

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 16-cv-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants, and

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

Relief Defendants, and

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

Additional Defendants.

**DACCACHE PLAINTIFFS' NOTICE OF OBJECTION TO ANY SETTLEMENT
BETWEEN QUIROS AND THE RECEIVER WHICH INCLUDES A BAR ORDER**

The Daccache Plaintiffs did not object to the settlement between the Securities and Exchange Commission (“SEC”) and Ariel Quiros (D.E. 447, 450) reached in this action which assists in resolving this litigation and facilitating the ultimate sale of the Jay Peak property. The Daccache Plaintiffs did not object to this settlement because it did not contemplate the entry of a bar order in favor of Quiros.¹

The Daccache Plaintiffs have recently become aware of pending settlement negotiations between the Receiver and Quiros.² (*See*, Exhibit 1, “Joint Motion to Suspend Pretrial Deadlines Pending Conclusion of Settlement Discussions and Documentation Thereof”). We favor the Receiver’s efforts in the administration of this estate and the Daccache Plaintiffs do not object to any settlement between the Receiver and Quiros that forwards the Receiver’s efforts, which does not seek the entry of a bar order. The Daccache Plaintiffs do object to a bar order in any settlement between the Receiver and Quiros, which, without the agreement of the affected investors, is illegal. We understand that the SEC itself finds bar orders inappropriate as a matter of internal policy, and

¹ On May 19, 2016, the Court in *Daccache et al., v. Raymond James & Associates, Inc., et al.*, Case No. 16-CV-21575-Moreno (the “Daccache Action”) entered an Order Granting Plaintiff’s Motion to Appoint Interim Class Counsel, appointing Harley S. Tropin of the Kozyak Tropin & Throckmorton law firm as Interim Class Counsel, and providing that Interim Class Counsel “shall have exclusive authority over ... any possible settlement negotiations in the matter.” [Daccache Action, D.E. 11]. This authority was confirmed in the Case Management Order entered by the Court in the Daccache Action on August 18, 2016, which appointed Mr. Tropin, and in his absence Thomas A. Tucker Ronzetti, as Chair Lead Counsel with authority to “[c]onduct settlement negotiations on behalf of plaintiffs....” [Daccache Action, D.E. 75, Section I.A.(3)]. On January 17, 2018, the Court in the Daccache Action closed the case for statistical purposes and placed it in the civil suspense file pending further developments with respect to the SEC and Receiver’s actions against Quiros. [Daccache Action, D.E. 279].

² Receiver Michael Goldberg filed a Complaint against Quiros and other Defendants. *Goldberg v. Raymond James Financial, Inc., et al.* [Case No. 16-21831-Civ-Lenard, D.E.1] (the “Receiver Action”). In that Complaint, Mr. Goldberg specifically “brings this action in his capacity as Receiver for the Receivership Entities to recover amounts stolen from the Receivership Entities and misused by Quiros....” Thus, Mr. Goldberg only brings claims in his capacity as Receiver, and only for damages suffered by the Receivership Entities.

as the cases cited below indicate, under these circumstances, a bar order is inappropriate. The Daccache Plaintiffs and the putative class should be left to pursue their claims in the Daccache Action against Quiros.

The Daccache Plaintiffs seek to ensure that the Receiver and Quiros do not request the entry of a bar order that would preclude the Daccache Plaintiffs from pursuing their direct claims asserted in the Daccache Action against Quiros. The Daccache Action seeks to recover the losses suffered by investors as a direct result of their investment in Jay Peak, independent claims belonging solely to the investors. Since these direct claims belong to the class members, a bar order precluding them from prosecuting their claims would be inappropriate.

The genesis of any authority for the issuance of settlement bar orders in this jurisdiction arises from the Eleventh Circuit's decisions in *In re U.S. Oil & Gas Litig.*, 967 F.2d 489 (11th Cir. 1992) and *In re Munford*, 97 F.3d 449 (11th Cir. 1996). Neither of those cases, nor their progeny, support the entry of a bar order that would prohibit prosecution of these independent claims against Quiros through a settlement with the Receiver.

U.S. Oil involved an FTC receivership in which the receiver had been authorized to file a class action on behalf of the defrauded customers. Upon reaching a settlement with one defendant, the receiver sought a bar order protecting the settling defendant from cross-claims by non-settling defendants for indemnification or contribution. In so doing, the court found that the objecting, non-settling defendants' claims against the settling defendant were not actually "independent claims," but rather were tied to the non-settling defendants' own liability to the plaintiffs. *U.S. Oil*, 967 F.2d at 495-96. Similarly, in *Munford*, the court approved a Chapter 11 debtor's settlement with one defendant, which as a condition of settlement barred the other co-defendants' contribution and indemnity cross-claims against the settling defendant. *Munford*, 97 F.3d at 453-54.

In subsequent decisions, the Eleventh Circuit has repeatedly clarified that these authorities do not authorize the barring of independent claims. In *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1312 (11th Cir. 2004), the court, in vacating an overbroad bar order, specifically noted that “[t]he opinion [*U.S. Oil*] expressly declined to address the issue of ‘truly independent claims,’” recognizing that there was “no controlling authority” to permit the bar of such claims. Subsequently, in *In re HealthSouth Corp. Securities Litigation*, 572 F.3d 854, 863-65 (11th Cir. 2009), the court again noted the same limitation on the *U.S. Oil* holding, citing with approval *Gerber v. MTC Electronic Technologies Co., Ltd.*, 329 F.3d 297 (2d Cir. 2003). In *Gerber*, the bar order had to be modified to limit the barred claims to those where the injury is the non-settling defendants’ liability to the plaintiffs. *Id.* at 307. The *Gerber* court further quoted with approval from the Tenth Circuit’s decision in *TBG, Inc. v. Bendis*, 36 F.3d 916, 928 (10th Cir. 1994):

Courts that have allowed bar orders have only barred claims in which the damages are measured by the defendant’s liability to the plaintiff. Besides contribution and indemnity claims, these include any claims in which the injury is the nonsettling defendant’s liability to the plaintiff. ***No court has authorized barring claims with independent damages.***

Id. at 306-307 (citations omitted) (emphasis added).

Courts applying these principles have similarly rejected bar orders that would extinguish independent causes of action by means of an involuntary, unilateral “settlement” by a trustee or receiver. In *In re GunnAllen Fin., Inc.*, 443 B.R. 908, 916-18 (Bankr. M.D. Fla. 2011), the court declined to approve a settlement which extinguished independent causes of action against non-debtors and forced them to accept a limited 22% distribution, and which released parties who were not contributing to the settlement, stating: “The decision to settle should rest with each individual Securities Claimant, and not be forced by the Liquidating Agent.” *See also In re Covington Props.*,

Inc., 255 B.R. 77, 78-80 (Bankr. N.D. Fla. 2000) (not “fair and equitable” to bar objecting creditors’ independent claims in what amounts to a unilateral “settlement” of those claims).

The Daccache Plaintiffs want to ensure that while their action is stayed, Quiros is not granted approval of a settlement that has a significant impact on their independent, direct claims by seeking an order barring those claims.

Accordingly, the Daccache Plaintiffs respectfully request that the Court not approve any settlement between the Receiver and Quiros that would require the entry of a bar order with respect to the Daccache Plaintiffs’ claims against Quiros.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed via CM/ECF and served on March 9, 2018, on the Receiver and Raymond James & Associates, Inc., via the manner stated in the service list below

By: /s/ Harley S. Tropin

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| <u>Via E-Mail</u> | <u>Via E-Mail</u> |
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 1:16-CV-21831-JAL

MICHAEL I. GOLDBERG, as
Receiver for Jay Peak, Inc., Q
Resorts, Inc., Jay Peak Hotel Suites
L.P., Jay Peak Hotel Suites Phase II
L.P., Jay Peak Management, Inc.,
Jay Peak Penthouse Suites L.P., Jay
Peak GP Services, Inc., Jay Peak Golf
and Mountain Suites L.P., Jay Peak GP
Services Golf, Inc., Jay Peak Lodge and
Townhouses L.P., Jay Peak GP Services
Lodge, Inc., Jay Peak Hotel Suites
Stateside L.P., Jay Peak GP Services
Stateside, Inc., Jay Peak Biomedical
Research Park L.P., AnC Bio Vermont
GP Services, LLC, Q Burke Mountain
Resort, Hotel and Conference Center, L.P.,
Q Burke GP, LLC, Jay Construction
Management, Inc., GSI of Dade County,
Inc., North East Contract Services, Inc.,
and Q Burke Mountain Resort, LLC,

Plaintiff,

v.

RAYMOND JAMES & ASSOCIATES,
INC., ARIEL QUIROS, and JOEL
BURSTEIN

Defendants.

**JOINT MOTION TO SUSPEND PRETRIAL
DEADLINES PENDING CONCLUSION OF SETTLEMENT
DISCUSSIONS AND DOCUMENTATION THEREOF**

Plaintiff, Michael I. Goldberg, as Receiver (the “Receiver”), and Defendant Ariel Quiros (“Quiros”) jointly move to suspend the pretrial deadlines in this action, and state as follows:

1. This action was filed pursuant to the Receiver’s appointment in the Securities and Exchange Commission’s pending enforcement action against Quiros and others. *See SEC v. Quiros et al.*, 1:16-cv-21301-DPG (S.D. Fla.) (the “SEC Action”). The Receiver was appointed

in the SEC Action to preserve, marshal and administer the assets of the receivership defendants and to bring claims for the benefit of the receivership estate.

2. This matter is currently set for trial on this Court's November 26, 2018 docket pursuant to its Order Adopting Joint Scheduling Report, Setting Pretrial Conference and Trial, Establishing Pretrial Deadlines, and Establishing Pretrial and Trial Procedures (the "Scheduling Order"). [D.E. 81].

3. On September 29, 2017, the parties moved for an order extending certain pretrial deadlines because collateral matters had delayed the parties' ability to conclude necessary discovery. [D.E. 112]. Specifically, the Receiver settled with Defendant Raymond James & Associates, Inc. for \$150 million, and that settlement included a requirement that all actions against Raymond James be stayed pending the several-month notice and approval process of the settlement. Defendant Quiros, in this action, and other defendants in the other actions involving the Jay Peak entities, objected to discovery taking place piecemeal, so essentially all discovery was stayed in all actions. On October 2, 2017, this Court granted the parties' request to extend pretrial deadlines. [D.E. 113].

4. Since that time, Quiros reached a settlement with the SEC in the SEC Action. As part of that settlement, Quiros will disgorge certain funds and properties to the SEC, after which they will be delivered to the Receiver for the benefit of investors and creditors. On February 2, 2018, the SEC filed an unopposed motion for entry of final judgment against Quiros, which memorializes Quiros' duties under the settlement. [SEC Action D.E. 447]. A Final Judgment has since been entered in the SEC Action. [SEC Action D.E. 450].

5. Quiros' settlement with the SEC – which involves the turnover of a number of assets – further narrows the issues in this case, and, as a result, settlement discussions between the Receiver and Quiros are currently taking place. The parties are hopeful that, with additional time

to devote towards those efforts, they will reach a settlement of this action without the need for further litigation.

6. Accordingly, the parties request that this Court temporarily suspend all pretrial deadlines in this matter. Such relief will preserve the parties' resources and allow them to focus on concluding their settlement discussions. The parties are *not* asking the Court to vacate the Scheduling Order or move the trial period. In the event this case does not settle, the parties will submit an updated proposed scheduling order that maintains the trial period to the extent possible, but the parties do wish to be able to devote their time and efforts towards the resolution of this matter rather than costly discovery and litigation.

7. As stated above, pursuant to Local Rule 7.1.A.3, all remaining parties to this case (the Receiver and Quiros) agree to the relief requested herein.

WHEREFORE, the parties respectfully request that this Court enter an order suspending the pretrial deadlines in this matter and granting such other and further relief as this Court deems just and proper.

Dated: February 22, 2018

Respectfully submitted,

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Case No. 1:16-CV-21831-JAL

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Counsel for Ariel Quiros

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this February 22, 2018 via the Court's notice of electronic filing on all CM/ECF registered users entitled to notice in this case as indicated on the attached Service List.

By: /s/ Stephanie Reed Traband
Stephanie Reed Traband, P.A.

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|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 1:16-CV-21831-JAL

MICHAEL I. GOLDBERG, as
Receiver for Jay Peak, Inc., Q
Resorts, Inc., Jay Peak Hotel Suites
L.P., Jay Peak Hotel Suites Phase II
L.P., Jay Peak Management, Inc.,
Jay Peak Penthouse Suites L.P., Jay
Peak GP Services, Inc., Jay Peak Golf
and Mountain Suites L.P., Jay Peak GP
Services Golf, Inc., Jay Peak Lodge and
Townhouses L.P., Jay Peak GP Services
Lodge, Inc., Jay Peak Hotel Suites
Stateside L.P., Jay Peak GP Services
Stateside, Inc., Jay Peak Biomedical
Research Park L.P., AnC Bio Vermont
GP Services, LLC, Q Burke Mountain
Resort, Hotel and Conference Center, L.P.,
Q Burke GP, LLC, Jay Construction
Management, Inc., GSI of Dade County,
Inc., North East Contract Services, Inc.,
and Q Burke Mountain Resort, LLC,

Plaintiff,

v.

RAYMOND JAMES & ASSOCIATES,
INC., ARIEL QUIROS, and JOEL
BURSTEIN

Defendants.

**ORDER ON JOINT MOTION TO SUSPEND PRETRIAL
DEADLINES PENDING CONCLUSION OF SETTLEMENT
DISCUSSIONS AND DOCUMENTATION THEREOF**

THIS CAUSE, having come on to be heard on the Joint Motion to Suspend Pretrial Deadlines Pending Conclusion of Settlement Discussions and Documentation Thereof (the “Motion”), and the Court being aware of the agreement of the parties and being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED:

1. The Motion is GRANTED.

CASE NO.: 1:16-CV-21831-JAL

2. All pretrial deadlines in this matter are suspended pending further order of this Court.

DONE and **ORDERED** in Chambers, Miami, Florida, this ___ day of _____, 2018.

JOAN LENARD
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record