UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:16-cv-21301-DPG

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.
_____/

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: PRELIMINARY INJUNCTION AND RECEIVERSHIP SUBMITTED BY DEFENDANT ARIEL QUIROS

Pursuant to the Court's order of May 11, 2016 (Doc. 116[1]), Defendant Ariel Quiros hereby submits proposed findings of fact and conclusions of law with respect to the order to show cause regarding preliminary injunction.

PROPOSED FINDINGS OF FACT

1. The SEC's claims in this case involve seven limited partnerships: Jay Peak Hotel Suites L.P. (the "Phase I Partnership"), Jay Peak Hotel Suites II L.P. (the "Phase II Partnership"), Jay Peak Penthouse Suites L.P. (the "Phase III Partnership"), Jay Peak Golf and Mountain Suites L.P. (the "Phase IV Partnership"), Jay Peak Lodge and Townhomes L.P. (the "Phase V Partnership"), Jay Peak Hotel Suites Stateside L.P. (the "Phase VI Partnership"), and Jay Peak Biomedical Research Park , L.P. (the "AnC Bio Partnership"). Amended Complaint ("Am. Comp.") ¶¶ 15-26.

2. All of the investors in all of the partnerships are foreign nationals who invested a minimum of $500,000 each seeking to earn permanent U.S. residency through the U.S. Citizenship and Immigration Services EB-5 Immigrant Investor Program. Am. Comp. ¶¶ 1, 5.

3. Each of the Partnerships was formed for purposes of building a separate project, ranging from hotels, condominiums, and townhomes to a biomedical research and manufacturing facility. Am. Comp. ¶¶ 15-27; Exs. 2-7, 57 (Doc. 46-2 through 46-17, 46-144 through 47-148) (offering memoranda for each partnership).

[1] References in this document to "Doc." are to the Document Numbers on the Court's docket.

A. The Jay Peak Projects

4. The Phase I through Phase VI Partnership projects are all located at the Jay Peak Ski Resort in Northern Vermont. The Jay Peak Resort is owned and operated by Jay Peak Inc. ("JPI"). At all times relevant to this matter, William Stenger ("Stenger") was the President and CEO of JPI. Am. Comp. ¶¶ 11, 14.

5. Prior to June 23, 2008, JPI was owned by Mont Saint-Saveur International, Inc. ("MSSI"), a Canadian company. Am. Comp. ¶¶ 57, 58; Ex. 58 (Doc. 46-149) Hebert/Dufour Decl. ¶ 2. On June 23, 2008, MSSI sold JPI to Q Resorts. Id. ¶¶ 4-5 and Exs. A and B thereto Am. Comp. ¶¶ 57, 58. Ariel Quiros ("Quiros") was and is the sole owner, officer and director of Q Resorts. Id. ¶ 12.

6. The Phase I through Phase V Partnership projects are completed, open and operating. Am. Comp. ¶¶ 15-22; Ex. 22 (Doc. 46-33) Pieciak Decl. ¶ 12; 5/10/16 Transcript at 181:25-182:8 (Goldberg Testimony). A hotel that was part of the Phase VI Partnership project is complete and ready to open; the 84 vacation cottages that are part of that project are partially constructed, and the medical and recreation centers that are part of the project have not yet been constructed. Am. Comp. ¶ 24; 5/10/16 Transcript at 159:5-15 (Goldberg Testimony). Approximately $20 million in construction is necessary to complete the Phase VI Partnership project. Kelly Decl. (Doc. 100) ¶ 9.

7. The general partners for the Phase I through Phase VI Partnerships were Jay Peak Management Inc. (Phases I and II), Jay Peak GP Services, Inc. (Phase III), Jay Peak GP Services Golf, Inc. (Phase IV), Jay Peak GP Services Lodge, Inc. (Phase V), and Jay Peak Services Stateside, Inc. (Phase VI). Jay Peak Management Inc. is owned by JPI. Someone other than

Quiros is also the sole director and principal of the other general partner entities. Am. Comp. ¶¶ 17, 19, 21, 23, 25.[2] No evidence has been presented showing that Quiros was an officer, director or principal of any of the general partner entities discussed in this paragraph.

8. The EB-5 investors in the Phase I through Phase VI Partnerships received offering statements describing those investments. Am. Comp. ¶¶ 44-46 The offering statements were prepared and dated as of the following dates:

Phase I	December 22, 2006
Phase II	March 31, 2008
Phase III	July 10, 2010
Phase IV	December 22, 2010
Phase V	May 18, 2011
Phase VI	October 31, 2011

Exs. 2-7 (Doc. 46-2 through 46-17) (offering memoranda).

9. Each of the offering memoranda identifies the limited partnership to which it pertains as the offeror, the entity making all of the representations made, and the source of the information provided in the offering statement. *See, e.g.,* Ex. 2 (Doc 46-2 through 46-4) at JPI 004530, JPI 004533 (Phase VI Offering Memo); Ex 3 (Doc. 46-5 through 46-6) at JPI 001977, JPI, 001980 (Phase I Offering Memo); Ex. 4 (Doc. 46-7 through 46-8) at JPI 001718, JPI 1721 (Phase II Offering Memo); Ex. 5 (Doc. 46-9 through 46-11) at JPI 001977, JPI 001980 (Phase III Offering Memo); Ex. 6 (Doc. 46-12 through 46-14) at JPI 030621, JPI 030624 (Phase IV

[2] According to the SEC's Amended Complaint, it is William Stenger.

Offering Memo); Ex. 7 (Doc. 46-15 through 46-17) at JPI 00829, JPI 000832 (Phase V Offering Memo).

10. The offering statements for the Phase I and Phase II partnerships were prepared and issued before Quiros and Q Resorts acquired any interest in JPI.

11. No evidence has been presented demonstrating that Quiros had any involvement in preparing, reviewing, issuing or disseminating any of the offering statements for Phases I through VI. No evidence has been presented showing that Quiros is the source of or responsible for any of the statements contained in those offering statements, or contributed any information contained in such offering statements.

12. No evidence has been presented that Quiros solicited any investors for the Phase I through VI partnerships or even spoke to any of those investors prior to the time they invested. None of the investors who provided declarations submitted to the court or who testified in court claimed to have spoken to Quiros. *See, e.g.*, SEC Exs. 44-49, 51-55, 58 (Docs. 46-58, 46-60, 46-70, 46-87, 46-97, 46-103, 46-104, 46-108, 46-109, 46-115, 46-121, 46-131); 5/9/16 Transcript (Doc. 124) at 70:4-7 (Vieira testimony).

13. When and after Quiros and Q Resorts purchased JPI in 2008, funds of the various partnerships were taken from the bank accounts in which they had been held and invested in U.S Treasury Bills at Raymond James Financial. The Treasury Bills purchased from the funds for each partnership were held in separate securities accounts at Raymond James, and Quiros arranged for margin credit agreements with Raymond James using the Treasury Bills as collateral. Quiros has explained that he arranged the credit agreements to allow him to borrow funds against the Treasury Bills to fund construction of the various partnership projects if and as

funds were needed in advance of the maturity date for the Treasury Bills. Then, as the Treasury Bills matured, the proceeds were to be used to pay off the margin loans. Quiros testified that he chose this method of holding partnership funds in 2008 because of the ongoing banking crisis and concerns that the amounts held for each partnership vastly exceed the limits of federal depository account insurance, and because investment in Treasury Bills meant that the full faith and credit of the United States was behind the full amount of the partnerships' funds. Ex. 10 (Doc. 46-20) Quiros Testimony at 51:3-54:9; 63:15-66:13.

14. The SEC contends that Quiros used $21.9 million from the Phase I and Phase II partnership accounts at Raymond James to purchase JPI. Ex. 11 (Doc. 46-21) Lama Decl. ¶¶ 9-12. However, one of the exhibits relied upon by the SEC in making that assertion, Exhibit A-1 to the Lama Declaration (Doc. 46-21 at 32) makes it clear that the purchase price for JPI was $15 million in cash, plus assumption of $8.5 million in long term debt, plus certain "adjustments," which the SEC contends totaled another $2.2 million. Ex 11 (Doc. 46-21) Lama Decl. ¶ 9. Thus, the SEC's assertion that $21.9 million was taken from Phase I and Phase II accounts to pay for JPI simply does not make sense. If the SEC were correct, Quiros and QResorts would have paid nearly $5 million more than the contract price for JPI. Moreover, although the SEC acknowledges that Phases I and II were completed, they offer no plausible explanation as to how that could have been accomplished if $21.9 million had been misappropriated. SEC Exhibit 133 details how the SEC believes funds from later projects were used, and none, according to the SEC, were spent on Phases I and II. To the extent that the SEC contends that margin loans were used to complete Phases I and II, the contention makes no sense, as the SEC has identified no unpaid margin loans.

15. The general contractor for Phases IV through VI was Jay Construction Management Inc. ("JCM"). Kelly Decl. (Doc. 100) ¶¶ 4, 7. As general contractor, JCM was responsible for paying subcontractors and others to complete each of the Phase IV through VI projects, and was responsible for completing each of those projects. Id. ¶ 7.

16. JCM had a written Services Agreement with JPI to use JPI's construction and development personnel and equipment to assist in the construction and completion of Phases IV through VI. Kelly Decl. (Doc. 100) ¶ 6 and Ex. 1 (Doc. 100-1) thereto. In exchange for providing such services, JCM was required to pay JPI or its parent company, QResorts, 14.5% of the total funds expended by the limited partnerships on the EB-5 projects, but not less than $12,000,000. Ex. 1 to Kelly Decl. (Doc. 100-1) at ¶ 4.

17. A substantial portion of what the SEC contends was "misuse" or "commingling" of funds of the Phase I through VI partnerships involves funds paid to JCM. *See, e.g.,* Ex. 22 (Doc. 46-33) Pieciak Decl. ¶¶ 15-19; Ex. 30 (Doc. 46-43) Dee Decl. ¶¶ 37, 41, 45. Another substantial portion of what SEC labels as "misuse" or "commingling" of those funds involves paying down margin loans secured by Phase I through VI Treasury Bills held at Raymond James. Ex. 30 (Doc 46-43) Dee Decl. ¶¶ 25, 28, 33, 36, 39, 40, 43, 44. Together, the claims that funds paid to JCM or used to pay down margin loans account for a large majority of the Phase I through VI partnership funds that the SEC claims was "misused" or "commingled."

18. However, the SEC's arguments fail to account for the facts that JCM was the general contractor for Phases IV through VI, and that the margin loans were intended to and did pay for construction costs for the various projects and were always intended to be repaid as the Treasury Bills matured. The SEC has failed to show that JCM had a contractual (or other)

obligation to segregate investor funds or account for their use once it was paid for its general contractor services—it was thereafter obligated to deliver finished projects, not account for funds. Nor has it shown that payoffs of margin loans used to construct the partnership improvements was a misuse or commingling of funds.

19. The SEC also argues that payments to JCM and/or JPI/Quiros affiliates were improper under the terms of the offering memoranda and limited partnership agreements if they were made in advance of completion of the project improvements. Nothing in the offering memoranda or limited partnership agreements prohibits advance payment for services or requires that payments to a general contractor be made only as construction is completed. Moreover, each of the offering memoranda and limited partnership agreements specifically permits dealings with affiliates, provided that the amounts paid to the affiliate be at "costs to the Partnership not in excess of those disclosed in the [offering memoranda]." *See, e.g.* Ex. 3 (Doc. 46-5 through 46-6) at JPI 001596, JPI 1658 § 5.07 (Phase I Offering Memo and Limited Partnership Agreement); Ex. 4 (Doc. 46-12 through 46-14) at JPI 030697, JPI 030747 § 5.07 (Phase IV Offering Memo and Limited Partnership Agreement); Ex. 5 (Doc. 46-2 through 46-4) at JPI 004610, JPI 004652-53 § 5.07 (Phase VI Offering Memo and Limited Partnership Agreement).

20. The SEC has not demonstrated that amounts paid to JCM exceeded the amounts disclosed in the offering statements as required to construct the project improvements. For example, according to the SEC's own certified fraud examiner, Mr. Dee, $34.3 in Phase IV funds and $36 million in Phase V funds were paid to JCM, the general contractor for Phases IV and V. Ex. 30 (Doc. 46-43) Dee Decl. ¶¶ 37, 41. According to the offering statements for Phases IV and V, the improvements for Phase IV (not including budgeted access and infrastructure costs) were budgeted at $39.4 million (Ex. 6 (Doc. 46-12) at JPI 030693, JPI 030713), and those for Phase V

were budgeted at $41.6 million (Ex. 7 (Doc. 46-15) at JPI 000903, JPI 000921). The amounts paid to JCM were less than the amounts disclosed for the improvements in the offering statement, and the improvements for both of those projects were completed, and the projects are now operating. The SEC has failed to demonstrate that these payments to JCM were in any way inconsistent with the disclosures in the offering statements.

21. Mr. Dee also testified that $63 million of Phase VI funds were paid to JCM, the general contractor for Phase VI. The amount budgeted for the Phase VI improvements, not including infrastructure, was just over $62.5 million, and the budget also disclosed another $525,000 in hotel infrastructure costs, including parking and pathways. Wx. 2 (Doc. 46-2 through 46-4) at JPI 004579, JPI 004617 (Phase VI Offering Memo). Once again, the amounts paid to JCM do not exceed the amounts disclosed for the improvements in the offering statement. While not all of the improvements have yet been completed, as noted in paragraph 19 above, nothing in the offering statements precludes advance payment to the general contractor for the improvements, and JCM was and remains under an obligation to complete those improvements. Thus, the SEC has failed to demonstrate that these payments to JCM were in any way inconsistent with the disclosures in the Phase VI offering statement.

B. The AnC Bio Project

22. The EB-5 investors in the ANC Bio Partnership all received the amended offering statement for that Partnership dated as of January 30, 2015. All investors who had invested in the AnC Bio Partnership prior to the preparation of the amended offering statement were provided with a copy of the amended offering statement and given an opportunity to rescind their prior investment or re-subscribe to the AnC Bio Partnership. 5/9/16 Transcript (Doc. 124) at

149:22-150:6 (Pieciak Testimony). Accordingly, the amended offering statement, not the original offering statement, is the statement relevant to the SEC's claims in this action.

23. Prior to October 2014, the Vermont Agency of Commerce & Community Development ("ACCD"), the state agency which runs the Vermont Regional Center under which the Jay Peak and AnC Bio partnerships fall, ordered the AnC Bio Partnership to stop raising money under the then-existing offering statement. A new offering statement was submitted to the ACCD in October 2014. That offering statement was reviewed by ACCD and, starting in December 2014, the Vermont Department of Financial Regulation ("DFR"). DFR approved AnC Bio's use of the amended offering statement to solicit investor funds, but required that new funds raised under the amended offering statement be escrowed at People's United Bank until an independent auditing firm completed a full financial review. AnC Bio made the changes to the amended offering statement suggested by DFR, and the resulting offering statement (Exhibit 57 (Docs. 46-144 to 46-148)) was provided to all AnC Bio investors. However, the financial review was not competed, and new funds remained escrowed at People's Bank. 5/9/16 Transcript (Doc. 124) at 147:20-150:6 (Pieciak Testimony).

24. The general partner of the AnC Bio Partnership is AnC Bio Vermont GP Services, LLC. Ex. 57 (Doc. 46-144) at AnC Bio 006673.

25. There is no evidence that Quiros had any involvement in preparing the amended offering statement for the AnC Bio project. Specifically, the SEC has not proven that Quiros wrote any part of the amended offering statement, read it before it was disseminated, or had any input into its content. Indeed, Quiros testified that he did not review the amended offering

statement before it was sent to or approved by Vermont's DFR, and relied on others to make sure that it was accurate. Ex. 13 (Doc 46-24) Quiros Testimony at 289:19-291:12

26. The SEC has offered no evidence that Quiros personally made any misrepresentation to any AnC Bio Partnership investor. As noted in paragraph 12 above, none of the investor declarations offered by the SEC discloses that Quiros even spoke to investors.

27. The SEC's contentions regarding the AnC Bio Partnership and the amended offering statement fall into two categories. First, the SEC contends that the revenue projections in the DFR-approved amended offering statement were false and misleading because they projected revenues earlier than was possible in that they did not properly account for the need to obtain FDA approval for products that were to be manufactured and sold by the AnC Bio Partnership. Second, the SEC contends that AnC Bio Partnership funds were misused in a manner inconsistent with the projected sources and uses of funds set out in the amended offering statement.

28. The amended offering statement for the AnC Bio Partnership in several places discloses that FDA approval of AnC Bio products will be required, that none of the products were currently approved, and that approval could take time, could be delayed, and may not occur. *See, e.g.*, Ex. 57 (Doc.46-144 through 46-148) at AnC Bio 006678, AnC Bio 006688, AnC Bio 006703, AnC Bio 006759-60. Among other things, it states:

> "AnC Bio Products will be subject to rigorous testing by the US Food and Drug Administration (FDA) and numerous international, supranational, federal and state authorities. The process of obtaining approvals to manufacture, distribute and market artificial organs, cell based therapy medicine and certain medical devices can be

> costly and time-consuming, and approvals might not be granted on a timely basis, if at all. Delays in the receipt of, or failure to obtain approvals for AnC Bio Products could result in delayed realization of product revenues, reduction in revenues, and in substantial additional costs. In addition, no assurance can be given that AnC Bio will remain in compliance with applicable FDA and other regulatory requirements once approval or marketing authorization has been obtained for a product. These requirements include, among other things, regulations regarding manufacturing practices, product labeling, and advertising and postmarketing reporting, including adverse event reports and field alerts due to manufacturing quality concerns. The Project Facility will be subject to ongoing regulation, including periodic inspection by the FDA and other regulatory authorities. The Limited Partnership and/or AnC Bio will be required to incur expense and spend time and effort to ensure compliance with these complex regulations."
>
> Id. at AnC Bio 006703.

29. Further, the amended offering statement also warned that actual dates and results could differ materially from those projected and that assumptions used in the projections could prove incorrect. *See, e.g.*, id. at AnC Bio 006678, AnC Bio 6699, AnC Bio 6735.

30. The SEC relied on the testimony of its in-house economist, Dr. Jan Jindra, to demonstrate that the projections in the amended offering statement were flawed because they did not account for the time necessary to obtain FDA approval. Dr. Jindra is an economist, not an engineer, a medical professional, a microbiologist or a geneticist. He has never been involved in seeking FDA approval for anything, and all the information he has about the process is based on

what he has read, not on experience in the area or studies he has conducted. 5/10/16 Transcript (Doc. 125) at 47: 9-48:1 (Jindra Testimony). He did not disagree with the size of the revenue stream projected in the amended offering statement, but instead testified that based upon what he read regarding the time FDA approvals might take, it was his opinion that the projected revenues would be realized from about one year to two years later than projected. Id. at 49:14-50:10. However, Dr. Jindra's testimony was premised on the assumption that product development, the first phase in the FDA approval process, would not begin until the AnC Bio facility in Vermont was constructed. Id. at 7:8-8:11. On cross-examination, he acknowledged that the amended offering statement disclosed that some of the AnC products were already under development in Korea, but that he did nothing to investigate whether the required product development had been undertaken overseas, beyond asking the SEC attorneys about overseas sales information, which "was not forthcoming." Id. at 50:11-52:7, 53:22-54:2. In fact, the amended offering statement discloses that one of the key AnC Bio products, the Twin Pulse Life Support System (a heart-lung machine) was already approved by the Korean counterpart of the FDA and had been used in over 500 cases in Asia. Ex 57 (Doc. 46-144 through 46-148) at AnC Bio 006688, AnC Bio 006746. The SEC offered no evidence to contradict this information. In light of the foregoing, the Court concludes that the SEC has failed to demonstrate that the projected revenues for the AnC Bio Partnership project are materially misleading because of the need to obtain FDA approval.

31. With respect to the SEC's contention that AnC Bio Partnership funds were misused or commingled, it is important to note that the amended offering statement discloses the following projected uses of AnC Bio Partnership funds, among others:

Construction and fit out (e.g., equipment)	$72.8 million

Construction supervision and expenses	$12.6 million
Purchase of distribution and market rights	$10 million
Purchase of land	$6 million
Design, architect and engineering fees	$2.1 million

Ex. 57 (Doc. 46-144 through 46-148) at AnC Bio 006743. The amended offering statement and the AnC Bio Limited Partnership Agreement, like those for Phases I through VI, also specifically permit dealings with affiliates, provided that the amounts paid to the affiliates be at "costs to the Partnership not in excess of those disclosed in the [offering memoranda]." Ex. 57 (Doc. 46-155 through 48-148) at AnC Bio 006785 (AnC Bio Limited Partnership Agreement § 5.07). Indeed, the amended offering statement even goes farther and specifically notes that (a) the property upon which the facility was to be built had been purchased for $6,000,000 from GSI of Dade County, Inc. ("GSI"), a company owned by Quiros, (b) a construction supervision contract was entered into with North East Contract Services, LLC ("NECS"), a company owned by William Kelly, JPI's COO, and (c) a Design, Procurement and Construction Management Services Contract (the "JCM Contract") had been entered into with JCM. Id. at AnC Bio 006688-89. Indeed, the amended offering statement attached the executed real property purchase and sale agreement, and the contracts with NECS and JCM. Id. at AnC Bio 006974-84, AnC Bio 007015-19.

32. In addition, the amended offering statement disclosed that the distribution rights for the AnC Bio products had already been acquired pursuant to a Master Distribution Agreement with AnC Bio Inc, the Korean owner of the technology, and that a Technical License

agreement had also been entered into with AnC Bio Inc. for the intellectual property rights necessary for the project and to sell the products. Id. at AnC Bio 006688-89. The Technical License and an unexecuted copy of the Master Distribution Agreement were also attached to the amended offering statement. Id. at AnC Bio 006928-39, AnC Bio 006959-6973. An executed copy of the Master Distribution Agreement has also been admitted into evidence. Kelly Decl. Ex 4 (Doc. 100-4).

33. The SEC asserts that approximately $69 million of investor funds have been released to the AnC Bio project "sponsor." Ex. 30 (Doc. 46-43) Dee Decl. ¶ 60.

34. According to the SEC, $6 million of the $69 million was paid to GSI for the land for the AnC Bio project. Id. ¶ 53 and Ex. CC thereto. That is precisely the amount that GSI was supposed to receive for the land according to the amended offering statement and the executed land purchase agreement appended thereto. *See* ¶ 32 *supra*. The SEC challenges this payment on the grounds that the deed has not yet been recorded, and asserts that the AnC Bio Partnership paid too much for the land. The SEC has not made any showing about why the deed has not been recorded or that Quiros is somehow at fault for the failure to record the deed. The price of the land was clearly disclosed in the amended offering statement, together with an appraisal supporting the price from a Vermont Certified General Appraiser. Ex 57 (Doc. 46-144 through 46-148) at AnC Bio 006743, AnCBio 007022-31. The SEC has not established any misrepresentations regarding this payment, or that the payment was somehow inconsistent with the amended offering statement.

35. According to the SEC, nearly $47 million of the $69 million was paid to JCM. Ex. 30 (Doc. 46-43 to 46-45) Dee Decl. ¶ 45 and Ex. V thereto. The amended offering statement

discloses that JCM is owned by QResorts and that it was hired to procure equipment, intellectual property, licenses, engineering, design build and other services for the project, and attaches the JCM Contract with JCM. Ex. 57 (Doc. 46-144 through 46-148) at AnC Bio 006689, AnC Bio 007015-18. Further, the record also discloses that pursuant to the JCM Contract, on March 1, 2013, a purchase order was issued by the AnC Bio Partnership to JCM for $52 million in equipment, distribution rights, architectural and design services. Kelley Decl. (Doc. 100) ¶ 15 and Ex. 5 thereto (Doc 100-5). The amount is absolutely consistent with the disclosures in the amended offering statement regarding the cost of distribution rights ($10 million), the design, architect and engineering fees ($2.1 million), and equipment cost ($40 million), which total $52 million. Ex. 57 (Doc. 46-144 through 46-148) at AnC Bio 006743.

36. Under the terms of the purchase order, the $52 million purchase price was to be paid in 20 monthly installments of $2.6 million. Kelly Decl. (Doc. 100) ¶ 16 and Ex. 5 thereto (Doc. 100-5). The SEC apparently contends that payment of the $47 million of the $52 million due in accordance with this payment schedule is somehow inconsistent with the amended offering statement. As shown above, the $47 million payment is consistent with both the $52 million purchase order to JCM and the $52 million use of funds projection in the amended offering statement. To the extent that SEC claims that the timing of the payments is inconsistent with the offering statement, nothing in the offering statement limits or restricts the timing of payments to JCM for the acquisition of distribution rights, equipment, design/engineering services.

37. The SEC also argues that once the funds were paid to JCM, they were used in ways inconsistent with the amended offering statement. Indeed, most if not all of the SEC's misuse and commingling allegations relate to funds that were paid by the AnC Bio Partnership to

JCM pursuant to the JCM Contract and the purchase order discussed above. However, similar to the Phase I through VI partnership arguments, the SEC has failed to show that JCM had a contractual (or other) obligation to segregate investor funds or account for their use once it was paid for its procurement services—it was thereafter obligated to deliver licenses, a distribution agreement, design/engineering services and equipment, not account for funds. Certainly the amended offering statement does not represent that once it is paid for the equipment, rights and services it is obligated to deliver, JCM will segregate and account for the monies it has been paid.

38. In any event, the record also discloses that JCM has paid out no less than $26.5 million to acquire intellectual property and distribution rights, design and engineering services, and as deposits on equipment. Kelly Decl. (Doc. 100) ¶¶ 15, 21 and Exs. 5 and 6 thereto (Docs. 100-5, 100-6). Among other things, declarations from the president and a director of AnC Biopharm Inc., the Korean company that is supplying the products, technology and much of the equipment for the AnC Bio project, acknowledge the receipt of $21 million for such items. Kelly Decl. Ex. 6 (Doc. 100-6).

39. $7.9 million was paid to NECS under its construction supervision contract with the AnC Bio Partnership. Dee Decl. (Doc 46-43) ¶ 52; Kelley Decl. ¶ 22 (Doc. 100). Under that contract, which was attached to the amended offering statement, NECS was entitled to 15% of the gross cost of construction and fit out of the project, plus an addition 5% of gross cost for construction supervision expenses. Kelly Decl. (Doc. 100) ¶¶ 10-11 and Ex. 2 thereto; Ex 57 (Doc. 46-144 through 46-148) at AnC Bio 006974-84. The projected uses of funds set out in the amended offering statement disclose that construction supervision fees will be 15% of total construction and fit out cost and construction supervision expenses will be 5% of that same cost.

Ex. 57 (Doc. 46-144 through 46-148) at AnC Bio 006743. The amended offering statement projects those fees and expenses to total $12.6 million. Id. Thus, neither the amount which NECS has been paid, nor the percentage of cost basis on which it has been paid is in any way inconsistent with the disclosures of the amended offering statement.

40. The SEC claims that payment by NECS of $5.5 of the $7.9 in construction supervision fees and costs to Quiros-related entities is somehow inconsistent with the amended offering statement. Not so. Under the NECS construction supervision contract, NECS was obligated to and did pay 68% ($5.5 million of $7.9 million) of the construction supervision fees it received to the sponsor of the AnC Bio project, AnC Bio Vermont LLC, or to its designee. Kelly Decl. (Doc. 100) ¶ 18 and Ex. 2 thereto (Doc. 100-2). The NECS contract, including the requirement that 68% of the fees be paid to a Quiros- related entity, was disclosed and attached to the amended offering statement. Ex. 57 (Doc. 46-144 through 46-148) at AnC Bio 006974-84. Thus, these payments to Quiros-related entities were not in any way inconsistent with the amended offering statement.

PROPOSED CONCLUSIONS OF LAW

41. The SEC has alleged that the Quiros violated the antifraud provision of the Securities Act of 1933 (the "Securities Act") and certain provisions of the antifraud provision of the Securities Exchange Act of 1934 (the "Exchange Act"). Specifically, the SEC charges Quiros with the following violations:

- as to all partnerships (*i.e.*, Phase I through VI Partnerships and AnC Bio Partnership): violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)];

- as to Phase I through Phase VI Partnerships: violating Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and SEC Rule 10b-5(a) and (c) (17 C.F.R. § 240.10b-5(a) and (c)) promulgated thereunder;

- as to the AnC Bio Partnership: violating Section 10(b) of the Exchange Act and SEC Rule 10b-5(a), (b) and (c); and

- as to all of the partnerships: aiding and abetting others' violations of Rule 10b-5(b), and, as to all partnerships except the AnC Bio Partnership, liability for the partnerships' violations of the Securities Act and Exchange Act as a controlling person under Section 20(a) of the Exchange Act [15 U.S.C. § 78t].

42. As the movant for a preliminary injunction, the SEC must prove, *inter alia*, that it is likely to succeed on the merits of its claims. *SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1199 n.2 (11th Cir. 1999). Similarly, the SEC bears the burden of establishing that appointment of a Receiver is warranted. *See generally United States v. Bradley*, 644 F.3d 1213, 1310 (11th Cir. 2011); *Rosen v. Siegel*, 106 F.3d 28, 34 (2d Cir. 1997) ("[T]he appointment of a receiver is considered to be an extraordinary remedy, and...should be employed cautiously and granted only when clearly necessary to protect plaintiff's interests in the property.") (internal citations omitted).

43. To obtain injunctive relief, the SEC must make a "proper showing." It must establish both: (i) a prima facie case of past securities law violations and (ii) a reasonable likelihood that the wrong will be repeated absent injunctive relief. *SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d at 1199. Moreover, where the preliminary injunction is mandatory, the SEC must make a "clear showing." *SEC v. Unifund SAL*, 910 F.2d 1028, 1039 (2d Cir. 1990) ("Thus, even

when applying the traditional standard of "likelihood of success," a district court, exercising its equitable discretion, should bear in mind the nature of the preliminary relief the SEC is seeking, and should require a more substantial showing of likelihood of success, both as to violation and risk of recurrence, whenever the relief sought is more than preservation of the status quo."). Although the SEC's proposed preliminary injunction's prohibition against future securities law violations is prohibitory in form, rather than mandatory, it accomplishes significantly more than preservation of the status quo. *Id.* at 1040 ("Such an order subjects the defendant to contempt sanctions if its subsequent trading is deemed unlawful and also has serious collateral effects."). For this form of relief, the SEC must make a ***substantial*** showing of likelihood of success as to both a current violation and the risk of repetition. *Id.*

44. The SEC has failed to meet its burdens of proof with respect to the granting of preliminary injunctive relief and the appointment of a receiver.

A. Phase I through Phase VI Partnerships

Securities Act Section 17(a) Claims

45. The SEC has alleged that Quiros violated Section 17(a) of the Securities Act with respect to each of the Phase I through Phase VI partnerships. To establish a violation of Section 17(a)(1), the SEC must prove, *inter alia*, (1) material misrepresentations or materially misleading omissions (2) in the offer or sale of securities. *See SEC v. Monterosso*, 756 F.3d 1326 (11th Cir. Fla. 2014); *SEC v. Merch. Capital, LLC*, 483 F.3d 747, 766 (11th Cir. 2007) (citing *Aaron v. SEC*, 446 U.S. 680, 695 (1980)). The SEC also must show that the misrepresentations and omissions were made with *scienter*. *Id.*

46. Scienter is a state of mind embracing an intent to deceive, manipulate, or defraud. It consists of either the "intent to defraud" or "severe recklessness." *Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 790 (11th Cir. 2010). Severe recklessness is "limited to those highly unreasonable omissions or misrepresentations that involve . . . an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1238 (11th Cir. 2008). Allegations of motive and opportunity to commit fraud, standing alone, are insufficient to establish scienter. *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282 (11th Cir. 2011); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1285 (11th Cir. 1999).

47. To show a violation of Section 17(a)(2) or 17(a)(3) of the Securities Act, the SEC must demonstrate (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities, (3) made with negligence. *Id.* (*citing Aaron*, 446 U.S. at 702).

48. Based on the foregoing standards, the SEC has failed to make the requisite showing that Quiros violated Section 17(a) of the Securities Act. The SEC has failed to offer any evidence that Quiros made any representations or owed a disclosure duty to any of the EB-5 investors in Partnerships Phase I through VI. The offering documents themselves state that all representations made therein were made by the partnerships, not Quiros. The offering statements for Phase I and Phase II partnerships were prepared and issued before Quiros even acquired any interest in JPI. No evidence has been presented demonstrating that Quiros had any role in preparing, reviewing, issuing or disseminating any of the offering statements for Partnership Phases I through VI. No evidence has been presented showing that Quiros is the source of or responsible for any of the statements contained in those offering statements, or contributed any

information contained in such offering statements. No evidence has been presented that Quiros solicited any investors for Partnership Phases I through VI or even spoke to any of those investors prior to the time they invested. Further, there is no evidence that Quiros was an officer, director or principal of the partnerships' general partners or otherwise had any managerial responsibilities or authority for such entities.

49. In summary, there is no evidence that Quiros had any involvement in the preparation of offering documents for Partnership Phases I through VI, and thus he cannot be liable under Section 17(a) for any statements or omissions contained in them.

Exchange Act Section 10(b) and Rules 10b-5(a) and (c) Claims

50. The SEC also has brought claims under Exchange Act Section 10(b) and Rules 10b-5(a) and (c). To prove a § 10(b) violation, the SEC must show (1) material misrepresentations or materially misleading omissions, (2) in connection with the purchase or sale of securities, (3) made with scienter. *SEC v. Merch. Capita, LLC*, 483 F.3d 747, 766 (11th Cir. 2007)(*citing Aaron v. SEC*, 446 U.S. 680, 695 (1980)).

51. The SEC failed to make a requisite showing that Quiros violated Rules 10b-5(a) or (c). The SEC's claims against Quiros are based on the misrepresentations and omissions that underlie its claim under Section 17(a) of the Securities Act (that were made by persons other than Quiros). However, liability under Rules 10b-5(a) and (c) requires proof of misconduct in addition to the making of misrepresentations or omissions. *See SEC v. PIMCO Advisors Fund Mgmt. LLC*, 341 F.Supp.2d 454, 467 (S.D.N.Y. 2004) (holding that to permit liability to "attach to individuals who did no more than facilitate preparation of material misrepresentations or omissions actually communicated by others…would swallow" the bright-line test between

primary and secondary liability.)

52. Liability under Rules 10b-5(a) and (c) does not arise simply by virtue of repackaging a fraudulent misrepresentation as a "scheme to defraud." *See SEC v. Kelly*, 817 F.Supp.2d 340 (S.D.N.Y. 2011) ("Courts have not allowed subsections (a) and (c) of Rule 10b-5 to be used as a 'back door into liability for those who help others make a false statement or omission in violation of subsection (b) of Rule 10b-5.") (citations omitted)"); *accord WPP Luxembourg Gamma Three SARL v. Spot Runner, Inc.*, 655 F.3d 1039, 1057-58 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 2713 (2012) (*cited with approval in In re Galectin Therapeutics, Inc. Sec. Litig.*, 2015 U.S. Dist. LEXIS 173767 (N.D. Ga.) (dismissal of Rule 10b-5(a) and (c) claims where plaintiff "repeats and realleges each and every allegation" set forth in the preceding paragraphs of the complaint and does not identify any factual allegations that form the basis of Rule 10b-5(a) and (c) claims that are separate from the factual allegations that form the basis of Rule 10b-5(b) claim).

53. To the extent that the SEC maintains there was a "scheme" to raise funds through later projects to cover funding shortfalls in earlier projects, SEC Exhibit 133 demonstrates otherwise. SEC Exhibit 133 sets forth the SEC's belief as to how funds in later projects, such as Phases VI and VII, were misspent. For example, Exhibit 133 asserts that Phase VI money was used to pay JCM taxes and Phase VII money was used to pay, among other things, various tax liabilities and the cost of acquiring Burke Mountain. Significantly, however, SEC Exhibit 133 identifies not a single instance in which funds belonging to later projects were used for the benefit of earlier projects. Indeed, as a matter of mathematics, the amount of money available from later projects to pay for supposed shortfalls in earlier projects never could have been sufficient, in view of how the SEC contends money from the later projects was spent and, *inter*

alia, the fact that Exhibit 133 does not account for the use of $6 million of Phase VII funds to buy land in accordance with the Phase VII offering documents.

Secondary Liability

54. The SEC has alleged that Quiros is liable for others' violation of Section 10(b) and Rule 10b-5(a) pursuant to Section 20(a) under the Exchange Act. Section 20(a) liability derives from liability under § 10(b) and therefore necessarily requires a finding of § 10(b) liability. *See Sapssov v. Health Mgmt. Assocs.*, 608 Fed. Appx. 855, 859 fn. 6 (11th Cir. 2015*); Thompson v RelationServe Media, Inc.*, 610 F.3d 628, 635-36 (11th Cir. 2010).

55. To establish controlling person liability under Section 20(a) of the Exchange Act, the SEC must show that (1) the defendant had the power to control the general affairs of the primary violator, and (2) the defendant had the power to control the specific corporate policy that resulted in the primary violation. *Brown v. Enstar Group, Inc.*, 84 F.3d 393, 396 (11th Cir. 1996).

56. The SEC failed to make the requisite showing that Quiros was a controlling person of the primary violator under Section 20(a). The alleged primary violators were the limited partnership entities, Partnership Phase I through Phase VI. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. at 2296. The SEC failed to present any evidence that Quiros exercised any control over the partnerships nor any evidence that he had the power to control the corporate policies of the partnerships.

57. The SEC also alleged that Quiros aided and abetted violations of Section 10(b) of the Exchange Act and Rule 10b-5(b). In order to establish aiding and abetting liability, the SEC must show: (1) a primary violation by another party; (2) a "general awareness" by the accused

aider-abettor "that his role was part of an overall activity that is improper"; and (3) that "the accused aider-abettor" must have "knowingly and substantially assisted the violation." *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 796 (11th Cir. Fla. 2015).

58. The SEC failed to make the requisite showing that Quiros aided and abetted a violation of Rule 10b-5(b), as the SEC failed to establish Quiros' participation or awareness of the contents of any of the offering documents for Partnership Phases I through Phase VI.

B. AnC Bio Partnership

Securities Act Section 17(a) and Exchange Act Rule 10b-5(b) Claims

59. The SEC has alleged that Quiros violated Section 17(a) and Section 10(b) and Rule 10b-5 thereunder by making false statements and material omissions in offering documents for the AnC Bio Partnership.

60. As a preliminary matter, the securities in this case were offered exclusively to "accredited" investors within the meaning of Rule 501 of Regulation D promulgated under the Securities Act. 17 CFR 230.501. Within the United States, the offers and sales of securities were made in reliance on Rule 506 of Regulation D, and outside the United States in reliance on Regulation S promulgated by the SEC. *Id.* Regulation S is not an exemption from registration but rather is a codification of the SEC's position that the Securities Act was designed only to protect U.S. securities markets and investors who acquire securities in such markets. *See* 17 CFR 230.901 - 230.905 and Preliminary Notes.

61. The "accredited investor" definition is a central component of Regulation D. It is "intended to encompass those persons whose financial sophistication and ability to sustain the

risk of loss of investment or ability to fend for themselves render the protections of the Securities Act's registration process unnecessary." *See* Report on the Review of the Definition of "Accredited Investor," U.S. Securities and Exchange SEC (Dec. 18, 2015). The policy that accredited investors have the ability to "fend for themselves," is reflected in Regulation D, which makes inapplicable the information requirement under Regulation D for accredited investors. 17 CFR 230.502(b). Although an issuer offering and selling securities has a disclosure duty, there is no specific disclosure requirements when sales are exclusively to accredited investors. *See* 17 CFR 501-506.

62. The SEC's contentions regarding the AnC Bio Partnership and the amended offering statement fall into two categories. First, the SEC contends that the revenue projections in the DFR-approved amended offering statement were false and misleading because they projected revenues earlier than was possible in that they did not properly account for the need to obtain FDA approval for products that were to be manufactured and sold by the AnC Bio Partnership. Second, the SEC contends that AnC Bio Partnership funds were misused in a manner inconsistent with the projected sources and uses of funds set out in the amended offering statement.

63. The SEC failed to make the requisite showing that Quiros violated Securities Act Section 17 or Securities Exchange Act Section 10(b) and Rule 10b-5 thereunder, as the SEC failed demonstrate that the funds used by the AnC Bio Partnership were inconsistent with the disclosures to investors contained in the partnership's offering documents. The amended offering statement disclosed the proposed affiliated transactions and the projected uses of AnC Partnership funds to be paid to affiliates, and the limited partnership agreements included among the offering documents specifically authorize the general partner to enter into agreements with

affiliates.

64. The SEC contends that representations in the offering materials regarding the projected time schedule for completion of the laboratory are actionable. "Statements regarding projections of future performance may be actionable under Section 10(b) or Rule 10b-5 if they are worded as guarantees or are supported by specific statements of fact … or if the speaker does not genuinely or reasonably believe them." *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 766-76 (11th Cir. 2007) (*quoting Kowal v. IBM Corp*. (*In re IBM Corp. Sec. Litig*.), 163 F.3d 102, 107 (2d Cir. 1998)).

65. "Statements classified as 'corporate optimism' or 'mere puffing' are typically forward-looking statements, or are generalized statements of optimism that are not capable of objective verification. Vague, optimistic statements are not actionable because reasonable investors do not rely on them in making investment decisions." *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997).

66. The SEC has failed to demonstrate that the amended offering statement contained any guarantees of performance or false statements of fact.

67. The SEC has also failed to demonstrate that Quiros did not genuinely believe the statements in the amended offering statement, if he read them, or that his belief was not reasonable.

68. Further, the amended offering statement contained cautionary language that renders the forward-looking statements regarding the timeline for the AnC Bio Partnership immaterial.

69. The 11th Circuit follows the "bespeaks caution" doctrine. *Merchant Capital*, 483 F.3d at 767. "When an offering document's projections are accompanied by meaningful cautionary statements and specific warnings of the risks involved, that language may be sufficient to render the alleged omissions or misrepresentations immaterial as a matter of law." *Saltzberg v. TM Sterling/Austin Assocs*., 45 F.3d 399, 399 (11th Cir. 1995). "The bespeaks caution doctrine is ultimately simply 'shorthand for the well-established principle that a statement or omission must be considered in context, so that accompanying statements may render it immaterial as a matter of law.'" *Merchant Capital*, 483 F.3d at 767-68 (quoting *Kaufman v. Trump's Castle Funding (In re Donald J. Trump Casino Sec. Litig.)*, 7 F.3d 357, 364 (3d Cir. 1993)).

70. The amended offering statement contained numerous and extensive cautionary statements regarding the forward-looking statements contained in the offering. In particular, the amended offering statement specifically warned of the risk that FDA approvals may be delayed or not occur at all. These cautionary statements rendered immaterial those forward-looking statements that assumed FDA approval. See *Merchant Capital*, 483 F.3d at 768 ("This cautionary language, specifically tailored to several of the risks faced by the debt purchasing business, rendered the projections immaterial as a matter of law, even if they were misrepresentations.").

71. Finally, while the issuer of securities has a duty to disclose material information under Section 10(b) and Rule 10b-5(b), this Circuit recently made clear in *Fried v.Stiefel Labs., Inc.*, 814 F.3d 1288 (11th Cir. 2016) that there is no general duty of disclosure by corporate insiders absent an affirmative statement by them. *Id*. at 1294. ("[a]n individual with a duty to disclose may violate Rule 10b-5(b) by omitting a material fact from a statement … and an

individual with a duty to disclose may commit a fraud under Rule 10b-5 by failing to disclose material information … *[b]ut this Court has never held that a failure to disclose material information is an omission under subsection (b) absent a statement made misleading by that failure*." (citations omitted and emphasis added)). The SEC offered no evidence of affirmative statements made by Quiros to investors that were rendered misleading because he failed to provide other or subsequent disclosures.

Secondary Liability

72. The SEC also alleged that Quiros aided and abetted violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5(b) in connection with AnC Bio Partnership's sales of its limited partnership interests. For the reasons discussed above, because the SEC failed to provide the requisite showing that the issuer of the securities, AnC Bio Partnership, violated Section 10(b) or Rule 10b-5(b), there can be no secondary liability. See *Sapssov v. Health Mgmt. Assoc.*, 608 Fed.Appx. at 859, fn. 6.

73. However, even if AnC Bio Partnership violated Section 10(b) and Rule 10b-5(b) thereunder, in order to establish aiding and abetting liability against Quiros, the SEC must show, a "general awareness" by the accused aider-abettor "that his role was part of an overall activity that is improper" and that "the accused aider-abettor" must have "knowingly and substantially assisted the violation." *See SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d at 796. Severe recklessness can satisfy the scienter requirement in an aiding and abetting case. *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d at 1004. The SEC failed to make the requisite showing that Quiros aided and abetted a violation of Rule 10b-5(b), as the SEC failed to establish that Quiros' had any general awareness of improper activity or that he assisted to any extent in the

preparation of the allegedly false offering documents or otherwise solicited investor in any manner.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Clerk of the Court and furnished via CM/ECF to all participating recipients, on this 27th day of May, 2016.

By: */s/ Karen L. Stetson*
Karen L. Stetson