

**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., et al.,**

Defendants, and

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

Relief Defendants.

**PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION OF BERGER SINGERMAN
FOR PAYMENT OF ATTORNEYS' FEES**

Plaintiff Securities and Exchange Commission files this Response in Opposition to the Motion of Berger Singerman for Payment of Attorneys' Fees and Memorandum of Law ("Motion" (DE 118)). In its Motion, the law firm of Berger Singerman seeks nearly \$100,000 of the funds that have been frozen for the benefit of defrauded investors to pay for the attorneys' fees and expenses from April 14, 2016 through May 5, 2016,¹ when the firm, without giving any

¹ The Motion claims attorneys' fees starting on April 1, 2016 - based on a 11.20 hour time entry for Charles Lichtman at \$695 an hour (11.20 X \$695 = \$7,784 in fees). This 11 line time entry refers to getting ready for a Monday hearing, case review, and conference calls with Chambers, the Court appointed Receiver (Michael Goldberg), and the Commission. However, the Commission's view is this time entry is erroneous. The Commission's case was not filed, and the Court did not appoint Goldberg as Receiver, until April 12, 2016. Also, the time entry is duplicative of a 11.20 hour time entry for Lichtman on April 21, 2016 that is also 11 lines long and appears to contain the same description of the work done. Hence, the April 1st entry is duplicative and erroneous and investors should not have to pay for it.

reason or seeking permission from the Court, withdrew from representing Defendant Ariel Quiros.

For three primary reasons the Court should deny the Motion. First, Berger Singerman has failed to show how it benefits defrauded investors to use an asset purchased with investor funds (the Setai Fifth Ave Condominium) to pay nearly \$100,000 in attorneys' fees and expenses (and the Court should not modify the asset freeze to allow the payment of attorneys' fees and expenses).² Second, the law firm has failed to show why investors should have to pay substantial fees for the Berger Singerman law firm get up to speed on this case and then withdraw without any explanation. Third, the request is unreasonable as the fees requested vastly exceed the hourly rates being charged by the Receiver and his professionals, includes time for numerous inter-firm conferences, and contains an erroneous and duplicative time entry. For all of these reasons, the Court should deny the Motion.

I. Investors Do Not Benefit from Quiros Using An Asset He Purchased With Their Funds to Pay His Attorneys' Fees

The Court has identified the Setai Fifth Avenue Condominium that Quiros purchased with investor funds as the asset that will be used to pay reasonable attorney fees. [DE 148]. However, the SEC has prevented uncontroverted evidence that the Setai Fifth Avenue Condominium was purchased using investor funds.³ [See DE 125, Mark Dee Testimony at pp. 80-82; Plaintiff Ex. 133; and Plaintiff Ex. 89 at Ex. YY]. Several courts have held that before they will remove assets from a freeze, "the movant must establish that [the] modification is in the

² As the Court is aware, the Commission opposes any modification of the blanket freeze against Quiros. Accordingly, the Commission incorporates by reference Pages 79-86 of its Proposed Findings of Fact and Conclusions of Law. [DE 152].

³ Besides his denial, Quiros has not provided *any evidence* that he did not buy the Setai Fifth Avenue Condominium with investor funds.

best interest of the defrauded investors.” *SEC v. Grossman*, 887 F.Supp. 649, 661 (S.D.N.Y. 1995) (denying release of funds to pay attorneys’ fees and funeral and burial expenses), *aff’d*, 173 F.3d 846 (2d Cir. 1999); *see also SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1972). Here Quiros has not shown how it is in the best interests of defrauded investors to release nearly \$100,000 (on top of the other pending fee requests) for Quiros to employ counsel for approximately three weeks and then to have that counsel quit the case. This is especially true here, since by granting the request, it will squander an asset that the uncontroverted evidence demonstrates Quiros purchased using investor funds.

II. Investors Should Not Have to Pay Substantial Fees For the Berger Singerman Law Firm to Get Up to Speed on the Case Then Quit

Investors should not have to pay substantial fees for the Berger Singerman law firm to get up to speed on this case (along with two other law firms) and then withdraw without any explanation. A substantial amount of attorney time being billed to investors is for the Berger Singerman law firm to get up to speed on this newly filed case. [*See e.g.*, De 118 at p. 17 of 23 (April 14, 2016 billing entry “get up to speed with the case”). It is hardly surprising the law firm would need to get up to speed on this case, but what is unfair is for the firm to receive substantial funds that otherwise could go to the benefit of defrauded investors after it withdrew so quickly and suddenly. Now another law firm (presumably Gray Robinson) will be duplicating Berger Singerman’s efforts and investors will have to pay twice for the same work.

III. The Fees Requested Are Not Reasonable

The law firm’s request is unreasonable, as the fees requested greatly exceed the hourly rates being charged by the Receiver and his professionals, include time for numerous conferences, and contain an erroneous and duplicative time entry. Quiros seeks fees for four attorneys at a top rate of nearly \$700 an hour and fees for one paralegal. In particular, Quiros’

lawyers seek to bill investors at rates for partners of \$695 and \$550 an hour, an associate at \$295 an hour, and \$235 an hour for a paralegal. By way of contrast, Michael Goldberg, the Receiver in the case, testified at the hearing he is billing at the reduced rate of \$395 an hour in an effort to conserve scarce resources for investors. Attorneys working for him are billing at rates of \$260 an hour to \$395 an hour, again in an effort to take a little as possible from the Receivership estate and leaving more for investors. The movants request for attorneys' fees shows no such interest in investors' well-being. The Court should, therefore, deny the request (or at a minimum reduce the hourly rates to conform with the rates being charged by the Receiver).

Additionally, the fee request includes time for numerous attorney conferences between the Berger Singerman law firm and the out-of-state law firm that is serving as Quiros' co-counsel. Quiros choose this inefficient method of using multiple law firms (nothing prevented him from employing a single law firm located in Florida), which would have alleviated the need for the numerous conferences that the Berger Singerman law firm is trying to charge to investors. Investors should not have to pay for the numerous attorney conferences between the law firms.

Lastly, as noted in footnote one above, the billing contains an erroneous and duplicative time entry. In sum, the April 1st 11.20 hour time entry for Charles Lichtman at \$695 an hour ($11.20 \times \$695 = \$7,784$ in fees) is duplicative of a 11.20 hour time entry for Lichtman on April 21st. Hence, at a minimum, the Court should reduce the attorney fees by at least \$7,784 to account for this erroneous and duplicative time entry.

For all those reasons, the Court should deny Quiros' requests for a modification of the asset freeze to pay his attorneys' fees and expenses, whether using the Setai Condominium or any other frozen asset.

Respectfully submitted,

May 31, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 31, 2016, 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/Christopher E. Martin
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SERVICE LIST

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