

**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 SECOND MOTION FOR AN ORDER
PERMITTING PAYMENT OF ATTORNEYS' FEES**

Plaintiff Securities and Exchange Commission files this Response in Opposition to the Second Motion for an Order Permitting Payment of Attorney's Fees and Memorandum of Law ("Motion" DE 192). To date, Quiros' lawyers are seeking more than \$1 million of investor funds to pay for several months of his attorneys' fees and costs.¹ The amount sought is greatly excessive and at this rate, Quiros is quickly squandering investor funds. In addition, Quiros has failed to show how payment of the more than \$640,000 to his lawyers to defend numerous cases benefits defrauded investors, since he would use an asset purchased with investor funds (the

¹ In his first motion for attorneys' fees, Quiros sought more than \$275,000. (DE 109) In a subsequent motion, the Berger Singerman law firm sought nearly \$100,000 in fees (DE 118), and in this Motion, Quiros' lawyers are seeking approximately \$640,000 for additional fees through June 2016. In total, these requests from the inception of this case through June 2016 total more than \$1 million.

Setai Fifth Ave Condominium) to pay his attorneys' fees and expenses.² Furthermore, the rates sought by Quiros' lawyers are not objectively reasonable. The rates are excessive for this market and approximately double the hourly rate the Receiver is charging. Moreover, Quiros does not provide any legal support for his claim that he can use assets frozen in a Commission action to pay for legal fees relating other civil actions that have been filed against him or a criminal investigation. In sum, the Court should deny this Motion and payment of the more than \$640,000 of fees requested.³

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

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].⁴ However, the SEC has presented uncontroverted evidence that the Setai Fifth Avenue Condominium was purchased using investor funds.⁵ [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 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'

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

³ Alternatively, the Court should greatly reduce the overall amount and proposed hourly rates.

⁴ The Court stated from proceeds received by the Receiver, he "shall pay Quiros' reasonable attorney's fees in amounts approved by the Court." [DE 148]. Hence, the Court did not rule on to what extent he was allowing payment of reasonable attorney fees (for example, only through a certain event like the preliminary injunction hearing) or to what matter or matters he would allow payment of reasonable attorney's fees.

⁵ Besides his denials, *Quiros has not provided any evidence* that he did not purchase the Setai Fifth Avenue Condominium with investor funds.

fees and funeral and burial expenses), *aff'd*, 173 F.3d 846 (2d Cir. 1999); *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 more than \$640,000 (in addition to other pending fee requests) to his lawyers. This is especially true here, since the relief Quiros seeks would squander an asset (the Setai Fifth Avenue Condominium) that the uncontroverted evidence demonstrates he purchased using investor funds.

II. The Fees Requested Are Unreasonable

Quiros' request is unreasonable as many of the fees sought greatly exceed the hourly rates normally charged in this District. Having already stolen more than \$55 million of investor funds and misspent hundreds of millions more, Quiros now seeks to exacerbate the harm perpetrated on investors by attempting to drain assets potentially subject to a disgorgement judgment to pay excessive attorneys' fees. For two months of work, Quiros' lawyers seek more than \$640,000 in fees – an annual rate of more than \$3.8 million.

Quiros' primary law firm, Mitchell Silberberg & Knupp LLP ("MSK"), seeks fees for at least 17 attorneys at rates that exceed \$800 an hour. [DE 192-11 at pp. 53 of 56 (showing at least 17 different attorney rates from \$340 to \$805 an hour)].⁶ In particular, Quiros' lawyers seek to bill investors – and any money Quiros receives from frozen assets for attorneys' fees will come straight out of assets that could be used for the benefit of defrauded investors – for rates that exceed standard rates in this market. By way of contrast, Michael Goldberg, the Receiver in the case, testified at the preliminary injunction hearing that he is billing at the reduced rate of \$395 an hour in an effort to conserve scarce resources for investors. He further testified that attorneys working for him are billing at rates of \$260 an hour to \$395 an hour, again in an effort to take a

⁶ Only 3 of 17 MSK lawyers bill at rates equal to or less than the Receiver's hourly rate. Notably, these three lawyers account for less than 10% of the fees requested by MSK.

little as possible from the Receivership estate and leaving more for investors. Quiros' request for attorneys' fees shows no such interest in investors' well-being.

Moreover, Quiros does not have the right to use contested assets to pay for counsel of his choice. The U.S. Supreme Court held that the Sixth Amendment's right to counsel does not entitle a criminal defendant to use stolen funds to pay for the attorney of his choice. *Caplin & Drysdale v. United States*, 491 U.S. 617, 626, 109 S. Ct. 2646, 2652-2653 (1989). The Sixth Amendment right to counsel, therefore, is qualified in that a defendant must have his own funds, as opposed to those stolen from another, to pay his counsel. *Id.*; *U.S. v. Bissell*, 866 F.2d 1343, 1351 (11th Cir.) (“[T]he right to counsel of choice belongs solely to criminal defendants possessing legitimate, uncontested assets.”), *cert. denied sub nom.*, 493 U.S. 876 (1989).

Further, in a civil litigation, such as this, Quiros does not have a sixth amendment right to counsel. *See SEC v. Prater et al.*, 296 F.Supp.2d 210 (D. Conn. 2003) (holding in the context of denying Defendants request to modify blanket asset freeze that “neither the SEC nor this Court has denied defendants their right to counsel, as it is clear that ‘defendant is not entitled to foot his legal bill with funds that are tainted by his fraud’”) (citations omitted); *SEC v. Quinn*, 997 F.2d 287, 289 (7th Cir. 1993) (“just as a bank robber cannot use the loot to wage the best defense money can buy, so a swindler in securities markets cannot use the victims’ assets to hire counsel who will help him retain the gleanings of crime”); *SEC v. Roor*, 1999 WL 553823 at * 3 (S.D.N.Y. July 29, 1999) (citation omitted) (defendant “may not use income derived from alleged violations of the securities laws to pay for legal counsel.”) The Court should, therefore, deny Quiros' request to pay for the very expensive legal counsel of his choice.⁷

⁷ The primary counsel of Quiros' choice, MSK, is very expensive and will deplete more assets than if he uses counsel billing at the prevail rates in this District. Hence, at a minimum, to minimize the depletion of investor assets, the Court should require MSK to bill at the prevailing rates in this District.

A. The Rates Charged by MSK Are Not Objectively Reasonable & Exceed the Rates Usually Charged in this District

MSK is trying to bill at rates charged in more expensive legal markets than the Southern District of Florida. Nonetheless, Quiros claims in his Motion that MSK's rates are "objectively reasonable." [DE 192, p. 8]. This claim is premised on the declaration of the Chief Marketing Officer of MSK, Douglas Gold. [DE 192, Ex. B]. In Gold's Declaration, he makes two key admissions. First, that MSK only has three offices (in New York, Washington D.C., and Los Angeles) and 123 lawyers; nonetheless, he tries to compare MSK rates to massive law firms with thousands of lawyers throughout the world. Second, he admits that the data has "outliers". As further explained below, we agree, as the data is nothing more than a series of "outliers" that contain glaring omissions, illogical conclusions, and apples to oranges comparisons.

In his declaration, Gold claims he looked at a Valeo Partners Database ("Database") of attorney fee and rate information from public court filings⁸ to determine the rates charged by securities lawyers in 16 markets around the country, including Miami and West Palm Beach. [*Id.*, at Ex. B (Ex. 1)]. He also claimed the Database showed the hourly rates charged by securities lawyers based on the year they graduated from law school (*Id.*, at Ex. B (Ex. 2)), and the hourly rates of what he considered were MSK's competitors. [*Id.*, at Ex. B (Ex. 3)].

The first of Gold's exhibits, Exhibit 1, purports to show the rates charged for securities lawyers (one column lists partner rates while the other column lists associate rates) in 16 markets around the country, including Miami and West Palm Beach. On its face, this exhibit is substantially incomplete. For the associate rates, half of the cities are blank, including no rates

⁸ Gold did not attach the underlying data, so we have no way of determining the accuracy of the data, we have no way of replicating his results, and we no way of determining what information he may have omitted from his analysis.

for Miami and West Palm Beach. For the partner rates, a quarter of the cities are blank.⁹ Notably, the two cities with the lowest legal rates are Miami (at \$643 an hour) and West Palm Beach (at \$439 an hour). Hence, to the extent Gold's Exhibit 1 has any evidentiary value, it merely proves the Commission's point, that MSK rates of more than \$800 an hour are excessive for legal markets within the Southern District of Florida.

The second of Gold's exhibits, Exhibit 2, purports to show the rates charged nationwide for securities litigation lawyers based on the year they received their bar license.¹⁰ The information on this exhibit is internally inconsistent, so it lacks any evidentiary value. For example, Ex. 2 shows that lawyers admitted in 1976 charge \$925 an hour while lawyers admitted in 1971 (five years earlier) charge \$599 an hour. Another example, Ex. 2, shows lawyers admitted in 2000 charge \$1,075 an hour while lawyers admitted in 1997 (four years earlier) charge \$557 an hour. In sum, Gold's Exhibit 2 shows no direct correlation between how long a lawyer has been admitted and the rates he or she charges.

The third of Gold's exhibits, Exhibit 3, purports to show the rates charged for associates and partners for MSK's competitors. This is a complete apples to oranges comparison. MSK, a small to mid-sized firm with three offices, is trying to compare itself to much larger national and international law firms. Gold's Exhibit 3 compares MSK to:

- DLA Piper – a global firm located in 30 countries (*see* <https://www.dlapiper.com/en/us/aboutus/>)
- Duane Morris – a firm with more than 750 attorneys (*see* <http://www.duanemorris.com/site/about.html>)

⁹ To accept Quiros' data one would have to conclude that in half of the major legal markets in the country for securities work, no associates billed anytime and in a quarter of such markets no partners billed anytime, which is, obviously, preposterous.

¹⁰ Presumably, MSK's premise is that the longer a lawyer has been practicing the more he or she charges.

- Fox Rothschild – a firm with nearly 750 attorneys in 22 offices coast to coast (*see* <http://www.foxrothschild.com/our-firm>)
- Greenberg Traurig – 2nd biggest firm in the U.S. for total number of lawyers (*see* <http://www.gtlaw.com/About-Us/Greenberg-Traurig-At-a-Glance>)
- Jones Day – one of world’s largest law firms with more than 2,500 attorneys on five continents (*see* <http://www.jonesday.com/principlesandvalues/firmhistory>)¹¹
- K&L Gates – approximately 2,000 attorneys who practice on five continents (*see* <http://www.klgates.com/about>)
- Strock & Strock & Lavan – a firm with more than 300 attorneys (*see* <http://www.stroock.com/about>)
- Weil, Gotshal & Manages – a firm with approximately 1,100 lawyers with offices on three continents (*see* <http://www.weil.com/about-weil>)
- White & Case – a truly global firm with offices all over the world (*see* <http://www.whitecase.com/firm/our-firm>)

In sum, Gold’s Exhibit 3 has no evidentiary value since it tries to compare MSK (a small to mid-sized firm with just three offices) to global law firms with hundreds and oftentimes thousands of more lawyers. As demonstrated above, the rates of MSK are not objectively reasonable, and in fact exceed the legal rates customarily charged in this District.

Moreover, the actual bills submitted as part of the Motion further demonstrate that the legal rates in the Southern of District of Florida are much closer to the rates being charged by the Receiver than the excessive rates being charged by MSK. The lawyers located in the Southern District of Florida that submitted bills as part of the Motion are substantially lower than MSK’s rates. For example, Gray Robinson lawyers located in Miami, submitted rates between \$350 and \$465 an hour. [See DE 192-18, p. 11 of 22 (Ex. 17)]. Another example, the firm of Leon Cosgrove, located in Coral Gables, submitted rates between \$485 and \$585 an hour. [See DE

¹¹ Under the People tab at the top of the webpage it states: “One Firm Worldwide With more than 2,500 lawyers, including more than 550 lawyers in Europe and 200 lawyers in Asia, Jones Day ranks among the world’s largest law firms. . .”

192-19, p. 3 of 8 (Ex. 18)]. Hence, if the Court allows MSK to receive payment from the investors' assets, it should substantially reduce MSK's proposed billing rates to bring them in line with rates charged by lawyers in the Southern District of Florida.

III. Quiros Fails to Provide Any Legal Support for Releasing Assets Frozen In a SEC Case to Defend Non-SEC Civil Cases

In addition to fees to defend the Commission's case against Quiros, he is seeking fees to defend six other civil actions, plus one criminal investigation. However, the Court has not ruled that Quiros is allowed payment for attorney's fees in other matters. [See DE 148]. Quiros also does not provide any legal support for his claim that he can use assets frozen in an SEC action to pay for other civil actions that have been filed against him or to pay to defend a criminal investigation. The Court should not open this Pandora's Box, which will quickly dissipate investors' funds. Hence, the Court should deny any request to release funds to defend other civil actions or the criminal investigation.

In conclusion, the Court should deny Quiros' Motion for more than \$640,000 to pay his attorneys' fees and expenses, whether using the Setai Condominium or any other frozen asset.

Respectfully submitted,

August 11, 2016

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on August 11, 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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SEC v. Ariel Quiros, et al.
Case No. 16-CV-21301-GAYLES

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