UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

JAY PEAK, INC., et al.,

Defendants, and

JAY CONSTRUCTION MANAGEMENT, INC., et al.,

Relief Defendants.
_____/

PLAINTIFF'S RESPONSE TO AMENDED MOTION TO INTERVENE OF MIAMI BEACH COMMUNITY KOLLEL

I. Introduction

The Court should deny the Amended Motion to Intervene of the Miami Beach Community Kollel (DE 438) for three reasons. First, the timing of the Amended Motion is premature. The proposed settlement between Plaintiff Securities and Exchange Commission and Defendant Ariel Quiros, if approved by the five SEC Commissioners and the Court, plus a related action by the Receiver, will obviate the need for the Court to rule on the Amended Motion as the Kollel will have additional potential remedies to seek its back rent or initiate eviction and related proceedings. Second, it is unnecessary for the Kollel to intervene to protect its rights to back rent and other relief, as the Receiver intends to provide a claims process for creditors such as the Kollel who have been victimized by Quiros' fraud.

Third, Section 21(g) of the Securities Exchange Act of 1934 ("Exchange Act"), which the Kollel does not address in its Amended Motion, acts as a bar to private parties intervening in

Commission enforcement actions, particularly in circumstances such as these. For all those reasons, the Court should deny the Amended Motion.

II. Factual Background

The Court is familiar with the factual background of this case, and therefore the Commission will not repeat it here except as necessary to explain the circumstances of the Amended Motion. GSI of Dade County, Inc., a corporation controlled by Quiros until April 2016 and which he used to help perpetrate his fraud, is a Relief Defendant in this case. As such, it was one of the corporate entities subject to the asset freeze the Court imposed at the outset of this case (DE 11). It was also one of the entities the Court placed into Receivership (DE 13). GSI has been under the control of the Court-appointed Receiver since April 2016.

As the Amended Motion sets forth, prior to the Commission filing this action, Quiros used GSI to enter into an agreement to rent space in a warehouse the Kollel owns. Amended Motion at 2. The Receiver temporarily came into possession of the leased premises when the Court placed GSI in the Receivership estate. The Receiver discovered that the warehouse contained personal property of Quiros, including motorcycles and jeeps.

The Amended Motion notes that the Receiver has only paid a portion of the rent due on the warehouse since assuming control over GSI in April 2016. However, the Amended Motion does not mention the Receiver took possession of numerous pieces of property and obligations (such as the warehouse rent at issue in the Amended Motion) that Quiros purchased or incurred through the various corporate entities over which the Receiver was appointed. *See, e.g.*, DE 396 and 405. Payment of rent, mortgages, property taxes, maintenance and other expenses on all these properties by the Receiver would have run into hundreds of thousands of dollars – a

hardship on a cash-poor Receivership.[1] *Id.*

However, to preserve the value of these frozen properties as well as properties Quiros owned outright that were also frozen to satisfy a potential disgorgement judgment against Quiros, the Receiver, the Commission, and Quiros agreed it would be beneficial for the Receiver to use certain frozen funds in Quiros' name to pay the outstanding, rent, mortgages, property expenses, etc. DE 396, 405. The Court approved both of the Receiver's unopposed motions. DE 399, 410. Pursuant to those motions and the orders approving them, the Receiver paid the Kollel $44,152, for back rent from May 1, 2016 through August 31, 2017. Amended Motion at 3. The Kollel alleges it is now owed an additional $24,627.80 in back rent and related fees and expenses. *Id.* It seeks through the Amended Motion to force the Receiver to pay back rent or to be allowed to levy on Quiros' personal property in the warehouse to cover the rent and related fees. For the reasons cited below, the Court should deny the Amended Motion.

III. Argument

A. The Asset Freeze And The Receivership Order Bar The Kollel's Proposed Actions

The Kollel suggests it has the right to levy on Quiros' personal property in the warehouse because it is not subject to the asset freeze. Amended Motion at 5-6. The Kollel is wrong. The asset freeze this Court imposed at the outset of this case (DE 11), and reaffirmed in its preliminary injunction order (DE 238), covers *all* assets of Quiros, including Quiros' personal property in the warehouse.[2] DE 11 at Section III.B (emphasis added):

> Any 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 . . .

[1] The Receiver's $150 million settlement with Raymond James did not impact payment of potential Receivership creditors such as the Kollel or financial institutions because the money Raymond James paid to the Receivership was earmarked for specific purposes benefitting defrauded investors, not for general Receivership expenses.

[2] Section III.A of DE 11 defines the assets subject to the freeze to include personal property.

> directly or indirectly, held jointly or singly, and wherever located, and which receives actual notice by personal service, mail, facsimile or otherwise, shall hold and retain within its control and prohibit the withdrawal, removal, transfer, disposition, pledge, encumbrance, assignment, set off, sale, liquidation, dissipation or other disposal or any such funds or other assets . . .

The freeze plainly prevents *any* person or entity from taking *any* action to encumber a frozen asset. There is no requirement that the Kollel have been associated with Quiros to be subject to the asset freeze as it suggests in the Amended Motion (at Page 6). Attempting to encumber Quiros' personal property would be a direct violation of this Court's asset freeze order under the clear terms of Section III.B of the order.

The need for a freeze in an action such as this one, where the defendant has defrauded hundreds of investors and creditors, is clear. Without a freeze to preserve Quiros' assets for a potential disgorgement judgment for the benefit of investors, there would be hundreds of creditors and investors all attempting to jump over each other in court filings to grab whatever assets they could to the detriment of other creditors and investors. For example, Quiros' personal property in the warehouse could be used to satisfy a disgorgement judgment for the benefit of investors. As discussed in Section C below, the Kollel should not jump to the front of the line because it filed its Amended Motion.

In addition, taking any action against the Receiver for payment of back rent without the Court's permission would violate the express terms of this Court's order appointing the Receiver (DE 13), an order the Kollel fails to mention in its Amended Motion:

> During the period of this receivership, all persons, including creditors, banks, investors, or others, with actual notice of this Order, are enjoined . . . from in any way disturbing the assets or proceeds of the receivership or from prosecuting any actions or proceedings which involve the Receiver or which affect property of the Corporate Defendants and Relief Defendants.

Order Granting Plaintiff Securities And Exchange Commission's Motion For Appointment Of

Receiver, DE 13, at ¶ 15. Without such an order, many Receiverships would descend into chaos, with defrauded creditors and investors filing dozens or hundreds of competing motions, each seeking payment from often scarce Receivership assets. As described in Section C below, the Receiver intends to establish a claims process to address these competing interests.

B. The Court Does Not Need To Rule On The Amended Motion Now

As the Court is aware, the Commission and Quiros have reached a proposed settlement agreement, for which the Commission staff is currently seeking approval from the five SEC Commissioners. DE 428, 430. The staff expects to complete that process in the next three to four weeks – prior to the February 15, 2018 deadline for reporting back to the Court. If the Commissioners approve the agreement, undersigned counsel will be filing a motion with the Court seeking approval of the settlement.

While the Commission staff is not at liberty to disclose details of the settlement agreement until after the Commissioners consider it, approval of the agreement by the Commissioners and the Court and fulfilment of the agreement's conditions by Quiros, plus a related action by the Receiver, will likely give the Kollel the ability to seek at least one of the remedies the asset freeze now prevents it from seeking. That alone provides the Court a reason to deny the Amended Motion without prejudice or hold off ruling for a short time. If the Kollel can independently seek its back rent or other relief, the Court need never rule on the Amended Motion.

Furthermore, the Kollel has not cited any reason why the matter is urgent now. The Kollel has already received 15 months of the back rent it is due – almost two-thirds of the total. Amended Motion at 3. In addition, according to the Amended Motion, the additional rent due has been accruing for at least four months. *Id.* Given that passage of time, the Kollel has not

cited any reason in its Amended Motion why the Court must rule immediately – particularly when in the next few weeks it is likely to be able to seek at least one remedy it now seeks without the necessity of Court approval. Accordingly, the Commission asks the Court to deny the Amended Motion without prejudice for the Kollel to renew it should it become necessary after the settlement process concludes.

D. The Receiver Should Be Allowed To Conduct An Orderly Claims Process For Creditors

As discussed above and as the Court is aware through extensive motion practice, the Jay Peak Resort as well as the related corporate entities such as GSI that the Receiver was appointed over had numerous creditors when the Receiver took over. Given the frequent lack of cash flow from resort operations, the Receiver has had to balance the need to pay creditors with the need to maximize his recovery for investors. There remain a number of unpaid creditors of the corporate entities according to the Receiver, including entities that are owed mortgage payments, maintenance fees, and rent on the various properties that were the subject of the property motions described in Section II above.

The Receiver intends to establish a claims process for unpaid creditors later in the case, and to the extent the Kollel believes it has a claim against the Receivership estate for any unpaid rent (and the Commission is not opining whether it believes the Kollel has such a claim), it can file a claim with the Receiver at the appropriate time. Typically in such a claims process, if the claim is denied, the claimant has a right to appeal the decision to the Court. Also frequently in such a claims process, there are not enough recovered funds to pay 100 percent of all allowed claims.

The Kollel will have the opportunity through an orderly claims process, in which all claims are considered at the same time and paid according to priority and the amount of available

cash, to seek its back rent. It will have an opportunity to ask the Court for a ruling on its claim if it is not satisfied with the Receiver's initial determination. Ordering the Receiver to pay the Kollel's claim piecemeal now would penalize those creditors who are waiting for the claims process and who might otherwise have priority over the Kollel's claim by reducing the total amount of funds available to pay those other creditors.

Furthermore, while the Commission sympathizes with the Kollel's predicament and the cash flow difficulties it has encountered, the Kollel's potential loss here pales in comparison to the hundreds of thousands of dollars in potential losses some of the Jay Peak investors face due to Quiros' fraud. Any amount awarded now to the Kollel could also be detrimental to those innocent investors by reducing the total pot of money available to repay them their initial investment. As between the investors and the Kollel, and particularly given the lower amount of the Kollel's losses, the Commission respectfully submits that denying the Kollel's motion now and allowing it to proceed through the claims process would be the most equitable result.

D. Exchange Act Section 21(g) Bars Intervention

Section 21(g) of the Exchange Act provides in pertinent part that:

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

Although the language of the statute does not mention intervention, some federal courts have held that, nonetheless, the statute operates as an "impenetrable wall" to a third party intervening in a Commission enforcement action absent the Commission's consent. *SEC v. Wozniak*, No. 92 C 4691, 1993 WL 34702 at *1 (N.D. Ill. Feb. 8, 1993) (denying motion to intervene by investor who asserted he was a victim of the fraud alleged in the Commission's complaint because the Commission would not consent).

Other courts have followed suit. For example, in *SEC v. Homa*, No. 99 C 6895, 2000 WL 1468726, (N.D. Ill Sept. 29, 2000), *aff'd* 17 Fed. Appx. 441 (7th Cir. 2001) (unpublished), the district court denied a motion to intervene by one of the defendant's creditors. The court found that "the language of Section 21(g) is plain and unambiguous," and that language "clearly bars [the creditor] joining the SEC's enforcement action as a party." *Id.* at *2. *See also SEC v. Cogley*, No. 98CV802, 2001 WL 1842476 at *3-*4 (S.D. Ohio March 21, 2001) (denying bankruptcy trustee's motion to intervene in enforcement action and finding that "after reviewing the legislative history, and reviewing other cases that have discussed this issue, this Court comes to the inescapable conclusion that Section 21(g) bars intervention"); *SEC v. Benger*, No. 09 C 0676, 2010 WL 724416 at *8-*11 (N.D. Ill. Feb. 23, 2010) (intervention by non-party in SEC enforcement action barred where the intervention concerned issues peripheral to the enforcement action and would result in the consolidation or coordination with other cases); *SEC v. One or More Unknown Traders*, 530 F. Supp. 2d 192, 194-95 (D.D.C. 2008) (Section 21(g) barred defendant's cross claims).

Even those courts that have held Section 21(g) did not automatically bar a third party from intervening have expressed skepticism about allowing wholesale intervention in Commission enforcement actions. *See, e.g., SEC v. Credit Bancorp Ltd.*, 194 F.R.D. 457, 468 (S.D.N.Y. 2000) (allowing permissive intervention on the unique facts of the case but noting that "intervention has been traditionally disfavored, given courts' hesitation to allow scores of investors and other interested persons from becoming full-fledge parties to governmental enforcement actions").

Here, as described above, the Kollel is potentially a creditor of either Quiros or the Receivership. There are, at a minimum, dozens of such entities in this case, and frequently

hundreds of creditors of a defendant or Receivership in many Commission cases. Allowing them all to intervene in the manner in which the Kollel attempts to here would create chaos with the docket and introduce issues into the case that, while important and must be addressed, have nothing to do with the issues of liability and remedies in the underlying enforcement action the Commission has brought. This is precisely the situation Section 21(g) is intended to address. The Court should not allow the Kollel to intervene in this action. Rather the Kollel can proceed as a claimant in any claims process against the Receivership and potentially proceed against Quiros at such time as the asset freeze is lifted. Its rights are protected and the docket and the case will be kept clear of extraneous issues.

IV. Conclusion

For all the reasons cited above, the Commission asks the Court to deny the Kollel's motion to intervene.

Respectfully submitted,

January 18, 2018

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 January 18, 2018, 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