UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 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.
_____________________________________/

DEFENDANT ARIEL QUIROS'S REPLY IN SUPPORT OF THIRD MOTION FOR AN ORDER PERMITTING PAYMENT OF ATTORNEYS' FEES AND COSTS

I. Introduction

The SEC's Opposition to Defendant Ariel Quiros's Third Motion for an Order Permitting Payment of Attorneys' Fees and Costs is the latest in a series of unseemly attempts by the SEC to separate Mr. Quiros from his counsel. Mr. Quiros has not been found liable for any wrongdoing, and he must be permitted to pay his counsel to defend him against a series of interrelated, high-stakes lawsuits. Indeed, in its May 27, 2016 Order, the Court explicitly recognized Mr. Quiros's right to pay his counsel.

Despite this Order, the SEC[1] has – yet again – taken the position that Mr. Quiros is guilty until proven innocent, and therefore he should not be allowed to use his own assets to pay the defense counsel of his choosing. This is in direct contravention of the Court's May 27, 2016 Order, which stated:

> The Court balances the ability to provide restitution to the victims with the defendants' ability to defend themselves prior to a finding of liability. *See F.T.C. v. 4 Star Resolution, LLC*, No. 15-CR-1125, 2015 WL 4276273 at *1 (W.D.N.Y. July 14, 2015) ("[I]t cannot be ignored that 'this suit was brought to establish [D]efendants' wrongdoing; ***the [C]ourt cannot assume the wrongdoing before judgment in order to remove the [D]efendants' ability to defend themselves.***'") (*quoting Fed. Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 553, 565 (5th Cir. 1987)).

(DE 148, pg. 3; emphasis added.)

The Court has already held that Mr. Quiros is entitled to use proceeds from his Setai Condominium to pay his attorneys' fees. (DE 148.) Furthermore, fully cognizant of the Vermont litigation and the possibility of class actions, the Court awarded Mr. Quiros his "reasonable attorney's fees in amounts approved by the Court[,]" without any further limitation. (DE 148, pg. 4.) Yet the SEC appears to believe that by making *ad hominem* attacks on Mr.

[1] The Receiver joined the SEC's Opposition to Mr. Quiros's fees motion. (DE 225.)

Quiros and comparing him to a "bank robber" it can reverse the Court's decision on these points. It cannot. Moreover, it would be manifestly unjust for the Court to deprive Mr. Quiros of the ability to pay his legal fees in the other cases against him. Unless Mr. Quiros is able to defend himself in ***all*** of the litigation, he will suffer costly default judgments, and the benefit of being able to pay his attorneys to defend against the SEC action will be illusory.

Thus, the only issue left for the Court to decide is whether the fees sought by Mr. Quiros are reasonable. And reasonableness must not be determined in a vacuum; it must be judged in light of the fact that Mr. Quiros is the defendant in multiple, related lawsuits brought by, among others, the SEC, the State of Vermont, a Court-appointed receiver, and highly sophisticated plaintiffs' class action attorneys. Rather than coordinate their efforts, Mr. Quiros's opponents have forced him to defend himself on multiple fronts. Thus, the size of Mr. Quiros's team of attorneys and the rate at which he has incurred fees are the direct consequence of the litigation strategy of his opponents – including the SEC and the Receiver – to which he has been forced to respond. And evaluating the scope and spend of Mr. Quiros's defense team must account for the enormous number of attorneys aligned against him.

Finally, the SEC's attack on the rates charged by Mr. Quiros's attorneys, particularly Mitchell Silberberg & Knupp LLP ("MSK"), is overstated. The SEC conveniently fixates on the highest rates charged by Mr. Quiros's attorneys, rather than those charged by the members of the core team. Moreover, the repeated comparison of Mr. Quiros's attorneys' rates to those of the Receiver and his counsel is misplaced because, by their own written admission, they are performing a special public service for which a discount is appropriate, whereas Mr. Quiros's attorneys represent the private interests of an individual whose financial life is literally on the line, and his counsel never agreed to provide a public service discount.

II. The SEC Attempts to Re-litigate Issues Already Decided by the Court.

A. The Court Has Already Determined that Proceeds from the Setai Condominium May be Used to Pay Mr. Quiros's Attorneys' Fees and Costs.

The SEC acknowledges that "[t]he Court has identified the Setai Fifth Avenue Condominium … as the asset that will be used to pay reasonable attorneys' fees." (DE 224, pg. 3, *citing* DE 148.) This should end the discussion. Yet the SEC cannot help itself in arguing that the proceeds from the Setai Condominium should not be used to pay Mr. Quiros's attorneys' fees because the asset is allegedly tainted. (DE 224, pg. 3.) This is now the ***third*** attempt the SEC has made to re-write the Court's May 27 Order.[2] The Court must reject it, just as the Court summarily rejected the SEC's first unsuccessful attempt. (*See* DE 157, 159.)

Further, the SEC's argument that the amount of attorneys' fees incurred by Mr. Quiros exceeds the proceeds that the Receiver has gotten from the initial mortgage on the Setai Condominium misses the point. In accordance with the May 27, 2016 Order, Mr. Quiros can still borrow additional funds using the Setai Condominium as collateral and/or sell the apartment to generate more money. Mr. Quiros does not anticipate any trouble in this regard, and it is unclear how any such difficulties would be of concern to the SEC.

B. The Court Has Already Awarded Mr. Quiros Fees Beyond the Instant Action.

The Court has also already granted Mr. Quiros the right to pay his reasonable attorneys' fees, without limitation to the SEC litigation. (DE 148.) The SEC argues that "[t]he other cases for which Quiros now seeks fees – the Receiver's action and the three private actions – had not even been filed yet, so it would have been impossible for the Court to grant payment relating to those cases." (DE 224, pg. 4.) This is disingenuous for several reasons: First, before granting

---

[2] The SEC made its second attempt to re-write the Court's order in its Opposition to Mr. Quiros's Second Motion for Attorneys' fees. (DE 199, pgs. 2-3.) Mr. Quiros responded to this argument in his Reply. (DE 204, pgs. 2-4.)

fees, the Court's discussion in the May 27 Order expressly recognized that Mr. Quiros was seeking "a sum sufficient to retain Vermont counsel." (DE 148, pg. 2.) Second, as early as the April 25, 2016 hearing on the asset freeze, counsel for Mr. Quiros apprised the Court of the Vermont litigation, the possibility of additional lawsuits, and the need for Mr. Quiros to pay his attorneys' fees to defend himself:

> We are also faced with actions in Vermont that have been filed. Those have to be paid. There is also a threat that I have read about. Nothing has yet been filed but I understand it's coming, and knowing the plaintiff's bar, it wouldn't surprise me of other lawsuits against Mr. Quiros resulting from the contentions that the SEC has made that have been well publicized in papers all around the country.

(DE 93, pg. 31:2-9; *see generally* pgs. 30-32; *see also* DE 204, pgs. 5-7.) As is evident from the above, the April 25 statement foreshadowed the class actions that were indeed filed. Third, on May 27, when the Court awarded Mr. Quiros reasonable attorneys' fees, the Receiver had been appointed by the Court in this SEC Action over a month earlier, and he had been given the mandate to "institute such actions and legal proceedings, for the benefit and on behalf of the Corporate Defendants and Relief Defendants and their investors and other creditors, as the Receiver deems necessary…." (DE 13, pg. 3.)

Moreover, the Court's order only can be read as granting Mr. Quiros the right to use his assets to pay reasonable attorneys' fees and costs across all the lawsuits against him because any other outcome would effectively mean financial ruin. If Mr. Quiros is not allowed to use his assets to pay his counsel to defend against the *Daccache* class action – a consolidated class action lawsuit featuring 15 highly sophisticated plaintiffs' attorneys across four law firms,[3] the

[3] This is the number of attorneys who appear on the pleading caption in the *Daccache* case, which does not include other attorneys at their firms working on the matter, thus it is no doubt a conservative calculation.

Receiver's action, the *Gonzalez Calero* state court action,[4] and the Vermont litigation, he will be effectively separated from his counsel, and he will suffer costly defaults in all of those cases. As a practical matter, this will negate the Court's grant of attorneys' fees to allow Mr. Quiros to defend himself.

The SEC contends that "Quiros does not provide any legal support for his claim that he can use assets frozen in a Commission action to pay for *other* civil actions filed against him." Mr. Quiros's basis for seeking such fees is the Court's May 27 Order itself.

III. Mr. Quiros's Attorneys' Fees Must Be Viewed in Light of His Many Opponents.

The SEC complains about the "burn rate" at which Mr. Quiros is incurring attorneys' fees and the number of attorneys on Mr. Quiros's defense team (DE 224, pg. 2, 6), but neither can be viewed in a vacuum. Rather, Mr. Quiros's attorneys' fees and staffing decisions are the direct result of the multiple lawsuits brought by his opponents. Since April 2016, Mr. Quiros has been named as the defendant in eight separate lawsuits. These include the SEC Action, the case filed by the State of Vermont, the case filed by the Receiver, three federal class actions, and two state court lawsuits. Instead of coordinating, Mr. Quiros's opponents have insisted upon waging war on multiple fronts – in two different states. Mr. Quiros's opponents have filed complaints over and over again that concern the same set of core events, and he has been forced to make five motions to dismiss in the past six months. Indeed, the SEC expressly rejected Mr. Quiros's counsel's suggestion that the SEC Action be coordinated with the Receiver's case and the class actions. The SEC is, of course, welcome to make its own strategy decisions, but it is disingenuous for the SEC to blame Mr. Quiros for the rate at which he is incurring attorneys'

[4] On September 23, 2016, the *Wei* class action was voluntarily dismissed, without prejudice.

fees and profess concern for investors when it is the very strategy choices of Mr. Quiros's opponents that have driven up his fees.

Likewise, the size of Mr. Quiros's team of attorneys must be viewed in light of his need to defend against eight lawsuits. As a threshold matter, the SEC's claim that Mr. Quiros has been represented by 39 lawyers is vastly overstated. First, the SEC has counted 39 timekeepers, but only 33 of these were attorneys.[5] Further, upon closer examination, as of August 2016, there were only ***11 attorneys*** at MSK who had billed more than 20 hours across the multiple cases against Mr. Quiros. (*See* DE 109-3, 192-11, 219-2.) Other MSK attorneys have helped with spot research and other discrete projects, as has been necessary given the crush of litigation. Moreover, the size of Mr. Quiros's defense team is eminently reasonable in comparison to his number of adversaries. Across the eight cases filed against Mr. Quiros, there have been at least ***41 attorneys*** lined up against him: 5 representing the SEC, 5 representing the Receiver, 4 representing the State of Vermont, 1 representing the *Gonzalez Calero* state court plaintiffs, 4 representing the *Wei* state court plaintiffs, 15 representing the *Daccache* class action plaintiffs, 4 additional attorneys representing the *Shaw* class action plaintiffs, and 3 additional attorneys representing the *Casseres-Pinto* class action plaintiffs.[6]

IV. Mr. Quiros's Attorneys' Rates Are Objectively Reasonable.

The SEC's complaints about the rates charged by Mr. Quiros's attorneys are also overstated. The SEC fixates on the rates charged by a few MSK senior partners (DE 224, pg. 6), rather than more appropriately looking at the rate charged by lead partner David Gordon

---

[5] Of the MSK personnel, Alina Kelly and Sunan Xing are librarians, Morgan Jackson is the litigation support coordinator, Laura Lanchaster is a paralegal, and Natalie Tran is a project assistant. (DE 219-2.) At the Dinse firm, Louise Reese is a paralegal. (DE 219-3.)

[6] Some, but not all of the attorneys from the *Shaw* and *Casseres-Pinto* class actions have joined the *Daccache* case. To the best of their ability counsel for Mr. Quiros has avoided double counting them.

($695/hour) and the rate charged by partner John Durrant ($675), who billed over twice as many hours in July and August as the next MSK attorney. Indeed, only one other senior partner, Robert Rotstein, billed more than 20 hours in July and August combined.

Moreover, the SEC's repeated comparison of the rates charged by Mr. Quiros's attorneys to those charged by the Receiver and his counsel is misplaced. The Receiver serves a special public service role that he has voluntarily undertaken, and in seeking that position he expressly agreed to discount his rates. In his application to be appointed as the Receiver, Michael Goldberg stated:

> If selected by the Court to serve as receiver, I propose to bill the estate at $395 per hour – a substantial discount from the $695.00 per hour rate I charge my private clients. This is the same rate that I handled similar cases for over ten years ago and it should save the estate thousands of dollars. All other Akerman professionals (attorneys and paralegals) will be billed at a 15% discount off their standard rates. Moreover, to the extent it is necessary for me to hire any other professionals such as attorneys or accountants, I will require them to provide similar discounts.

(DE 7-2, pg. 7.) Additionally, the Receiver's counsel, Jeffrey Schneider, also sought to be appointed as the Receiver here. Tellingly, in his application, Mr. Schneider stated:

> I also appreciate the importance of managing the expenses of a receivership. We consider receivership work to be an honor and a privilege. ***It is public service work for which we must significantly reduce the hourly rate we charge typical commercial clients***, because my goal, naturally, is to maximize recoveries to the victims. To that end, my current hourly rate is $575.00 an hour. For purposes of serving in this case, however, I am willing to reduce and cap my hourly rate at $260.00 per hour. Partners at my firm have hourly rates that range from $450.00 to $600.00 per hour but I would agree to reduce and cap my partners' rates at $250.00 per hour. Associates of my firm have hourly rates that range from $325.00 to $375.00 per hour, but associates of my firm would be reduced and capped at $200 per hour. Paralegals would be billed at $125.00 per hour. Wherever possible, I will attempt to use those professionals with the lowest billing rate.

(DE 7-1, pg. 5; emphasis modified.) In their bids, both Mr. Goldberg and Mr. Schneider voluntarily offered to drastically reduce their rates if appointed as Receiver. Mr. Goldberg even pledged to obtain discounts from the professionals he hired (which ended up including Mr. Schneider). Critically, as Mr. Schneider recognized, he and Mr. Goldberg offered to charge lower rates because serving as the Receiver is "public service work."[7]

By contrast, Mr. Quiros's attorneys ***are*** working for a private client, and thus are charging him their standard hourly rates. Mr. Quiros's counsel have been retained by the defendant in a series of high-stakes, complex lawsuits, and are seeking fees commensurate with the services provided. Comparing the Receiver and his counsel, the SEC claims "Quiros's request for attorneys' fees shows no such interest in investors' well-being by taking any reasonable discount." (DE 224, pg. 9.) But again, Mr. Quiros's attorneys have not been charged with protecting investors, they have been hired to defend their private client.

Additionally, as defense counsel fighting litigation on multiple fronts, Mr. Quiros's attorneys face a harder job than the Receiver and his counsel. Although the Receiver has not coordinated his action with the other cases in a way that would promote efficiency and reduce Mr. Quiros's litigation spend, the Receiver and his attorneys have been able to ride the coattails of the SEC and the class action plaintiffs. Indeed, rather than file his own opposition to the instant fees motion, the Receiver simply joined the SEC's Opposition. (DE 225.) Furthermore, portions of the Receiver's complaint were lifted whole cloth from the *Daccache* class action.

Finally, the SEC's complaints about specific categories of attorneys' fees are not well-founded. The SEC argues that Mr. Quiros should not be entitled to recover his attorneys' fees

[7] Additionally, as with any other government services contract, Mr. Schneider and Mr. Goldberg were no doubt competing to be the lowest bidder.

for the work on his fees applications. But Mr. Quiros made such fee applications in direct response to this Court's order that "the Receiver shall pay Quiros's reasonable attorney's fees ***in amounts approved by the Court***[.]" (DE 148, pg. 4; emphasis added.) Moreover, as the Eleventh Circuit has recognized, "[s]everal courts have awarded fees for time spent in connection with fee and expense applications." *Haitian Refugee Ctr. v. Meese*, 791 F.2d 1489, 1500-01 (11th Cir. 1986) (*vacated in part on other grounds on reh'g*, 804 F.2d 1573 (11th Cir. 1986)) (upholding district court's award of attorneys' fees); *see also, e.g., DVI Receivables XIV, LLC v. Rosenberg*, 779 F.3d 1254, 1261 (11th Cir. 2015) (affirming district court order granting request for attorneys' fees spent preparing petition for attorneys' fees, or "fees on fees"); *see Class B Ltd. Partner Comm. v. Meyers Law Group, P.C. (In re GFI Commer. Mortg. LLP)*, 2013 U.S. Dist. LEXIS 124077, *19-20 (N.D. Cal. Aug. 29 2013) (affirming bankruptcy court order denying creditor's committee's request to disallow debtor's request for attorneys' fees incurred in preparing debtors' attorneys' fees application; "here, the legal work was necessary given that the [creditors] Committee forced [debtor] into litigation over the fee award"). The SEC's quip about time spent on "project management" is even more frivolous; coordination among the multiple cases is an absolute necessity for promoting efficiency and ***reducing*** the cost of Mr. Quiros's defense. And the SEC's argument about time spent monitoring news articles is likewise absurd. Not only was this minor task appropriate in such a high-profile case, inasmuch as the SEC itself has issued a press release and the Receiver and State of Vermont have been communicating with the press, but also the majority of such time entries were by a project assistant.

V. Conclusion

For the foregoing reasons, Mr. Quiros respectfully requests that this Court allow Mr. Quiros to have access to the fees necessary to defend the onslaught of litigation against him by granting his third motion for attorneys' fees and awarding the full amount of fees and costs sought by his motion as well as his first and second fees motions.

Dated: October 17, 2016

Respectfully submitted,

By: *s/ James R. Bryan*
Scott B. Cosgrove
Florida Bar No. 161365
James R. Bryan
Florida Bar No. 696862
León Cosgrove, LLC
255 Alhambra Circle, Suite 800
Coral Gables, Florida 33133
Telephone: (305) 740-1975
Facsimile: (305) 437-8158
Email: scosgrove@leoncosgrove.com
Email: jbryan@leoncosgrove.com
Email: anoonan@leoncosgrove.com

DAVID B. GORDON *(pro hac vice)*
12 East 49th Street
30th Floor
New York, NY 10017
Telephone: (212) 509-3900
Facsimile: (212) 509-7239
Email: dbg@msk.com

JOHN S. DURRANT *(pro hac vice)*
11377 W. Olympic Blvd.
Los Angeles, CA 90064
Telephone: (310) 312-3187
Facsimile: (310) 312-3100
Email: jsd@msk.com

Counsel for Defendant Ariel Quiros

CERTIFICATE OF SERVICE

I hereby certify that on this on October 17, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing documents are being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in the manner stated in the service list attached.

s/ James R. Bryan
James R. Bryan

SERVICE LIST
US District Court, Southern District of Florida
Case No.: 16-cv-21301-DPG

Securities and Exchange Commission v. Ariel Quiros, et al.

Robert K. Levenson, Esq.
Senior Trial Counsel
Florida Bar No. 0089771
Direct Dial: (305) 982-6341
Email: levensonr@sec.gov

Christopher E. Martin, Esq.
Senior Trial Counsel
SD Florida Bar No.: A5500747
Direct Dial: (305) 982-6386
Email: martine@sec.gov

SECURITIES AND EXCHANGE COMMISSION
801 Brickell Avenue, Suite 1800
Miami, Florida 33131
Telephone: (305) 982-6300
Facsimile: (305) 536-4154

Counsel for Plaintiff

Michael I. Goldberg
AKERMAN LLP
350 E. Las Olas Blvd., Suite 1600
Ft. Lauderdale, Florida 33301
Telephone: (954) 463-2700
Facsimile: (954) 463-2224
Email: michael.goldberg@akerman.com

Jonathan S. Robbins, Esq.
AKERMAN LLP
350 E. Las Olas Blvd., Suite 1600
Ft. Lauderdale, Florida 33301
Telephone: (954) 463-2700
Facsimile: (954) 463-2224
Email: jonathan.robbins@akerman.com

Naim Surgeon, Esq.
AKERMAN LLP
Three Brickell City Centre
98 Southeast Seventh Street, Suite 1100
Miami, Florida 33131
Telephone: (305) 374-5600
Facsimile: (305) 349-4654
Email: naim.surgeon@akerman.com

Counsel for Court-Appointed Receiver

Roberto Martinez, Esq.
Stephanie A. Casey, Esq.
COLSON HICKS EIDSON, P.A.
255 Alhambra Circle, Penthouse
Coral Gables, Florida 33134
Telephone: (305) 476-7400
Facsimile: (305) 476-7444
Email: bob@colson.com
Email: scasey@colson.com

Counsel for William Stenger

Jeffrey C. Schneider, Esq.
LEVINE KELLOGG LEHMAN SCHNEIDER + GROSSMAN
Miami Center, 22nd Floor
201 South Biscayne Blvd.
Miami, Florida 33131
Telephone: (305) 403-8788
Email: jcs@lklsg,com

Counsel for Receiver

Mark P. Schnapp, Esq.
Mark D. Bloom, Esq.
Danielle N. Garno, Esq.
GREENBERG TRAURIG, P.A.
333 SE 2ndAvenue, Suite 4400
Miami, Florida 33131
Telephone: (305) 579-0500
Email: schnapp@gtlaw.com
Email: bloomm@gtlaw.com
Email: garnod@gtlaw.com

Counsel for Intervenor, Citibank NA.

J. Ben Vitale
David E. Gurley
GURLEY VITALE
601 S. Osprey Avenue
Sarasota, Florida 32436
Telephone: (941) 365-4501
Email: bvitale@gurleyvitale.com
Email: dgurley@gurleyvitale.com

Counsel for Blanc & Bailey Construction, Inc.

Haas A. Hatic
GREENSPOON MARDER, P.A.
200 East Broward Blvd.
Suite 1500
Fort Lauderdale, FL 33301
Telephone: 954-491-1120
Email: haas.hatic@gmlaw.com

Counsel for North East Contract Services, Inc.