21, 2014) ("in determining whether asset freeze should be modified, court must consider whether modification would be 'in the best interests of the defrauded investors'"); *SEC v. Forte*, 598 F. Supp. 2d 689, 692 (E.D. Pa. 2009) ("Several courts have held that before they will unfreeze assets, the defendant must 'establish that modification is in the interest of the defrauded investors'").

As the ensuing sections make clear, Quiros' former lawyers come nowhere close to

meeting their burden. The Raymond James settlement does not represent a significant change in circumstances, and the vast majority of the Motion reiterates legal and factual arguments the Court has repeatedly rejected in its rulings on fee applications and in the Preliminary Injunction Order. Moreover, it is absurd to argue that releasing frozen funds now in the possession of the Receiver to pay the former lawyers' fees that otherwise could be used for the benefit of defrauded investors would ever be in the best interest of those investors.

C. The Motion Improperly Seeks Reconsideration Of Prior Rulings

Other than the Raymond James settlement, which we address in Section III(D) below, the former lawyers' Motion simply asks the Court to reconsider its prior rulings using the same arguments the Court already rejected. For example, the former lawyers revisit the same arguments they made during the preliminary injunction briefing that the Court already considered and found infirm in its Preliminary Injunction Order (DE 238). This includes the value of the Jay Peak resort, Quiros' net worth, the amount of potential disgorgement the Commission could seek against Quiros, and how much of the Commission's disgorgement claim is subject to the five-year statute of limitations in 28 U.S.C. § 2462.[5] Motion at 5-7.

Similarly, the Motion repeats the numerous arguments Quiros' former lawyers made in their prior motions regarding their entitlement to payment under the Interim Funding Agreement. This includes insurance proceeds not being subject to the asset freeze, the terms of the Agreement, and their purported contractual entitlement to payment under the Agreement.

[5] The former lawyers' citation to the recent Supreme Court decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), is not a changed circumstance. *Kokesh* affirmed the Eleventh Circuit holding in *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016), that disgorgement is subject to Section 2462's five-year statute of limitations. *Graham* was the law in the Eleventh Circuit at the time the Court entered the preliminary injunction and continued the asset freeze against Quiros, and the Court addressed the five-year statute of limitations in the Preliminary Injunction Order. *Kokesh* did not change that analysis.

Motion at 10-15. Again, Quiros' former lawyers have provided no new law or facts – just a request that the Court reverse its prior orders based on the same arguments they previously made.

Reconsideration of a previous order is an extraordinary remedy to be employed sparingly. *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1370 (S.D. Fla. 2002); *Mannings v. School Board of Hillsborough Co.*, 149 F.R.D. 235, 235 (M.D. Fla. 1993). There are three reasons justifying reconsideration of a prior order: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *Offices Togolais Des Phosphates v. Mulberry Phosphates, Inc.*, 62 F. Supp. 2d 1316, 1331 (M.D.Fla.1999); *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D.Fla.1994). The moving party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. *Burger King*, 181 F. Supp. 2d at 1369; *Sussman*, 153 F.R.D. at 694. A "motion for reconsideration should not be used as a vehicle to . . . reiterate arguments previously made." *Burger King*, 181 F. Supp. 2d at 1369.

The Commission is not going to spend time restating our previous arguments during the preliminary injunction proceedings and in response to prior attorneys' fees motions as to why all of Quiros' former lawyers' arguments are wrong. We incorporate our prior briefs here, and note the Court has already ruled in favor of the Commission on all of them. The lawyers have provided the Court with no new evidence, no intervening change in the law, and no clear error that needs to be corrected. The Court should deny the Motion for that reason.

D. The Raymond James Settlement Is Not A Changed Circumstance

The Court in June approved the settlement of the Receiver's and class action lawsuits against Raymond James. Quiros' former lawyers erroneously argue in the Motion the settlement makes investors in all seven Jay Peak projects whole, and therefore obviates the need to continue

the asset freeze against Quiros. In a complete *non sequitur*, they also claim the $25 million Raymond James payment to the class action lawyers means they also should receive fees.

All three arguments are wrong. First, the Raymond James settlement will not make all investors whole. Second, Quiros' former lawyers misstate the nature of the Commission's disgorgement claim and the reasons the Court entered the asset freeze – incorrectly tying both exclusively to investor losses. While one goal of disgorgement is compensating harmed investors, it is not the only purpose; nor is it the sole purpose for the asset freeze. Third, there is a considerable difference between a third party (Raymond James) paying fees of attorneys who helped bring proceeds *into* the Receivership Estate to *benefit* investors and Quiros' former lawyers, who seek to take proceeds *out of* the Receivership Estate to the *detriment* of investors.

As to the first issue, Quiros' former lawyers incorrectly assume the entire $150 million Raymond James is paying will go to reimburse harmed investors. There are a number of payments set forth in the Receiver's Motion To Approve Settlement (DE 315) that, while beneficial to the Receivership Estate and helpful to investors, do not repay their investments. These include the $25 million payment to the class action attorneys responsible for helping bring the settlement funds into the Receivership Estate, $5.1 million to pay off creditors who did work for the Jay Peak entities but whom *Quiros* and his companies were responsible for paying but failed to, and $17.6 million for Phase VIII investors, which was not a project the Commission sued over.

Thus, at best, approximately $102 million of the Raymond James settlement could be classified as going to reimburse investors in the seven projects at issue. That consists of $15 million to buy out the Phase I investors, $67 million to return the Phase VII investors' funds to them, and almost $20 million to finish Phase VI. However, that leaves the 529 Phase II-VI

investors, who invested $264 million into those projects, still needing to recoup their investment. These investors are nowhere close to being made whole. Therefore, the claim of Quiros' former lawyers that the Raymond James settlement proceeds, combined with the value of the Jay Peak resort,[6] are sufficient to make investors whole, is preposterous. The need for the asset freeze to preserve funds for a potential disgorgement judgment against Quiros and to compensate harmed investors is as great today as it was when the Court first entered the freeze in April 2016.

On the second issue, Quiros misstates the law when he equates the asset freeze and disgorgement solely with compensating injured investors. The Commission and Quiros extensively briefed this issue both in the preliminary injunction proceedings. The Commission will not repeat all of those arguments here, but in summary, as the Court held, an asset freeze is appropriate to preserve funds for disgorgement, which is calculated based on the ill-gotten gains of a defendant. *See, e.g.*, Preliminary Injunction Order, DE 238, at 34-38. Those ill-gotten gains can include not just amounts that Quiros personally stole from Jay Peak investors, but amounts by which the companies he controlled were unjustly enriched. *Id.* at 35.

Thus, the Commission's calculations during the preliminary injunction proceedings that Quiros' disgorgement and prejudgment interest in this case could include amounts raised for the Phase VI and VII projects and amount to more than $190 million[7] are still valid today. The Raymond James settlement does not change that because the settlement has no impact on

[6] The lawyers also claim Quiros should get credit for the $13.3 million settlement the Receiver reached in 2016 with Citibank. However, that settlement was consummated and made public long before the Court ruled on the majority of attorneys' fees motions and the preliminary injunction. Thus, it is not a changed circumstance justifying reconsideration of any of the Court's prior orders.

[7] The Motion uses the figure of $156 million, but this excludes the $24 million the Commission identified in the preliminary injunction hearing and briefing that Quiros' companies failed to contribute to the EB-5 projects that the offering documents promised they would, as well as prejudgment interest.

Quiros' ill-gotten gains, i.e., the amounts by which he was personally enriched, whether individually or through his companies. As the Court held in the Preliminary Injunction Order, Quiros may be jointly and severally liable for amounts the companies in this case took from investors. DE 238 at 35. As the record in the case makes clear, this includes a host of misuse of funds, including paying off margin loans, defrauding investors by failing to complete Phases VI and VII, and failing to make the required developer contributions, in addition to the plethora of personal uses to which Quiros put investor funds.

The fact that Raymond James, a third party, has agreed to pay the Receiver some of those amounts does not absolve Quiros of liability for his misappropriation of investor funds. Nor is the current Motion the proper forum for the Court to make detailed factual determinations as to the exact amount of disgorgement. That determination is for future proceedings by the parties and lawyers still in the case based on *evidence*, rather than the rehashed, unsupported arguments of former law firms whose only interest is to be paid exorbitant fees at the expense of investors.

Attempting to relitigate the value of the Jay Peak Resort in the Motion, Quiros' former lawyers claim it is worth $100 million based on an isolated newspaper quote from the Receiver in April 2017, almost a year after the preliminary injunction proceedings. One newspaper quote is insufficient to contradict the expert witness and other testimony the Commission presented at the preliminary injunction hearing that the resort then was worth only about $41 million. As the Receiver explains in more detail in his response, there is no way to say exactly what the resort is worth today. Additionally, if it has increased in value in the last year, it is due entirely to the Receiver's efforts.[8] Furthermore, as the Receiver also explains, even if the resort were worth $100 million, Quiros' ownership interest is worth only a fraction of that. Quiros only owns the

[8] As discussed in Section II(B) above, the Court recognized the evidence showed the Jay Peak resort was in poor financial condition when the Receiver was appointed.

resort land and the ski facilities – a small part of the overall value of the resort. The majority of the resort's value is in the individual EB-5 projects that the *investors* own – the hotels, the water park, the ice rink, and the other amenities that constitute the projects at issue in this case.

Third, payment of the class action lawyers does not impact the claims of Quiros' former lawyers in any fashion. The two situations are not even remotely similar. The plaintiffs' lawyers represented investors and helped the Receiver negotiate a settlement with Raymond James that brought $125 million into the Receivership Estate for the benefit of investors. Furthermore, their payment is not coming from investor funds, but from money Raymond James is paying *in addition to* the money going to the Receiver. As a further benefit to investors, they will not have to pay their lawyers' contingency fees because Raymond James is paying the attorneys' fees.

In contrast, Quiros' former lawyers are attempting to take proceeds that could directly benefit investors. In the case of insurance proceeds, any proceeds used to pay the former lawyers will reduce dollar for dollar the amount of insurance proceeds available for all competing parties, including the Receiver. Furthermore, as discussed in more detail in Section III(F), the bulk of the money they seek for their $3 million in fees will come from funds now in the possession of the Receiver which would otherwise directly benefit investors. Motion at 19 (seeking more than $2 million from the sale of the Setai Condominium, which the *Receiver*, not Quiros, now owns). In summary, there are no changed circumstances justifying the payment of any further fees to Quiros' former lawyers.

E. Quiros' Former Lawyers Misrepresent The Interim Funding Agreement

Quiros' former lawyers make two arguments as to why the Court should allow them to be paid under the Interim Funding Agreement: first, that insurance proceeds are not subject to the asset freeze, and second, the terms of the Interim Funding Agreement require them to be paid.

Both arguments are wrong.

To start with, the Court already ruled any insurance proceeds Quiros might receive are subject to the asset freeze. Therefore, the former lawyers are asking the Court to reconsider its ruling without citing any new law or facts. The cases the lawyers cite are the same ones they previously cited, which are neither binding nor persuasive. For months, Quiros' former lawyers have been arguing that *Morriss*, 2012 WL 1605225, stands for the proposition that insurance proceeds for defense costs are not subject to the asset freeze. However, they have repeatedly failed to inform the Court of one key difference between *Morriss* and this case that renders *Morriss* completely inapposite.[9] Unlike Quiros, Morriss, the defendant seeking defense costs under the applicable insurance policy, *was not subject to the asset freeze.* The asset freeze order in that case, which Quiros' former lawyers submitted as an exhibit to their original motion seeking entitlement to insurance proceeds (DE 288-3), makes clear that *only* the corporate defendants and a corporate relief defendant, and not Morriss, were subject to the freeze. DE 288-3 at 2.

The Commission never argued the insurance proceeds in that case were subject to any asset freeze against Morriss, because there was none. Therefore, the Court's statement in that case that Morriss was not asking the Court to release frozen assets as to him was correct, because Morriss was not subject to the freeze. Quiros' situation is entirely different; he is subject to an asset freeze. Thus, *Morriss* has no application here as to whether any insurance proceeds are subject to the asset freeze against Quiros.[10]

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[9] Undersigned counsel was one of the Commission's attorneys in *Morriss*, and is very familiar with the details of that case.

[10] The former lawyers' other cases are no more persuasive than *Morriss*. Two of them concern bankruptcy cases that did not involve asset freezes, and the court in *SEC v. Narayan*, No. 3:16-cv-1417, 2017 WL 447205 (N.D. Tex. Feb. 2, 2017), analyzed only whether the insurance

In similar fashion, Quiros' former lawyers have misstated the terms of the Interim Funding Agreement. The declaration of Joe Galardi, a lawyer representing Ironshore in the Coverage Action, attached as Exhibit 1, gives a different reading of the Agreement than Quiros' former lawyers have been claiming. First and most important, Ironshore has not paid *any* money under the Agreement to either of the two law firms or any law firm representing Quiros. Ex. 1 at ¶13. Thus, the Court's previous ruling (DE 312) that there is no issue for the Court to decide until Ironshore actually pays any defense fees under the Agreement is still valid.[11]

Furthermore, Quiros' former lawyers have repeatedly overstated their standing under the Agreement and their entitlement to payment under it. The Interim Funding Agreement is an Agreement solely between Quiros and Ironshore. Ex. 1 at ¶¶7, 15. While Leon Cosgrove and Mitchell Silberberg & Knupp are two of four law firms authorized to receive any payments on behalf of Quiros under the Agreement, Ironshore disputes the law firms' claim that they are third-party beneficiaries under the Agreement with a contractual right to payment. *Id.* at ¶¶8, 15. A key portion of the Agreement the former lawyers' have *never* revealed to the Court is that Quiros must repay any and all defense fees and costs Ironshore pays under the Agreement if the insurance company prevails in the Coverage Action. *Id.* at ¶11. Thus, the former lawyers' repeated statements in their numerous motions that *they* are not required to repay any fees they receive under the Agreement are highly misleading. In fact, payment under the Agreement is directly related to the outcome of the Coverage Action because Quiros will get *nothing* if he

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proceeds were property of a receivership estate, not whether an asset freeze applied to those proceeds. In summary, the former lawyers have not cited a single case holding contrary to the Court's ruling that the insurance proceeds in this case are subject to the asset freeze.

[11] Case law supports that ruling. *See, e.g., In re Jacks*, 642 F.3d 1323, 1332 (11th Cir. 2011) (claims that raise "speculative possibilities" about "events that may take place in the future" are not ripe for adjudication); *Cheffer v. Remo*, 55 F.3d 1517, 1524 (11th Cir. 1995) (claims that "require speculation about contingent future events" are not "fit for adjudication").

loses the Coverage Action. He will have to repay everything. This further supports the Court's previous ruling that any decision on whether it should modify the asset freeze to allow payment of defense fees under the Agreement is premature. DE 312.

Finally, Quiros' former lawyers have consistently misrepresented the amount of fees they are likely to receive under the Agreement. *See, e.g.,* Motion at 19 (stating they have incurred fees of $1 million under the Agreement that Ironshore has a contractual obligation to pay). Although the maximum payment under the Agreement is $1 million, the reality is the two law firms who filed the instant Motion are likely to get far less than that if they get anything. Ex. 1 at ¶¶12, 14, 16. The Agreement only covers fees from December 1, 2016 through the end of the two law firms' engagement, which was mid-March 2017. *Id.* at ¶9. The former law firms have to submit detailed fee applications that Ironshore has to approve before it pays any fees. *Id.* at ¶10. Rates are capped, the fees must be reasonable and necessary, and Quiros contends that the fees and costs the former lawyers occurred are excessive and unreasonable.[12] *Id.* at ¶¶10, 14, 16. Because of these disputed issues, which as Ironshore points out are not before this Court, any amounts Ironshore ultimately approves for payment under the Agreement are likely to be less than $1 million. *Id.*

In summary, the former lawyers' claims to any payment under the Interim Funding Agreement, as well as any specific amounts, are far from certain. The declaration of Ironshore's attorney shows the former lawyers' have regularly misrepresented the terms of the Agreement to this Court – yet another reason the Court should deny the Motion.

[12] Quiros' former lawyers claim he should be estopped from disputing their fees under the Agreement because he supposedly approved the fees the lawyers incurred. Motion at 19-20. Yet they implicitly acknowledge the infirmity of this claim, as well as their lack of entitlement to $1 million under the Agreement, when they state that whether anything is paid under the Agreement is "a matter between the insurer, Quiros, and" the two law firms. Motion at 19.

F. Quiros' Former Lawyers Provide No Support For Their Exorbitant $3 Million Fee Claim

In addition to asking for $1 million in insurance proceeds to which they are not entitled, the former lawyers are asking the Court to unfreeze $2 million of other assets that have nothing to do with insurance proceeds to pay their fees. The request is outrageous. The Court already denied their previous request for almost $1.5 million in fees, choosing to award them only $80,000 on top of the $41,000 unfrozen at the outset of the case. DE 232. The former lawyers have offered no reason for the Court to reverse that ruling.

In addition, they now ask the Court to award them $3 million – $1.5 million *more* than they previously requested – without so much as a single fee application detailing their work or justifying the first dollar of that additional amount. They simply ask the Court, the Commission, and defrauded investors to accept their naked, unsupported representation that the additional fees were reasonable. In an additional display of unbridled hubris, they ask the Court to award them proceeds from assets in the possession of the Receiver that the Receiver intends to use to compensate defrauded investors – without bothering to address the standard of demonstrating that taking these assets would be in the best interest of defrauded investors,.

Plainly the former lawyers' request is directly contrary to the best interest of investors. Quiros no longer owns the Setai Condominium, which he bought using stolen investor funds and is the source of funds from which the lawyers seek payment. He agreed to turn it over to the Receiver and the Court approved the transfer. The Receiver now owns the condominium and plans to sell it and potentially use the proceeds to benefit those defrauded investors who have not been made whole. The request of Quiros' former attorneys to use that money, or any asset the Receiver owns, for their attorneys' fees runs counter to the best interest of investors. The Court should therefore deny the former attorneys' request to use frozen assets to pay their fees, and it

should not direct the Receiver to hold any asset or funds in trust pending any appeal the former lawyers may take to the Eleventh Circuit. Their claim is not against the Receivership Estate, but against Quiros, and the Court should not allow the former lawyers to hold up the orderly administration of the Receivership with their dubious claim to frozen funds.

IV. CONCLUSION

For all the reasons discussed above, the Court should deny the former lawyers' Motion. There are no changed circumstances justifying the Court reconsidering any of its prior rulings.

Respectfully submitted,

August 31, 2017

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

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 August 31, 2017, 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 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 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

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

Jeffrey C. Schneider, Esq.
LEVINE KELLOGG LEHMAN
SCHNEIDER + GROSSMAN LLP
Miami Center, 22nd Floor
201 South Biscayne Blvd.
Miami, Florida 33131
Telephone: (305) 403.8788
Facsimile: (305) 403.8789
Email: jcs@lklsg.com
Co-Counsel for the Receiver

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

Melissa D. Visconti, Esq.
Melanie E. Damian, Esq.
DAMIAN & VALORI LLP
1000 Brickell Avenue, Suite 1020
Miami, Florida 33131
Telephone: (305) 371-3960
Facsimile: (305) 371-3965
Email: mvisconti@dvllp.com
mdamian@dvllp.com
Counsel for Defendant Ariel Quiros

DECLARATION OF JOSEPH GALARDI

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

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

2. I am a lawyer admitted to the Florida Bar since 1999. I am also admitted to practice in the United States District Courts for the Northern, Middle, and Southern Districts of Florida, and the Second and Eleventh Circuit Courts of Appeal. I am a partner in the firm of Beasley Kramer & Galardi, P.A.

3. I represent Ironshore Indemnity, Inc. ("Ironshore") in the case of *Ariel Quiros v. Ironshore Indemnity, Inc.*, Case No. 16-cv-25073, MCG, pending in the Southern District of Florida ("Coverage Action").

4. I have reviewed Leon Cosgrove, LLC and Mitchell Silberberg & Knupp's Motion to Modify Asset Freeze for the Payment of Attorneys' Fees Based on Changed Circumstances ("Motion") (DE 384) filed on August 4, 2017 in Case No. 16-cv-21301-DPG in the Southern District ("the SEC Action").

5. The Motion makes several statements about an Interim Funding Agreement ("IFA") between my client, Ironshore, and Ariel Quiros. I am familiar with the specific terms of the IFA, and the Motion makes statements about the IFA that are inaccurate.

6. Quiros signed the IFA in connection with the Coverage Action. Quiros seeks a declaration of coverage under two Ironshore Director & Officer Policies for claims made against Quiros in the SEC Action and for related actions stemming from the same operative facts alleged against Quiros in the SEC Action. Ironshore denies any obligation to provide coverage, has filed a counterclaim for declaratory judgment, and is vigorously defending the

EXHIBIT

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Coverage Action.

7. The IFA is an agreement between Ironshore and Quiros, both of which are defined as the only "Parties" to the IFA. If certain conditions are met, the IFA provides for Ironshore to advance attorneys' fees and costs billed to Quiros in connection with his defense in the SEC Action and five other cases filed against Quiros ("Defense Costs").

8. Under the IFA, Ironshore will advance only Defense Costs charged by approved firms at rates approved by Ironshore. Leon Cosgrove and Mitchell Silberberg are not parties to the IFA. They are two of four law firms listed as "approved firms" in the IFA.

9. The IFA provides for the advancement of Defense Costs to Quiros only from December 1, 2016 forward. The maximum aggregate advancement amount under the IFA is $1 million. I understand that Quiros terminated his relationship with the Leon Cosgrove and Mitchell Silberberg firms on or around March 29, 2017. *See* Coverage Action, 3/29/17 Motion to Withdraw as Counsel of Record for Plaintiff Ariel Quiros (DE 22).

10. The IFA is subject to the terms and restrictions in the D&O policies, and Ironshore will only approve the advancement of Defense Costs that are reasonable and necessary. The hourly rates of attorneys for the approved firms, including Leon Cosgrove and for Mitchell Silberberg, are capped under the IFA. Quiros must submit to Ironshore detailed invoices of any approved firms for Ironshore's full review before any Defense Costs are advanced.

11. The IFA requires Quiros to repay all Defense Costs advanced to him if Ironshore prevails and coverage is denied in the Coverage Action.

12. The Motion filed by Quiros' former attorneys is improper to the extent it seeks an order from the Court in the SEC Action to require Ironshore to pay $1 million to Leon

Cosgrove and Mitchell Silberberg, including for the following reasons.

13. Ironshore has yet to advance (i.e., pay) any Defense Costs under the IFA to Quiros or any approved firm.

14. Additionally, Quiros has asserted that the fees and costs incurred by Leon Cosgrove and Mitchell Silberberg are excessive and unreasonable. Ironshore cannot advance Defense Costs that are unreasonable. Therefore, Defense Costs to be advanced under the IFA are likely to be less than $1 million.

15. Ironshore contends it has no contractual obligations to Leon Cosgrove or Mitchell Silberberg. Neither firm is a party to the IFA. Contrary to certain statements in the Motion, Ironshore disputes that the law firms are designated as third-party beneficiaries under the IFA or that Ironshore has any agreement with Leon Cosgrove or Mitchell Silberberg under the IFA.

16. In summary, it is for Ironshore to determine whether the fees and costs billed to Quiros by the approved firms from December 2016 through March 2017 have been reasonably and necessarily incurred, and there appear to be disputed issues of contract as set forth in Paragraphs 14 and 15 relating to the IFA. These contractual issues are not before the Court in the SEC Action.

17. The IFA includes a confidentiality provision, whereby the IFA, its terms, and negotiations leading up to it are to be kept confidential. Leon Cosgrove and Mitchell Silberberg have disclosed provisions of the IFA through the filing of the Motion. This Declaration is submitted for the limited purpose of rebutting certain assertions in the Motion and should not be deemed a waiver of the confidentiality rights or obligations under the IFA or of Ironshore's

right to enforce the confidentiality provisions of the IFA.

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

Joseph Galardi

Executed this 16th day of August, 2017.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12143

LEÓN COSGROVE, LLC and MITCHELL SILBERBERG & KNUPP LLP

Appellants,

v.

SECURITIES AND EXCHANGE COMMISSION et al.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

PRINCIPAL BRIEF OF APPELLANTS LEÓN COSGROVE, LLC AND MITCHELL SILBERBERG & KNUPP LLP

Scott B. Cosgrove
Fla. Bar No. 161365
James R. Bryan
Fla. Bar No. 696862
Jeremy L. Kahn
Fla Bar No. 105277
LEÓN COSGROVE LLC
255 Alhambra Circle, Suite 800
Coral Gables, Florida 33134
Tel: 305.740.1975
Fax: 305.437-8158
Email: scosgrove@leoncosgrove.com
Email: jbryan@leoncosgrove.com
Email: jkahn@leoncosgrove.com
Attorneys for Appellants

EXHIBIT
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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Circuit Rule 26.1-1, Appellants León Cosgrove, LLC Mitchell Silberberg & Knupp, LLP state that the following may have an interest in the outcome of this appeal:

AnC Bio Vermont GP Services, LLC

Akerman LLP

Berger Singerman, P.A.

Bloom, Mark D.

Bryan, James B.

Casey, Stephanie A.

CitiBank, N.A.

Colson Hicks Eidson, P.A.

Cosgrove, Scott B.

Damian & Valori, LLP

Damian, Melanie E.

Durrant, John S.

Galleria of Key Biscayne, Inc.

Garno, Danielle N.

Gayles, Honorable Darrin P.

Goldberg, Michael I.

Gordon, David B.

GrayRobinson P.A.

Greenberg Traurig, P.A.

Greenspoon Marder, P.A.

Grodin, Jaclyn H.

Group 7 Ad Hoc Committee

GSI of Dade County, Inc.

Hatic, Haas A.

Hiraide, Mark T.

Ironshore Indemnity, Inc.

Jay Construction Management, Inc.

Jay Peak Biomedical Research Park, L.P.

Jay Peak Golf and Mountain Suites L.P.

Jay Peak GP Services Golf, Inc.

Jay Peak GP Services, Inc.

Jay Peak GP Services Lodge, Inc.

Jay Peak GP Services Stateside, Inc.

Jay Peak, Inc.

Jay Peak Hotel Suites, L.P.

Jay Peak Hotel Suites Phase II L.P.

Jay Peak Hotel Suites Stateside L.P.

Jay Peak Lodge and Townhouses L.P.

Jay Peak Management, Inc.

Jay Peak Penthouse Suites L.P.

Kahn, Jeremy L.

Law Offices of Neil G. Taylor, P.A.

León Cosgrove, LLC

Levenson, Robert K.

Levit, Joan M.

Lichtman, Charles H.

Martin, Christopher E.

Martinez, Roberto

Mitchell Silberberg & Knupp, LLP

Nogues, Jean Pierre

North East Contract Services, Inc.

Pardo Jackson Gainsburg, P.L.

Q Burke Mountain Resort, LLC

Q Resorts, Inc.

Quiros, Ariel

Schnapp, Mark P.

Securities and Exchange Commission

Stenger, William

Stetson, Karen L.

Taylor, Neil G.

Visconti, Melissa D.

Worton, Linda G.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant León Cosgrove, LLC submits the following corporate disclosure statement stating that it has no parent corporation and there is no publicly held corporation that owns ten percent or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Mitchell Silberberg & Knupp LLP submits the following corporate disclosure statement stating that it has no parent corporation and there is no publicly held corporation that owns ten percent or more of its stock.

LEÓN COSGROVE, LLC
255 ALHAMBRA CIR. | SUITE 800 | CORAL GABLES, FL 33134 | T 305.740.1975 | WWW.LEONCOSGROVE.COM

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STATEMENT REGARDING ORAL ARGUMENT

This appeal concerns a de novo review of rulings by the District Court and involves, in part, issues of first impression with significant implications, including regarding the appropriate scope and administration of asset freezes in Securities and Exchange Commission ("SEC") enforcement actions and the SEC's potential power to restrain a director's or officer's ability to fund his or her defense using insurance proceeds under a standard D&O policy issued primarily for the protection of such a director or officer. Appellants believe that oral argument would be of assistance to the parties and the Court in resolving these issues.

STATEMENT REGARDING JURISDICTION

The District Court had subject-matter jurisdiction over this action pursuant to Sections 20(b), 20(d), and 22(a) of the Securities Act, 15 U.S.C. §§ 77t(b), 77t(d), and 77v(a); Sections 21(d), 21(e), and 27 of the Exchange Act, 15 U.S.C. §§ 78u(d), 78u(e), and 77aa; and 28 U.S.C. § 1331.

This Court has subject-matter jurisdiction to determine the appeal, which is taken from a denial of a motion to intervene and an order denying reconsideration of the denial of the motion to intervene. *See Fox. v. Tyson Foods*, 519 F.3d 1298, 1301 (11th Cir. 2008). Under the "anomalous rule," the Court has "'provisional jurisdiction' to determine whether the district court erroneously concluded that the appellants were not entitled to intervene as of right under [Federal Rule of Civil Procedure 24(a)]." *Id.* (alterations in original). "If the district court erred when it denied intervention of right," the Court has "jurisdiction to reverse the denial of the motion to intervene." *Id.* Here, the Court has jurisdiction because the district court erred when it denied intervention as of right.

For the reasons set forth in Appellants' Response to the Motion to Dismiss this Appeal, this issue is ripe and Appellants are not seeking an improper advisory opinion regarding a contingent payment.

The District Court entered the orders appealed from on April 6, 2017 and April 11, 2017. Appellants timely filed their Notice of Appeal on May 8, 2017.

STATEMENT OF ISSUES

I. Whether the District Court erred in denying Appellants' motion to intervene as of right when (a) Appellants, who were former defense counsel in the case below, were intended third-party beneficiaries under an agreement between their client and a non-party insurer who was about to make payments from its own funds to Appellants; (b) the SEC and the appointed receiver had taken the position that an asset freeze order barred payment by a non-party insurer from its own funds to a defendant's attorneys; (c) all the parties to the action and their counsel opposed Appellants' interests; (d) the intervention was discrete, concerning the specific scope of one ruling by the District Court; and (e) Appellants expeditiously moved to intervene.

II. Whether the District Court erred in issuing a ruling on whether its asset freeze extended to payments to defense counsel by a non-party D&O insurer from its own funds, even though no party in the case moved for a ruling on that issue and the District Court denied Appellants' motion to intervene to raise that precise issue.

III. Whether the District Court erred in ruling that its asset freeze order applied to payments by a non-party D&O insurer from its own funds to Appellants.

I. STATEMENT OF THE CASE

A. Course of Proceedings in the Court Below

This appeal arises from León Cosgrove, LLC (LC) and Mitchell, Silberberg & Knupp, LLP's ("MSK" and, collectively with LC, "Appellants") representation of Ariel Quiros ("Quiros") in a number of related matters, including an SEC enforcement matter.

The SEC filed the instant action on April 12, 2016 and immediately sought and received an order granting a TRO, asset freeze, and other relief. In granting the requested relief, the District Court appointed Michael I. Goldberg, as receiver ("Receiver"), an experienced receiver with close ties to the SEC. (ECF Nos. 11-13, 17.)[1]

On April 19, 2016, Quiros moved the District Court to allow frozen assets to be used to pay his attorneys. (ECF No. 39 – Pg. 14-16.) On May 27, 2016, the District Court granted the motion and indicated that a multi-million dollar luxury condominium belonging to Quiros could be used to pay counsel. (ECF No. 148 – Pg. 3.) For months, the District Court made no change or modification to this ruling. Appellants submitted bills periodically to the District Court for approval. (ECF Nos. 109, 192, and 219.) While the District Court did not find fault with the amount

[1] The relevant docket entries cited herein are attached as Composite Exhibit 1 and refer to the docket entries in the District Court.

Appellants had billed, on October 20, 2016, the District Court awarded Appellants only $80,000 of the $1.5 million then owing. (ECF No. 232.)

Appellants then sought other funding sources for Quiros's defense. Quiros's insurer, Ironshore Indemnity, Inc. ("Ironshore"), had previously denied Quiros insurance coverage for advancement of defense costs. Later, after filing a separate action against Ironshore on Quiros's behalf for advancement of defense costs (the "Coverage Action"), LC secured an agreement from Ironshore called an Interim Funding Agreement ("IFA"). The IFA – which has a strict confidentiality provision, preventing Appellants from filing it without Ironshore's consent – provided that Ironshore would pay Appellants directly for their prospective services (as well as services in the prior month of December). Ironshore would continue to contest coverage in the Coverage Action, but the IFA provided that, even if Ironshore won the Coverage Action, it would not require the Appellants to return any payments made under the IFA.

The purpose of the IFA was to ensure that Quiros, Ironshore's insured, had a continued defense in the actions against him while the Coverage Action was pending. In other words, the IFA induced Appellants to remain as Quiros's counsel during the pendency of the Coverage Action, and assured that they would be paid for services going forward regardless of the result of the Coverage Action. To that end, Appellants were named in the IFA as specifically "Approved Firms" with

approved rates.

In early December 2016, at or about the time that the parties agreed to the IFA, Appellants informed the Receiver that they were being paid under an agreement with Ironshore. Neither the Receiver nor the SEC objected.

Months later, just as Ironshore was about to make its first payments to Appellants, a representative from the offices of the Receiver reached out to Ironshore to prevent payment, suggesting for the first time that such payments might violate the asset freeze. Appellants believe the Receiver and SEC wanted to punish LC and MSK for not being sufficiently compliant in settlement negotiations.

In an abundance of caution, on March 13, 2017, LC and MSK filed a motion on Quiros's behalf to clarify, or in the alternative modify, the asset freeze order to confirm that Ironshore's payments to Appellants did not violate the asset freeze. (ECF No. 288.) Immediately prior to the due date for the SEC's opposition brief, Quiros replaced LC and MSK as his counsel with Melissa Damain Visconti of Damian & Valori ("DV"), an attorney with close ties to the Receiver. DV first postponed the hearing date on the attorneys' fees motion and then took it off calendar and withdrew the motion to clarify, meaning that no party to the case would ask the Court for a ruling on the motion. (ECF Nos. 295, 296, 299.) The Receiver, SEC, and DV filed a separate motion, providing that DV would be paid up front for legal services. (ECF No. 300.) The District Court approved that joint motion.

LC and MSK then moved to intervene, incorporating by reference the arguments in the initial motion to clarify or modify the asset freeze. (ECF No. 303.) The District Court denied this request based on an apparent misunderstanding of the essential, indisputable facts, as described in detail below. LC and MSK then moved for reconsideration of the District Court's denial of its motion to intervene, trying to point out the District Court's apparent misunderstanding of crucial facts. (ECF No. 311.) The District Court denied that motion also, again making factual assumptions that, though different than the District Court's previous misunderstandings, were similarly erroneous. (ECF No. 312.) LC and MSK timely appealed. (ECF No. 312.)

B. Statement of Facts

1. Apr.-May 2016: The Asset Freeze and Initial Request for Fees

The SEC filed the action below against Quiros and others on April 12, 2016 and immediately commenced proceedings to enter a temporary restraining order, asset freeze, and other relief, including the appointment of a receiver. (ECF No. 1.) The District Court granted the relief, including the entry of an asset freeze and the appointment of the Receiver for the entity defendants, and the parties commenced litigation of a preliminary injunction. (ECF Nos. 11, 13.)

On April 19, 2016 (*i.e.*, prior to incurring nearly all of the attorneys' fees now owing), Appellants (on behalf of Quiros) moved the District Court for a ruling

allowing the use of frozen assets to pay his attorneys. (ECF No. 39 at 14–16.) On May 27, 2016, the District Court granted that motion, stating: "[T]he Court does find that Quiros should be able to pay reasonable living expenses and to retain and pay counsel." (ECF No. 148 at 3.) The District Court noted that it "cannot assume the wrongdoing before judgment in order to remove the [D]efendants' ability to defend themselves." (*Id*.)

2. May-Oct. 2016: Quiros's Attorneys Incur Substantial Costs

Relying on the District Court's assurances, as well as Quiros's assurances that he would support applications to the District Court for attorney fees, Appellants incurred substantial bills for work performed on behalf of Quiros. This included significant out-of-pocket expenses as well as opportunity costs. Quiros submitted three fee applications to the District Court:

- On May 6, 2016, Quiros moved the District Court for payment of MSK and for other lawyers' fees and costs. (ECF No. 109.) The motion sought payment of $204,852 to pay MSK's fees, as well as additional amounts for other lawyers and experts. Quiros was informed of this motion and explicitly supported the application. The court did not rule on this motion until October 20, 2016. (ECF No. 232.)
- On July 25, 2016, Quiros moved the District Court for additional payment of

Appellants' and other lawyers' fees and costs. (ECF No. 192.) The motion sought payment of approximately $580,000 to pay Appellants' fees and costs. Quiros was informed of this motion and explicitly supported the application. The court did not rule on this motion until October 20, 2016. (ECF No. 232.)

- On September 27, 2016, Quiros moved the District Court for additional payment of Appellants' and other lawyers' fees and costs. (ECF No. 219.) The motion sought payment of approximately $534,000 to pay Appellants' fees and costs, and certain other amounts for other law firms. Quiros was informed of this motion and explicitly supported the application.

3. Oct. 2016: District Court Awards About 5% of the Fees Incurred

On October 20, 2016, the District Court awarded MSK and other law firms a total of only $80,000 out of more than $1.5 million incurred and owing (not including amounts that had subsequently been billed in September and October 2016). (ECF No. 232.) The District Court had given no prior indication that such a small percentage of defense counsels' fees would be paid and did not make any determination that the amounts incurred by Quiros's counsel were excessive or improper. At an October 20, 2016 hearing, the District Court did state, however, that Appellants could apply for further fees.

4. Nov.-Dec. 2016: Appellants Secure Funding for Quiros's Defense

Without any assurance of further payment, Appellants were on the verge of withdrawing as counsel. They stepped up efforts against Quiros's insurer Ironshore, which had previously denied coverage. In December 2016, LC filed the Coverage Action on behalf of Quiros against Ironshore seeking advancement of Quiros's defense costs in the SEC action and several other actions against Quiros.

Shortly afterward, Appellants had secured the IFA, pursuant to which Ironshore agreed to pay only fees and costs incurred by specifically-named law firms (including Appellants) in defending Quiros in the SEC action and other actions from December 1, 2016-on, up to a specified cap or until the occurrence of specific triggering events (including a final judgment of no coverage for advancement of defense costs in the Coverage Action).

Thus, despite Ironshore contesting any obligation to actually pay for Quiros's defense costs under the Ironshore Policy, it agreed via the IFA to nevertheless advance defense costs while the Coverage Action was pending.[2]

The IFA was and is highly confidential. The confidentiality language

[2] Even if the Coverage Action were unsuccessful, Appellants would not have to return any defense costs advanced. Thus, the outcome of the Coverage Action cannot have any effect on Appellants' current right to payment or their ability to retain such payments.

prevented the IFA from being filed without the consent of the parties to the IFA, Ironshore and Quiros. Without such permission, Appellants did not file the IFA in the District Court.

5. Dec. 2016: The Receiver is Notified that Quiros's Defense Would be Paid Through Insurance

At or about this time, in early December 2016, Appellants told the Receiver that they intended to use insurance proceeds to be paid, and informed the Receiver of the ongoing Coverage Action. The Receiver did not object in any way, nor did he indicate that he felt insurance proceeds were part of the asset freeze. Appellants understand that the SEC also was fully apprised that Appellants intended to be paid through insurance. The SEC also did not object.

6. Dec. 2016-Mar. 2017: Quiros Authorizes Submission of Bills to Insurer and Induces Further Performance from Appellants

Quiros supported the submission of the amounts being incurred by Appellants to Ironshore for payment under the IFA. He repeatedly implored Appellants to keep working for him, even though he owed both firms mounting amounts of money. He induced further performance by repeatedly and profusely expressing gratitude to counsel and begging them for sympathy:

> "***David, I just want to thank you for your efforts, and to please stay next to me until it's over. I believe in your efforts and talent. We will get a break soon. The law and truth has to prevail. Thank you on all fronts. It must be***

hard …"

(ECF No. 311 at 2, A. Quiros in a text to D. Gordon of MSK, March 9, 2017 (*i.e.*, 16 days before he terminated Appellants).)

7. Feb.-Mar. 2017: The Receiver and SEC Try to Thwart Payment to Appellants

Right as Ironshore was about to pay Appellants, rather than call Appellants to discuss the matter, a representative of the Receiver called Ironshore to object to payment. This concerned Appellants, who believed the SEC had previously falsely alleged wrongdoing by Quiros's counsel in an attempt to gain leverage.

8. Feb. 2017-Present: The Receiver and SEC Provide No Authority Supporting Extending an Asset Freeze to Insurance Proceeds Used for Defense Costs

At no time has the SEC or Receiver provided any authority to the District Court or Appellants that insurance money used for defense costs is part of an asset freeze.

9. Mar. 2017: In an Abundance of Caution, a Motion to Clarify/ Modify the Asset Freeze

Now concerned that the Receiver and SEC might allege that taking insurance money was a violation of the District Court's asset freeze order, Appellants, on behalf of Quiros—in an abundance of caution—moved the District Court on

March 13, 2017 for clarification or modification of the asset freeze to allow payment to Appellants from the IFA. (ECF No. 288.)

10. Mar. 2017: An Apparently Coordinated Effort to Fire Appellants Prior to Payment of Fees

Rather than oppose the motion for clarification or modification of the asset freeze, the Receiver and SEC coordinated with Quiros's new counsel, DV, to prevent a hearing:

- On Saturday, March 25, 2017, without prior notice to Appellants, DV appeared for Quiros (ECF No. 294). This was two days before the SEC and Receiver's oppositions to the motion for clarification were due.
- On March 27, 2017, and again without consulting with Appellants, DV requested to continue the hearing on the motion for clarification (ECF No. 295), and the hearing was continued to April 12, 2017 (ECF No. 296).
- Then, on March 31, 2017, DV filed a Motion To Withdraw the Motion for Clarification (ECF No. 299), thus risking leaving unsettled whether Ironshore's payment to Appellants would violate the asset freeze. Importantly, DV's actions also meant that no party to the action would bring a motion to clarify or modify the asset freeze, seeking the relief sought by Appellants.
- Immediately afterward, DV filed an Agreed Motion to Modify Asset Freeze

Order (ECF No. 300), which asked the District Court to confirm that Ironshore could pay new counsel without violating the asset freeze.

- So, while the SEC and Receiver had *opposed* payments to Appellants, they had *allowed* it for Quiros's new counsel.

11. Mar. 2017: The District Court Awards Relief to New Counsel

On March 31, 2017, the District Court issued an order granting the Agreed Motion, stating: "The Asset Freeze Orders [ECF No. Nos. 11 and 238] are modified to authorize Ironshore Indemnity, Inc. to pay $100,000 to Damian & Valori LLP, without prejudice to Damian & Valori LLP's ability to request the payment of additional defense costs under the Ironshore Policy at a later date."[3] (ECF No. 301.)

Recently, the Receiver and DV filed a further application for $175,000 in additional funds (from frozen assets) to pay DV's bills, which the District Court granted.

12. Mar. 2017-Apr. 2017: Appellants Attempt to Intervene

Appellants then moved to intervene, to have the District Court determine whether payment to Appellants by Ironshore, which Ironshore had already agreed to make, would violate the asset freeze. (ECF No. 303.) The District Court denied this

[3] DV is not an approved law firm under the IFA and Ironshore has not made payment to DV. The District Court's order merely authorizes payment to DV.

request, but based its ruling on a misunderstanding of the issues: "The Court does not find it appropriate to resolve a private attorney's fee issue between Quiros and his prior counsel in this action." (ECF No. 310.)

In fact, Appellants did *not* ask the District Court "to resolve a private attorney's fee issue between Quiros and his prior counsel in this action." They asked only that the District Court follow a line of cases (discussed below) in clarifying that its Asset Freeze Order (ECF No. 11) does not apply to Ironshore's payment of insurance proceeds for defense costs. If there remained a dispute about amounts owing to Appellants, Quiros had every right to commence an arbitration proceeding regarding that issue. He has not done so.

13. Apr. 2017: Appellants Seek Reconsideration

Appellants then moved for reconsideration of the denial of their motion to intervene. (ECF No. 311.) The District Court summarily denied this motion too, stating:

> ENDORSED ORDER denying 311 Leon Cosgrove, LLC and Mitchell, Silberberg & Knupp LLP's Motion for Reconsideration Regarding Motion to Intervene for the Limited Purpose of Addressing Scope of Asset Freeze. While this Court has the authority to permit intervention by Leon Cosgrove, LLC and Mitchell, Silberberg & Knupp, LLP, Quiros's former counsel, it is not warranted here for three reasons. First, the insurance proceeds at issue are clearly covered by the broad scope of the Court's asset freeze order. In fact, all parties to this action recognize that as set forth in their Agreed Motion to

> Modify Asset Freeze Order [DE 300]. Second, there is no need to address the specific scope of the asset freeze until Judge Cooke renders a decision in the separate action to determine whether insurance proceeds may be used to pay Quiros's attorneys' fees. In that action, the insurance company asserts that attorneys' fees are excluded from coverage under the policy. Third, Quiros's former counsel attempts to assert a position on behalf of Quiros which may conflict with Quiros's position and ability to negotiate with the insurance company in the insurance coverage action. In fact, Quiros was able to obtain an agreement to release some of the insurance proceeds at issue and objects to the instant motion to intervene. Accordingly, the Court declines to reconsider its prior ruling. Signed by Judge Darrin P. Gayles

(ECF No. 312.)

Unfortunately, in making this ruling, the District Court repeatedly misstated the facts set forth in submissions to the District Court, and jumped to conclusions that were not legally warranted:

- First, the District Court—without citing any authority and without allowing Appellants intervention to argue the issue—concluded that insurance used for defense costs is subject to the asset freeze. The District Court also relied on the apparent view of *current* counsel for Quiros, the SEC, and the Receiver regarding the proper scope of an asset freeze. But the scope of an asset freeze with regard to an affected third-party is a function of law, not the collusive preferences of the parties or their lawyers.
- Second, the District Court mistakenly believed that the ongoing Coverage

Action concerned or affected the funding source from which Appellants would be paid. This was wrong. As noted, the ongoing litigation concerned potential payment under an *insurance policy*. The IFA was a *separate, private contract* through which Ironshore agreed to pay Appellants, in order to make sure that those firms did not withdraw. The ongoing Coverage Action does not concern that narrow agreement because Ironshore has already separately agreed to pay Appellants under the IFA.

- Third, the District Court claimed that Appellants were asserting claims "on behalf of Quiros" through their attempt to intervene. This was incorrect. Appellants were asserting claims on their own behalf. Moreover, the position taken by Appellants cannot impact Quiros's coverage arguments or positions because it only concerns the scope of the asset freeze rather than the Ironshore Policy.
- Fourth, the District Court incorrectly assumed that "Quiros was able to obtain an agreement to release some of the insurance proceeds at issue." But there was no evidence of this, and Quiros had not secured any agreement from any insurer to pay his new counsel. Instead, the District Court conflated Appellants efforts to secure the IFA with DV's ability to collude with the Receiver and SEC without any agreement by Ironshore.

14. Apr. 2017: The District Court Allows the Use of Frozen Assets to Pay New Counsel "Up-Front" for Services

On April 26, 2017, after refusing to authorize payment to Appellants, the District Court allowed frozen assets to be used to pay DV's fees. (ECF No. 320.) DV's claim that such amounts will be reimbursed through insurance is without legal or factual support. (*See* ECF No. 319.)

15. May-June 2017: Appellants Appeal and SEC Moves to Dismiss

Appellants appeal the denials of their intervention and reconsideration motions. The SEC has filed a Motion to Dismiss this Appeal, which has been briefed and will be decided with this Appeal. Although counsel for the Appellants explained the difference between the IFA and the Ironshore Policy, the SEC filed its Motion without addressing the IFA or its own statements to the District Court indicating that payment from Ironshore to Appellants was imminent.

II. SUMMARY OF ARGUMENT

The District Court erred in denying Appellants' motion to intervene, because Appellants had a "direct, substantial, and legally protectable" interest in the subject matter of the underlying litigation. Appellants are intended third-party beneficiaries under the IFA, an agreement by which Ironshore, a non-party, agreed to pay Appellants from its own funds in exchange for Appellants not withdrawing as counsel. Moreover, intervention was warranted because the parties to the litigation

and their counsel were hostile to Appellants' claims and undertook a coordinated effort to redirect payments due to Appellants under the IFA to DV.

Even if the District Court did not err in denying Appellants' motion to intervene, the relief sought by Appellants could have been properly sought by Appellants without intervening as a motion to modify the asset freeze. The District Court erred in not considering the Appellants motion as a motion to modify.

Despite denying Appellants motion to intervene, the District Court violated Appellants' due process rights, and exceeded its jurisdiction, by nonetheless apparently ruling that the District Court's asset freeze barred Appellants' receipt of money owed to them by non-party Ironshore even though no party had raised that issue and the District Court denied Appellants—the only ones raising the issue—the right to intervene to raise that particular issue.

The District Court also erred on the substance – the asset freeze did not bar Appellants' receipt of money from Ironshore.

III. STANDARD OF REVIEW

The denial of Appellants' motion to intervene as of right is reviewed de novo, with subsidiary findings of fact reviewed for clear error. *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1301 (11th Cir. 2008) ("We review the denial of a motion to intervene of right de novo. We review subsidiary findings of fact for clear error.. . . Although orders denying a motion to intervene are not final orders, under the

'anomalous rule' we have 'provisional jurisdiction' to determine whether the district court erroneously concluded that the appellants were not entitled to intervene as of right under Federal Rule of Civil Procedure 24(a), or clearly abused its discretion in denying their application for permissive intervention under Rule 24(b)." (alterations and quotation marks omitted).)

Review of the District Court's denial of Appellants due process rights is de novo. *See Lonyem v. United States Att'y Gen.*, 352 F.3d 1338, 1341 (11th Cir. 2003) (constitutional challenges, including due process claims, reviewed de novo.)

IV. ARGUMENT

A. The District Court Erred in Denying Appellants' Motion to Intervene

1. Appellants Met the Standard for Intervention as of Right

Under Rule 24(a)(2), a party is entitled to intervention as a matter of right if the party's interest in the subject matter of the litigation is direct, substantial and legally protectable." *Mt. Hawley Ins. Co. v. Sandy Lakes Props., Inc.*, 425 F.3d 1308, 1311 (11th Cir. 2005) (quoting *Georgia v. United States Army Corps of Eng'rs*, 302 F.3d 1242, 1249 (11th Cir. 2002)). The putative intervenor's "interest need not [] 'be of a legal nature identical to that of the claims asserted in the main action.' Inquiry on this issue 'is a flexible one, which focuses on the particular facts and circumstances surrounding each motion for intervention.'" *DeVault v. Isdale*,

No. 6:15-cv-135-Orl-37TBS, 2015 U.S. Dist. LEXIS 137684, at *10 (M.D. Fla. Oct. 8, 2015) (quoting *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989)).

The District Court erred in denying Appellants' motion to intervene. Appellants were intended third-party beneficiaries under the IFA because they were specifically designated recipients of money under the IFA. *See, e.g.*, *Carvel v. Godley*, 939 So.2d 204, 207–08 (Fla. 4th DCA 2006) (quoting *Moyer v. Graham*, 285 So 2d 397, 402 (Fla. 1973)) ("A known beneficiary is owed the same duty and is entitled to the same remedy as the party to a contract."); *see also, M-I LLC v. Util. Directional Drilling, Inc.*, 872 So.2d 403, 404 (Fla. 3d DCA 2004) (third party designated to receive payment in a contract is an intended third-party beneficiary).

Because questions were raised by the SEC and the Receiver regarding whether the District Court's asset freeze applied to payments by Ironshore, Appellants had a "direct, substantial, and legally protectable" third-party beneficiary right to be heard in the adjudication of whether the asset freeze applied to payments by Ironshore.

After all, the IFA did not provide that money would be paid to Quiros, DV, the SEC, the Receiver, investors, or anyone else; *only* certain law firms designated in the IFA could receive money under that agreement and such firms would receive such funds directly (not through Quiros). The District Court denied intervention and thereby left adjudication of the matter in the hands of the current parties to the lawsuit, who had collusively sought to undermine Appellants' attempts to receive

money from Ironshore.

The Appellants' interest in the underlying matter is more than merely economic. *C.f. Mt. Hawley*, 425 F.3d at 1311 ("a legally protectable interest is something more than an economic interest.").[4] While the Appellants here – like most intervenors – certainly have an economic motivation in seeking to intervene, they also have a substantive, non-speculative, non-contingent interest in the outcome, as intended third-party beneficiaries under the IFA.

Other courts have granted intervention by beneficiaries of key contracts. For instance, in *Cox Enters. v. News-Journal Corp.*, the court allowed former employees of a defendant corporation in receivership to intervene, finding that the former employees "have alleged an interest to the property at issue, namely the distribution of [the defendant's] assets to fund the Pension Plan." No. 6:04-cv-698-Orl-28KRS, 2009 U.S. Dist. LEXIS 80585, at *8 (M.D. Fla. Aug. 24, 2009). Similar to

[4] For instance, in *Mt. Hawley*, the motion to intervene in an insurance coverage action was denied because the putative intervenor "fails to cite any legally protectable interest and states only that there will be less money available from which he can recover his wrongful death damages if [the insurer] is released from defending and providing coverage to [the defendants]. Further, [the intervenor's] interest is purely speculative because it is contingent [intervenor's] prevailing against [the defendants] in the wrongful death action." *Mt. Hawley*, 425 F.3d at 1311. Here, by contrast, LC and MSK had a legally protectable interest, as third-party beneficiaries, in the IFA, and their interests thereunder were not based on any contingent outcome in the SEC Action. LC and MSK therefore have more than a mere economic interest in the outcome of the court's ruling modifying the asset freeze.

employees' contractual rights in regard to the pension plan, Appellants here are intended third-party beneficiaries of the IFA.[5]

Moreover, Appellants here were asking the District Court to make a substantive ruling: *i.e.*, to apply the law and modify its asset freeze (or clarify its scope). Unlike the cases in which intervention was properly denied, the attempted intervention here concerned arguments and authority only the Appellants would present, given that DV, the SEC, and the Receiver were united in their hostility to the interests of Appellants. Accordingly, intervention as of right should have been granted.

2. There is no Doctrine Barring Intervention in SEC Enforcement Actions

In the Court below, the SEC argued that Appellants could not intervene, because intervention is always disallowed in enforcement actions under Section 21(g) of the Exchange Act. (ECF 306 – Pg. 4.) Section 21(g) provides that:

> . . . no action for equitable relief instituted by the Commission pursuant to the securities laws shall be

[5] Accordingly, in *Skinner Pile Driving, Inc. v. Atl. Specialty Ins. Co.*, the court explained that the would-be intervenor therein "has not claimed it is a party to the Atlantic insurance policy *and has not claimed a legally protectable interest in that policy* (*e.g.*, additional named insured; *third-party beneficiary status*)." No. 14-00329-N, 2015 U.S. Dist. LEXIS 41417 at *11 (S.D. Ala. Mar. 31, 2015) (citing *Mt. Hawley*, 425 F.3d at 1310) (emphases added). In applying *Mt. Hawley*, the court in *Skinner Pile Driving* thereby expressly noted, in dicta, that a party's status as a third-party beneficiary to an insurance contract, like the Interim Funding Agreement here, would suffice as a legally protectable interest warranting intervention.

> consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

15 U.S.C. §78u(g)(1).

The Section makes no mention of intervention, let alone an otherwise mandatory intervention, like that in the instant case. And, though the case law was generally unfavorable the SEC, the SEC told the District Court "that the statute operates as an 'impenetrable wall' to a third party intervening in a Commission enforcement action absent the Commission's consent." (ECF 306 – Pg. 4.) In support of this inaccurate statement, the SEC proffered several decisions that happened to deny intervention, largely in the context of *permissive intervention*. (*Id*.) It neglected to address the arguments or authority that the instant intervention met the standard for mandatory intervention. The SEC nonetheless encouraged the District Court to adopt an extreme outcome: namely, that Appellants would never be heard regarding whether the asset freeze prevents them from being paid for defense costs.

As Appellants made clear below, the SEC's argument was not supported by the law. There are numerous cases in which courts have allowed intervention in SEC cases. *See, e.g., SEC v. Flight Transp. Corp.*, 699 F.2d 943, 949-50 (8th Cir. 1983) (finding that Section 21(g) does not prohibit all intervention in SEC actions,

but implies that the issue must be decided on a case-by-case basis); *SEC v. Credit BanCorp, Ltd.*, 194 F.R.D. 457, 465-66 (S.D.N.Y. 2000) (same).

Importantly, none of the cases relied upon by the SEC involved an "intervention" as discrete as the instant case – *i.e.*, not on the merits but for one hearing to clarify or modify the District Court's own ruling. And, the central rationale for the interpretation of 21(g) advanced by the SEC, was not present in this case. *SEC v. One or More Unknown Traders*, 530 F. Supp. 2d 192, 195 (D.D.C. 2008), relied upon by the SEC, explained that "squarely within Congress's crosshairs" when it enacted 21(g) was the risk of "significant[] delay."

And, in some cases, this rationale holds – for instance, a private plaintiff intervening in an SEC enforcement action designed to protect investor interests could gunk up the works, making litigation or settlement more complicated. But – in this case – one short hearing would not have caused *any* delay.

3. Even if Appellants Did Not Meet the Standard for Mandatory Intervention, Appellants Had the Right to Be Heard as Affected Parties Seeking to Modify the Asset Freeze

Even if Appellants could not properly intervene, the Court should have heard the motion as a motion to modify the asset freeze. A third party affected by an injunction may bring a motion to modify and narrow a Preliminary Injunction order. *United States v. Board of School Commrs. of City of Indianapolis*, 128 F.3d 507, 511

(7th Cir. 1997) ("[A]ny person bound and significantly constrained by an equitable decree may present evidence to show that the decree should be lifted even if the primary wrongdoer is someone else."); *FTC v. Global Mktg. Group*, 2008 U.S. Dist. LEXIS 46848, *2, 2008 WL 2477641 (M.D. Fla. June 17, 2008) (allowing a third party to modify an injunction over a Receiver's objection); *SEC v. Versos Partners, Inc.*, 2015 U.S. Dist. LEXIS 135638, *2, (S.D. Ind. Oct. 5, 2015) (allowing a third party to modify an asset freeze).[6] Accordingly, this Court should consider and rule on the substantive issue of the Scope of the Asset Freeze, even if it deems intervention was not mandatory.

B. The District Court Erred in Apparently Ruling that the Asset Freeze Extended to Insurance Proceeds Used for Defense Costs

1. The District Court Erred by Ruling on the Scope of its Asset Freeze without Allowing Intervention

Appellants sought to intervene to modify the Court's Asset Freeze Order to allow for the payment of funds under the IFA or, alternatively, to confirm that the

[6] Notably, a motion to modify need not meet the requirements for an intervention. *CFTC v. Battoo*, 66 F. Supp. 3d 1095, 1096 (N.D. Ill. 2014), aff'd sub nom. *CFTC v. Battoo*, 790 F.3d 748 (7th Cir. 2015) (considering but denying motion to modify preliminary injunction after previously denying motion to intervene). *United States CFTC v. Wilkinson*, 2016 U.S. Dist. LEXIS 165703, *10, 2016 WL 7014066 (N.D. Ill. Nov. 30, 2016); *see, e.g., U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1093 *3-5 (9th Cir. Cal. Jan. 12, 2010). If a court finds that a proposed consent judgment is unduly one-sided, calls for unfair actions against a nonparty, or would be unworkable or difficult to apply or enforce, it can reject or modify it. *NLRB v Brooke Indus.*, 867 F2d 434, 435 (7th Cir 1989).

Asset Freeze did not apply to funds under the IFA. Even though the District Court denied intervention, the District Court nonetheless seems to have ruled on the scope of the Asset Freeze Order:

> While this Court has the authority to permit intervention by Leon Cosgrove, LLC and Mitchell, Silberberg & Knupp, LLP, Quiros's former counsel, it is not warranted here for three reasons. First, the insurance proceeds at issue are clearly covered by the broad scope of the Court's asset freeze order. In fact, all parties to this action recognize that as set forth in their Agreed Motion to Modify Asset Freeze Order.

(ECF No. 312.)

There are a number of problems with the District Court's formulation. First, having denied intervention to Appellants, the District Court should not have ruled on the matter (*i.e.*, "the insurance proceeds at issue are clearly covered by the broad scope of the Court's asset freeze order"), much less used such a purported denial as a basis to deny intervention. By denying intervention and ruling against Appellants, the Court denied Appellants' due process. *See Edwards v. City of Houston*, 78 F.3d 983, 989 (5th Cir. 1996) (reversing trial court order denying motion to intervene and vacating judgment approving consent decree where "would-be intervenors complained that their interests were not adequately represented by the parties in the negotiation and drafting of this Consent Decree, and as a result it impairs their interests").

Second, none of the "parties to the action" represented Appellants' interests. The District Court's reliance in denying intervention on what the parties to the action wanted only furthered the Orwellian injustice of the situation. After all, DV, the Receiver, and counsel for the SEC had collusively sought to stand in the way of payment; DV, the SEC, and Receiver joined in agreed motions, which expressly sought to have the amounts contemplated in the IFA paid to DV for future work (rather than Appellants for work already performed), apparently believing that the IFA would allow such payments (it would not). (ECF Nos. 300, 301.) By preventing Appellants from being heard, the District Court essentially endorsed and enabled these collusive tactics. Because Appellants were denied intervention, the Court of Appeal should vacate the District Court's rulings on the scope of the asset freeze. *See id.*

Moreover, perhaps because the District Court did not allow intervention, the District Court's order got some basic facts wrong that were clearly set forth in Appellants submissions to the District Court. (*See, e.g.*, ECF No. 311.) The District Court then used those indisputable errors as yet further reason to deny intervention. The District Court stated:

> Second, there is no need to address the specific scope of the asset freeze until Judge Cooke renders a decision in the separate action to determine whether insurance proceeds may be used to pay Quiros's attorneys' fees. In that action, the insurance company asserts that attorneys' fees are

> excluded from coverage under the policy. Third, Quiros's former counsel attempts to assert a position on behalf of Quiros which may conflict with Quiros's position and ability to negotiate with the insurance company in the insurance coverage action. In fact, Quiros was able to obtain an agreement to release some of the insurance proceeds at issue and objects to the instant motion to intervene. Accordingly, the Court declines to reconsider its prior ruling.

(ECF No. 312.) The Court's factual predicates were all incorrect:

1. As set forth in Appellants' separately filed Opposition to the SEC's motion to dismiss, it is simply untrue that the IFA was being litigated in the Coverage Action before Judge Cooke. Rather, as was made clear in the submissions to the District Court (*See*, *e.g.*, ECF Nos. 288 – Pg. 1-5, 304 – Pg. 1-2 , 311 – Pg. 1-3), the IFA was an interim agreement to provide funding while that coverage action was ongoing.
2. The District Court's speculation that payment under the IFA would impact Quiros's "position and ability to negotiate with the insurance company in the insurance Coverage Action," was utterly baseless and – indeed – contrary to the very purpose of the IFA – *i.e.*, to provide interim funding while the Coverage Action was litigated.
3. The District Court's conclusion that "Quiros was able to obtain an agreement to release some of the insurance proceeds at issue" was also untrue and

erroneous. In fact, Quiros's replacement of his counsel provided Ironshore reason to discontinue its agreement to pay for Quiros's defense.

2. The District Court Erred by Ruling that its Asset Freeze Applied to Insurance Proceeds Used for Defense Costs

a) The SEC Unlawfully Sought to use an Asset Freeze to Prevent the Use of Insurance Proceeds for Defense Costs

Moreover, the District Court's apparent ruling on the scope of the asset freeze defies ready explanation and is inconsistent with the rulings of the other district courts.

As an initial matter, the plain language of the Asset Freeze Order did not actually preclude Ironshore's advancement of defense costs. Indeed, the Asset Freeze Order does not mention insurance at all. The first part of the Asset Freeze Order applies to "assets or property, including but not limited to cash, free credit balances, fully paid for securities, personal property, real property, and/or property pledged or hypothecated as collateral for loans, or charging upon or drawing from any lines of credit, owned by, controlled by, or in the possession of, whether jointly or singly." [DE 11 at 8.] The right to advancement of defense costs by Ironshore does not fall into any of the enumerated categories of "assets or property." Nor are the defense costs "owned by, controlled by, or in the possession of" Quiros or any other Defendant. While Quiros has a right to have these defense costs paid on his

behalf, he does not own or control the funds and the funds must be paid to his defense counsel.

The second part of the Asset Freeze Order applies to "[a]ny financial or brokerage institution or other person or entity holding any such funds or other assets, in the name, for the benefit or under the control of Defendant Quiros." [DE 11 at 9.] Here, Ironshore is not "holding any such funds or other assets" of Quiros, or even for his benefit. No funds have been deposited into an account with Ironshore. Instead, Ironshore is merely discharging a contractual duty—using its own funds—to pay for Quiros's defense costs.

Courts have held that asset freeze orders with language identical to this Court's Asset Freeze Order do not apply to advancements of defense costs by a D&O insurer. *SEC v. Morriss*, No. 4:12-CV-80 (CEJ), 2012 U.S. Dist. LEXIS 64465, at *6 (E.D. Mo. May 8, 2012) ("The SEC's argument is directed [at] the efforts of defendants to gain access to their own assets placed under an asset freeze. Morriss is not asking the Court to release frozen assets and the SEC's argument has no application here." (emphasis added)); *id.* at *16 ("[T]he asset freeze order previously entered does not bar Federal from disbursing proceeds to pay Morriss's defense costs in accordance with the policy's terms and conditions."). Indeed, it is telling that the SEC continues to use the same form proposed asset freeze order at issue in *Morriss* even after courts have held that it does not apply to the payment of

defense costs by an insurer.

The SEC and its appointed receivers have repeatedly sought to argue that the "interests of investors" should be placed above those of insureds seeking payment for defense costs. *See*, *Morriss*, 2012 U.S. Dist. LEXIS 64465, at *6, *16. While they high-mindedly invoke the "interests of investors," the SEC's tactics have another potential benefit to the SEC: denying defendants capable, independent counsel. In effect, the SEC has sought in this case and others to use asset freezes to deny counsel to defendants in enforcement actions (which naturally affects a defendants' settlement position). The courts have repeatedly rejected such tactics.

SEC v. Morriss provides a particularly well-reasoned and thoroughly researched discussion of the issue. In that case, the court held that asset freeze orders with language *identical* to the District Court's asset freeze order do not apply to advancement of defense costs by a D&O insurer. *Id.* at *6.

The SEC had sued defendant Morriss and four investment entities alleging that Morriss had misappropriated money from the investment entities, resulting in significant harm to investors. *Id*. at *2. The court in that case appointed a receiver and froze the assets of investment entities. Morriss sought to fund his defense with a D&O insurance policy purchased by one of the defendant investment entities. Over the objections of the SEC and Receiver, the court allowed Morriss to use the policy. *Id*. at *6 and *16. While the court noted the general principle related to asset

freezes that "a defendant cannot fund a defense with 'loot' or 'gleanings of a crime,'" the court nonetheless concluded that the asset freeze in that case did not extend to insurance proceeds used for defense costs.

The reasoning in *Morriss* finds broad support in both the case law regarding insurance law and cases involving SEC receiverships and asset freezes. Appellants discuss each of these aspects of the analysis below.

b) Applicable Ironshore Policy Language Bars Claims By SEC/Receiver Against the Ironshore Policy

The court in *Morriss* first looked to the underlying language of the insurance policy to measure the defendants' interest in coverage for defense costs against the SEC and receiver's potential claims on the policies. The aspects of the policy identified by the court in *Morriss*, each militate in favor of allowing payment under the IFA in this case:

(1) The Ironshore Policy Provides No Coverage for Indemnity for Fraud, Yet the SEC/Receiver's Claims All Concern Fraudulent Conduct and Disgorgement

The *Morriss* court noted that there would be no coverage for fraud under the policy; indemnity for fraud was barred by the law and public policy. The Ironshore policy in this case, like most insurance policies, also expressly excludes coverage for fraud. There is *no possibility* of indemnification for an SEC disgorgement claim or recovery by allegedly defrauded investors under the Ironshore Policy, which

specifically excludes coverage for indemnifying any claim arising out of the insured "gaining any profit or remuneration to which they were not legally entitled" or committing fraudulent acts.[7] (Ironshore Policy § III.A, ECF No. 288-1 at Pg. 10 of 64.)

Thus, if Quiros is ultimately required to pay a disgorgement award or reimburse allegedly defrauded investors, the Ironshore Policy's exclusions will necessarily bar indemnification for such an award. Consequently, preventing the advancement of defense costs will not further the Asset Freeze Order's goal of preserving funds for disgorgement or compensation of defrauded investors.[8] And, denying payment under the IFA would not increase the pool of assets for disgorgement by one cent.

[7] The Policy also expressly does not cover the payment of civil fines and penalties. This exclusion is also limited to payment of fines and penalties, and is expressly inapplicable to defense costs for claims seeking such fines and penalties.

[8] While these exclusions apply to indemnification, they do not apply to defense costs prior to the outcome of litigation because they are triggered only if there is a final adjudication that such triggering conduct occurred. *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562, 567 (5th Cir. 2010). It is well-established that "[t]he duty to defend is of greater breadth than the insurer's duty to indemnify, and the insurer must defend even if the allegations in the complaint are factually incorrect or meritless," and "[a]ny doubts regarding the duty to defend must be resolved in favor of the insured." *Jones v. Fla. Ins. Guar. Ass'n*, 908 So. 2d 435, 443 (Fla. 2005).

(2) The Ironshore Policy's Priority-of-Payments Provision Makes Clear That The SEC/Receiver's Claims are Subordinate to Appellants Claims

The *Morriss* court also noted that the "priority of payments provision" in the policy in that case required the insurer to pay claim to an "insured individual" before any others and the insurer must "advance defense costs on a current basis without regard to the potential for other future payment obligations.". *Id*. at *12-13. The same is true of the Ironshore Policy in this case.

That is, even if the Receiver had a property interest in Ironshore Policy proceeds, the Ironshore Policy prioritizes coverage for individuals such as Quiros over coverage for an entity, and prioritizes payment for defense costs before payment for indemnification. (Ironshore Policy § VI.F, ECF No. 288-1 at Pg. 15 of 64; Ironshore Policy, End. No. 9 at § VI(i), ECF No. 288-1 at Pg. 38 of 64.) Therefore, even if the Receiver were a competing claimant, claims for defense costs would take priority over other claims. *Morriss*, 2012 U.S. Dist. LEXIS 64465, at *12 (holding that, even if receiver had a cognizable claim under the D&O policy, the policy's priority-of-payments provision required that "any claim that the receiver may have for defense costs is subordinate to the coverage for Morriss and any other insured persons under Insuring Clause 1"); *In re Laminate Kingdom*, 2008 Bankr. LEXIS 1594, at *7–9 (holding that policy's priority-of-payments provision meant

that estate had "only a contingent, residual interest in the Policy's proceeds" so proceeds were "not considered to be property of the estate subject to a stay").

Accordingly, to the extent the Receiver has any property interest in Ironshore Policy proceeds, such interest is limited by the Ironshore Policy's priority-of-payments provisions. To ignore such provisions would impermissibly grant the Receiver greater rights than previously held by the entity in receivership, which originally contracted with Ironshore. *See In re Downey Fin. Corp.*, 428 B.R. 595, 607–08 (Bankr. D. Del. 2010).

c) The Reasoning of *Morriss* And Other Cases Allowing Payment Under Insurance Policies Notwithstanding Receiverships Applies With Even Greater Strength to the Instant Case

The reasoning of *Morriss* applies with even greater strength in this case. While the IFA provided for the advancement of insurance proceeds, it is a wholly separate contract from the Ironshore Policy. In fact, the IFA provides that payment could *only* be made to certain designated firms for defense costs. The IFA does not allow indemnity of any kind.

d) Appellants Actual Current Claims Under the Ironshore Policy Trump The SEC/Receiver's Hypothetical and Speculative Claims

The Receiver or SEC may contend that the payment of defense costs depletes available policy limits that the SEC or allegedly defrauded investors could

hypothetically recover. Case law expressly rejects efforts to put such conjectural claims ahead of the defense needs of insureds. *See In re CHS, Elecs., Inc.*, 216 B.R. 538, 542 (Bankr. S.D. Fla. 2001) (noting that "the goal of a D&O insurance policy [i]s the 'protection of individual directors and officers'"); *Ochs v. Lipson* (*In re First Cent. Fin. Corp.*), 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999) ("D&O policies are obtained for the protection of individual directors and officers. Indemnification coverage does not change this fundamental purpose. . . . In essence and at its core, a D&O policy remains a safeguard of officer and director interests and not a vehicle for corporate protection."). As noted, the terms of the Ironshore Policy reflect this by requiring that individual coverage be given priority, and that coverage for defense costs be paid prior to any indemnification. *See* Exhibit 1, Ironshore Policy, End. No. 9 at § VI(i) (providing that Ironshore shall "first pay such Loss for which coverage is provided under Section I.(A) of this Ironshore Policy [individual directors and officers coverage]"; Ironshore Policy § VI.F (Ironshore "shall advance Costs of Defense prior to the final disposition of any Claim.").

So, even absent the priority-of-payments provision, the equities would dictate that Appellants' current claims under the Ironshore Policy would trump the Receiver's hypothetical claims. Just like any other plaintiff, the Receiver's claims are uncertain and unproven while Appellants' claims for reimbursement of defense costs are real and immediate.

In such cases, courts have not hesitated to allow advancement of defense costs even assuming that the receiver has a property interest in the proceeds. *Narayan*, 2017 U.S. Dist. LEXIS 14424, at *19 ("The Court, therefore, finds there is a clear, immediate, and actual harm to Movants that greatly outweighs any speculative and potential harm to the Receivership Estate."); *SEC v. Stanford Int'l Bank, Ltd.*, No. 3:09-CV-298-N, 2009 U.S. Dist. LEXIS 124377, at *20–21 (N.D. Tex. Oct. 9, 2009) (holding that even if proceeds were property of receivership court would allow advancement of directors' defense costs under D&O policy where "the possibility that the D&O proceeds might one day be paid into the receivership does not justify denying directors' and officers' claims" and "[t]he potential harm to [the directors] if denied coverage is not speculative but real and immediate: they may be unable to defend themselves in civil actions in which they do not have a right to court-appointed counsel")[9])); *Salem Baptist Church of Jenkintown v. Fed. Ins. Co.* (*In re*

[9] In the analogous bankruptcy context, insured D&Os can generally obtain defense costs even where doing so diminishes available policy proceeds that could potentially go to the estate. *See In re Taylor Bean*, 2010 Bankr. LEXIS, 6532 at *13 ("Numerous courts have granted relief from the automatic stay to permit the advancement of defense costs to a debtor's directors and officers even though the insurance policies also provided direct coverage to debtor."); *In re Laminate Kingdom*, 2008 Bankr. LEXIS 1594, at *10 ("Because of the separate and distinct interests between the directors and officers and the debtor, numerous courts have granted relief from the automatic stay to permit the advancement of defense costs to a debtor's directors and officers—even though the insurance policies also provided direct coverage to debtor.").

Salem Baptist Church of Jenkintown), 455 B.R. 857, 864–65 (Bankr. E.D. Pa. 2011) ("Here, the Debtor has not obtained a judgment against the Eastburn Defendants. As a result, the Debtor is not entitled to injunctive relief barring the Eastburn Defendants from expending the proceeds of the Ironshore Policy."); *In re Laminate Kingdom, LLC*, 2008 Bankr. LEXIS 1594, at *11 (Bankr. S.D. Fla. Mar. 13, 2008) ("The Trustee's real concern is that payment of defense costs may affect his rights as a plaintiff seeking to recover from the D & O Policy rather than as a potential defendant seeking to be protected by the D & O Policy. In this way, Trustee is no different than any third party plaintiff suing defendants covered by a wasting policy." (quoting *In re Allied Dig.*, 306 B.R. at 513)); *In re CHS*, 261 B.R. at 542 ("One having a pending, unadjudicated tort claim against another does not . . . thereby have a property interest in liability insurance proceeds payable to the defendant.").

e) <u>The SEC/Receiver have no "Super-Powers" as a Plaintiff</u>

Like a bankruptcy trustee, the fact that the Receiver is a receiver "does not arm him with super-plaintiff powers in causes of actions between third parties." *In re CHS*, 261 B.R. at 544. Therefore, like any other plaintiff or potential plaintiff, the Receiver has no property interest in "the Proceeds which [he] seeks to protect to satisfy his claims if he obtains a judgment against the officers and directors." *Id.*; *see*

also Morriss, 2012 U.S. Dist. LEXIS 64465, at *13; *In re Laminate Kingdom*, 2008 Bankr. LEXIS 1594, at *11. The Receiver therefore lacks any power, or even standing, to challenge the advancement of defense costs for Quiros to mount a defense in any action against him. Only after obtaining a judgment against Quiros (or another insured) would the Receiver even have standing to make a claim under the Ironshore Policy. Fla. Stat. § 627.4136(1); *see also In re Salem Baptist*, 455 B.R. at 864. Accordingly, the Receiver currently has no standing in regards to the IFA.

A receiver may assert a claim to insurance proceeds only if it presently has a legally cognizable right to proceeds, such that the proceeds are property of the receivership estate. *See e.g.*, *SEC v. Narayan*, No. 3:16-cv-1417-M, 2017 U.S. Dist. LEXIS 14424, at *12–13, 19 (N.D. Tex. Feb. 2, 2017). The receiver "stands in the shoes" of the entity in receivership and "acquires no greater rights in property" than that entity. *Id.* at *13. While an insurance policy itself may be property of the receivership estate, "ownership of the policy does not dictate whether proceeds are part of the receivership estate." *Morriss*, 2012 U.S. Dist. LEXIS 64465, at *7. Indeed "many courts have made a distinction between insurance policies owned by a debtor and the proceeds payable under the policies, holding that the proceeds are not property of the estate where the debtor owns the policies but has no interest in the proceeds." *In re Taylor Bean & Whitaker Mortg. Corp.*, 2010 Bankr. LEXIS 6532, at *7 (M.D. Fla. Sept. 14, 2010); *see also In re CHS*, 216 B.R. at 541–53

(noting that "courts have made a distinction between insurance *policies* owned by a debtor, and the *proceeds* payable under the policies").

Accordingly, here the District Court reached a conclusion – without allowing intervention – that is directly at odds with the outcome of other courts to have decided the issue. This Court should reverse that decision and order that proceeds from the IFA should not be subject to the Court's asset freeze.

f) Allowing the SEC/Receiver's Speculative Claims to Bar Payment to Appellants Would Render D&O Coverage Meaningless

If this Court were to allow the Receiver to use a speculative claim—especially one that is not for a claim by the Receiver as an *insured* but rather as a *potential plaintiff* against an insured director or officer—to prevent the advancement of defense costs, it would render D&O coverage meaningless. "D&O policies are obtained for the protection of individual directors and officers." *In re First Cent. Fin. Corp.*, 238 B.R. at 16.

Lawsuits against a company's directors and officers are common when the company goes into receivership. "Unless directors can rely on the protections given by D & O policies, good and competent men and women will be reluctant to serve on corporate boards." *In re WorldCom*, 354 F. Supp. 2d at 469. If a receiver could simply set aside a director's or officer's entitlement to advancement of defense costs, directors and officers would be deprived of defense costs coverage at the exact time

it is most needed and expected. This Court should not become the first to grant a receiver such devastating power.

V. THE DISTRICT DID NOT ADVANCE A LEGITIMATE PURPOSE OF THE ASSET FREEZE BY APPLYING IT TO DEFENSE COST ADVANCEMENT

In closing, Appellants note that the stated purpose of the District Court's Asset Freeze Order was to preserve funds for future disgorgement claims. The Court aimed to prevent Defendants from "continu[ing] to dissipate, conceal or transfer from the jurisdiction of this Court assets, which could be subject to an Order of Disgorgement." [DE 11 at 4] (emphasis added). This echoed the SEC's primary stated reason for seeking an asset freeze, "as a means of preserving funds for the equitable remedy of disgorgement" [DE 4 at 57] (emphasis added); *see also* [DE 4 at 58] ("[A] freeze over the bank and other financial accounts, and any other assets they possess of Defendants Quiros . . . is necessary to preserve those funds for disgorgement." (emphasis added)

As noted above, preventing the advancement of defense costs did not advance this purpose because:

- If the insurance proceeds are not paid out as defense costs, they would simply be kept by Ironshore;
- The Receiver and SEC's claims are hypothetical and uncertain;

- Both principles of insurance law and the language of the Ironshore Policy prioritize payments of an individual D&O's defense costs to indemnity coverage; and, most fundamentally,
- There is no coverage for disgorgement under the Ironshore Policy.

VI. CONCLUSION

For the reasons set forth above, the District Court's decision should be reversed. This Court should hold that the asset freeze currently pending in the District Court does not prevent payment by Ironshore to Appellants under the IFA. To be clear, this would not be an order that Ironshore must do anything, but simply that the SEC's asset freeze order should not stand in the way of such payment.

Dated: August 18, 2017

Respectfully submitted,

s/ Scott B. Cosgrove

Scott B. Cosgrove
Fla. Bar No. 161365
James R. Bryan
Fla. Bar No. 696862
Jeremy L. Kahn
Fla Bar No. 105277
LEÓN COSGROVE LLC
255 Alhambra Circle, Suite 800
Coral Gables, Florida 33134
Tel: 305.740.1975
Email: scosgrove@leoncosgrove.com
Email: jbryan@leoncosgrove.com
Email: jkahn@leoncosgrove.com
Attorneys for Appellants

Fed. R. App. P. 32(g)(1) CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i). This documents contains 8,922 words, excluding the parts exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 18, 2017, I filed the foregoing *Principal Brief of Appellants León Cosgrove, LLC and Mitchell Silberberg & Knupp LLP*, using CM/ECF and served Counsel of Record via Notice of Electronic Filing generated by CM/ECF or in some other authorized manner.

s/ Scott B. Cosgrove
Scott B. Cosgrove