

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

I. Introduction

Plaintiff Securities and Exchange Commission moves the Court to strike the Daccache Plaintiffs' Notice Of Objection To Any Settlement Between Quiros And The Receiver Which Includes A Bar Order (DE 460) ("Notice of Objection"). The Court should strike the Notice of Objection for three reasons. First, the Court has never granted the Daccache Plaintiffs a right to intervene in this action, so they cannot make general filings such as the Notice of Objection (and, in fact, the Daccache Plaintiffs have never moved to intervene). Furthermore, Section 21(g) of the Securities Exchange Act of 1934 ("Exchange Act") bars the Daccache Plaintiffs from intervening without the express consent of the Commission, which the Commission does not give under these circumstances.

Second, the Daccache Plaintiffs filed the Notice of Objection to an event that has not yet taken place – and in fact may never occur. They object to a hypothetical term – a bar order – in a

hypothetical settlement between the Court-appointed Receiver and Defendant Ariel Quiros. Because neither of these two events has occurred, the Notice of Objection is not ripe. If the Receiver and Quiros were to propose a settlement for the Court to approve that contained a bar order, the Daccache Plaintiffs would have ample opportunity to object. Third, the Daccache Plaintiffs did not confer with the Commission prior to filing the Notice of Objection, and the Notice did not contain the required Certificate of Conferral under Local Rule 7.1(a)(3) indicating they had conferred with the Commission, the Receiver, or Quiros. For all those reasons, the Court should strike the Notice of Objection.

II. Background

The Daccache Plaintiffs are a group of Jay Peak investors who brought a putative class action against Quiros, Raymond James & Associates, and others after the Commission filed its enforcement action against Quiros and others. DE 315 at 3-4. The Court in the class action case appointed Harley S. Tropin of the Kozyak Tropin & Throckmorton law firm as interim class counsel in 2016. Notice of Objection at 2 n.1. In 2017, the Receiver, the Daccache Plaintiffs, and other investors who had sued reached a proposed settlement with Raymond James. *See, e.g.*, DE 315. The Receiver and the private plaintiffs filed the proposed settlement in this case and asked this Court to approve it. *Id.* By necessity, that involved interim class counsel and other private plaintiffs' lawyers appearing in this case for the limited purpose of supporting the settlement agreement and filing papers regarding the proposed distribution of \$25 million of the settlement amount in attorneys' fees. DE 325, 329, 331-335, 343, and 354.

III. Argument

The first reason the Court should strike the Notice of Objection is because the Daccache plaintiffs do not have standing to file it. The Commission did not object to the previous limited

appearance of interim class counsel because it was necessary for the Court to fully consider the proposed settlement with Raymond James, and because the appearance was limited to the sole issue of the settlement agreement and attorneys' fees under it. That limited appearance, however, did not give the Daccache plaintiffs and interim class counsel the unrestricted ability to file papers in this Commission enforcement action on any issue they deem appropriate. The Daccache plaintiffs have never moved to intervene in this case under Rule 24 of the Federal Rules of Civil Procedure,¹ either as of right or permissively, and thus do not have a right to make general filings without prior Court approval.

Furthermore, as the Court is aware from recent briefing on a motion by a potential creditor of the Receivership to intervene in this action, 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 . . ." Many courts have held the statute operates as an "impenetrable wall" to a third party intervening in a Commission enforcement action absent the Commission's consent. DE 440 at 7-9. Here, the Commission does not give its consent for the Daccache plaintiffs to intervene because, as discussed below, there is no need at this time.

The second reason the Court should strike the Notice of Objection is because there is simply nothing for the Daccache plaintiffs to object to at this time. As their Notice of Objection points out, the Receiver and Quiros have moved to stay deadlines in the Receiver's separate action against Quiros because the two parties are engaged in settlement discussions. DE 460-1 at 2-3. However, no settlement agreement has been reached, and therefore there is no pending motion before this Court to approve any settlement between the Receiver and Quiros, let alone a

¹ The Commission does not believe the Daccache plaintiffs could articulate a right to intervene under Rule 24; however that is not the point here. The point is the Daccache plaintiffs have never moved to intervene and the Court has not granted them that right.

settlement agreement that contains a bar order on actions against Quiros, which is what the Daccache plaintiffs object to. It simply is not ripe for the Daccache plaintiffs to file a notice objecting to a provision that does not yet exist in a settlement agreement that has not yet occurred.

Moreover, should the Receiver and Quiros ask the Court to approve a settlement agreement containing a bar order on actions against Quiros, the Daccache plaintiffs will have the chance to object and be heard. The Daccache plaintiffs know this, as they were intimately involved in the approval process for the Raymond James settlement, which contained a proposed bar order on actions against Raymond James. There, the Receiver asked the Court to give preliminary approval to the settlement agreement, establish a procedure for the Receiver to notify anyone potentially affected by the settlement agreement and proposed bar order, and establish a procedure for those persons to file objections. DE 315. The Court established such a process and it was more than two months after the Receiver first filed the proposed settlement agreement that the Court held a final hearing on the proposal. There is no reason to believe the Receiver would request any different process for any bar order in a proposed settlement with Quiros, and even if he did, the Commission has every confidence this Court would not consider a bar order without allowing potentially affected parties the opportunity to object.

Finally, the Court should strike the Notice of Objection because the Daccache plaintiffs did not confer as required under Local Rule 7.1(a)(3) with the affected parties. The Notice of Objection did not contain the required Certificate of Conferral under Local Rule 7.1(a)(3). Pursuant to the Local Rule, the Daccache plaintiffs at a minimum should have conferred with the Commission (which it failed to do), Quiros, and the Receiver.

For all those reasons the Court should strike the Notice of Objection without prejudice for

the Daccache plaintiffs to object to any proposed bar order should the Receiver and Quiros propose one in any settlement agreement.

Certificate Of Conferral

Pursuant to Local Rule 7.1(a)(3), the Commission conferred with attorneys for Quiros, the Receiver, and the Daccache plaintiffs. The Daccache plaintiffs oppose this motion. Quiros and the Receiver do not oppose it.

Respectfully submitted,

March 13, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 13, 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
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SERVICE LIST

SEC v. Ariel Quiros, et al.
Case No. 16-CV-21301-GAYLES

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

THIS MATTER is before the Court on Plaintiff's Motion To Strike Daccache Plaintiffs' Notice Of Objection To Any Settlement Between Quiros And The Receiver Which Includes A Bar Order (DE ____). Having reviewed the motion and the record and finding good cause for the Plaintiff's request, it is:

ORDERED AND ADJUDGED that the motion is granted and the Daccache Plaintiffs' Notice Of Objection To Any Settlement Between Quiros And The Receiver Which Includes A Bar Order is stricken..

DONE AND ORDERED in Chambers in Miami, Florida, this ____ day of March, 2018.

THE HON. DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

Copies: Counsel and parties of record