

**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.**

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**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT ARIEL QUIROS'  
THIRD MOTION FOR AN ORDER PERMITTING PAYMENT  
OF ATTORNEYS' FEES AND COSTS**

**I. Introduction**

The Court should reject Defendant Ariel Quiros' Third Motion for an Order Permitting Payment of Attorneys Fees' and Costs (DE 219) ("Third Motion"), because as with Quiros' first two motions, he seeks to deplete funds that could go towards paying a disgorgement judgment for the benefit of defrauded investors. Quiros' Third Motion seeks almost \$560,000 in fees and costs for just two months' work and seeks to have his lawyers paid at outlandishly high rates. In total in his three motions, Quiros now has sought more than \$1.5 million in fees and costs for just five months' work – a burn rate of \$3.6 million a year.<sup>1</sup> The Court should deny Quiros' Third

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<sup>1</sup> In his first motion for attorneys' fees, Quiros sought almost \$230,000 in attorneys' fees and

Motion for three primary reasons.

First, Quiros has failed to show how paying more than \$1.5 million for just five months of attorneys' fees and costs for work in *seven* different matters benefits defrauded investors. In fact, it would harm investors, since he would use the Setai Fifth Avenue Condominium, an asset he purchased using \$3.86 million of investor funds, to pay his attorneys' fees and expenses.

Second, the amount Quiros is seeking is greatly excessive and he is quickly squandering investor funds. At his current burn rate, Quiros will be seeking annually \$3.6 million of attorneys' fees and costs. Notably, the total amount Quiros has requested for just five months of his attorneys' work significantly exceeds the \$1.194 million the Receiver has received from Quiros for mortgaging the Setai Fifth Avenue Condominium. Hence, Quiros has not provided the Receiver enough funds to pay the pending fee requests and his living expenses.

Third, the rates and amounts Quiros seeks for his lawyers are not reasonable. These New York City rates are substantially excessive for this market and approximately double the hourly rate being charged by the Receiver and the attorneys working for the Receiver. Furthermore, 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 arising in five other civil actions and a criminal investigation.

In sum, the Court should deny all of Quiros' motions for payment of more than \$1.5 million of attorneys' fees and costs. Alternatively, as discussed below, the Court should greatly reduce the rates and amounts that Quiros' lawyers receive.

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another \$50,000 to hire an accounting firm. DE 109. In a subsequent motion, the Berger Singerman law firm sought nearly \$100,000 in fees and costs. DE 118. In Quiros' second motion, his lawyers sought approximately \$640,000 for additional fees and costs through June 2016. DE 192. In this Motion, Quiros is seeking almost \$560,000. DE 219. These requests from April through August 2016 total more than \$1.5 million.

**II. Investors Do Not Benefit from Quiros Using An Asset He Purchased With  
Their Funds to Pay His Outlandish 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. However, as described in our opposition to Quiros' Second Motion, the Commission presented uncontroverted evidence in support of our motion for a preliminary injunction that Quiros used \$3.86 million of investor funds to purchase that condominium. DE 125, Mark Dee Testimony, at 80-82; Plaintiff Ex. 133; and Plaintiff Ex. 89 at Ex. YY.<sup>2</sup> Quiros has not shown how it is in the best interests of defrauded investors to use this asset to release more than \$1.5 million of investor funds to his lawyers.

This is especially true because the amounts Quiros seeks for just five months of his lawyers work *already* exceeds the amount Quiros has received and deposited with the Receiver for mortgaging the Setai Condominium. Quiros obtained \$1,184,000 from the mortgage, which the Court has said could be used to pay both attorneys' fees and \$15,000 a month in living expenses. DE 148. The Receiver has already released \$30,000 to Quiros for the living expenses, leaving \$1,154,000 for attorneys' fees. Yet with the Third Motion, Quiros now seeks more than \$1.5 million in total fees and costs, without saying where the additional money would come from. The Court should deny the Third Motion alone on those grounds, as it would be inequitable and unfair to investors to let the man who defrauded them out of hundreds of millions of dollars victimize them again by tapping further into the Setai Condominium or other assets that could be used to pay a disgorgement judgment that would ultimately inure to the benefit of investors.

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<sup>2</sup> 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 at 79-86.

### **III. Quiros Is Burning Through Millions Of Dollars Of Investor Funds**

As described in more detail in footnote one, Quiros is requesting more than \$1.5 million to pay his attorneys' fees and costs from April through August 2016. DE 109, 118, 192 and 219. At that rate, Quiros will be seeking \$3.6 million annually for attorneys' fees and costs, plus an additional \$180,000 for living expenses. Not only is this burn rate excessive, it also greatly exceeds the amount Quiros received for mortgaging the Setai Condominium (as described immediately above).

One reason why Quiros' lawyers are charging such high amounts is that, in addition to requesting fees to defend the Commission's case, they are seeking fees to defend against the Receiver's lawsuit, three private civil actions, a lawsuit by the State of Vermont, and a criminal investigation. In fact, almost half of the fees Quiros requests in the Third Motion (approximately \$265,000 of the \$560,000) are not for the Commission's case, but rather to defend against the five other lawsuits that have been filed against Quiros and others.<sup>3</sup> Almost one third of the more than \$1.5 million Quiros seeks in all three motions – \$465,000 – has been spent on other cases.<sup>4</sup>

Notably, 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 that have been filed against him. The Court should not open this Pandora's Box, as it will quickly dissipate investors' funds. Hence, the Court should deny the portion of Quiros' requests for attorneys' fees and costs that are to defend any cases besides this action. The Court should also require Quiros to re-submit

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<sup>3</sup> This is a rough calculation, based on the detailed bills submitted by four of the law firms Quiros has had defending him. Because Quiros has redacted some of the individual entries attached as exhibits to all three Motions, and because some lawyers have not separated their time entries by specific tasks, it is impossible to calculate precisely the amount Quiros' lawyers have billed for the other cases.

<sup>4</sup> For the reasons described in footnote 3, this is also a rough calculation.

his bills for approval deleting any fees for the other cases.

In contrast to Quiros' claim in the Third Motion, the Court has *not* previously decided that Quiros is entitled to collect fees for defending any and all cases filed against him. In the Court's May 27, 2016 Order partially granting Quiros' First Motion for attorneys' fees (DE 148), the Court stated that once the Receiver obtained funds from the Setai Condominium, "the Receiver shall pay Quiros' reasonable attorney's fees in amounts approved by the Court." DE 148 at 4. Nothing in that statement purports to give approval for all fees for all cases, or even to what extent the Court was allowing payment of *reasonable* attorneys' fees in this case (for example, it could be only through a certain event such as the preliminary injunction hearing and briefing). In fact, the First Motion only covered this case and the lawsuit by the Vermont Attorney General's Office. The 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. Quiros, therefore, has vastly overstated the Court's prior ruling. The Court has not ruled that Quiros is allowed payment for attorneys' fees and costs in other matters. And it should not allow him to collect fees from investor money for his defense in those cases.

#### **IV. The Fees Requested Are Unreasonable**

Quiros' request is unreasonable as many of the hourly rates he is seeking significantly exceed the hourly rates normally charged in the Southern District of Florida. 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 these excessive attorneys' fees.

For example, in the Third Motion, Quiros' primary law firm, Mitchell Silberberg &

Knupp LLP (“MSK”), seeks fees for 17 separate attorneys and one paralegal at rates of up to \$805 an hour. DE 219-2 at 65 of 68. Attorneys who did the vast majority of the work billed at rates of \$600, \$675, \$695, \$750, \$775, and \$805 an hour. *Id.* That is in addition to three attorneys from Quiros’ local counsel in Vermont (who are not doing *any* work on this case), and two attorneys at Leon Cosgrove, Quiros’ current Florida local counsel. DE 219-3 and 219-4. Thus, in the Third Motion alone, Quiros seeks fees and expenses for 22 *lawyers*.<sup>5</sup>

The numbers are even more staggering when all three Motions are considered. In the three Motions combined, Quiros seeks fees and costs for 39 *lawyers* from *six* different law firms. DE 109, 118, 192 and 219. While the Court has indicated it believes Quiros is entitled to reasonable attorneys’ fees to defend himself, there is nothing reasonable about the rates and amounts Quiros seeks. Rather, he is attempting 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 a Cadillac defense team that is billing fees equivalent to representing a multi-millionaire with untainted funds who could pay for such services.

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.*; *United States v. Bissell*, 866 F.2d 1343, 1351 (11th Cir. 1989) (“[T]he right to counsel of choice belongs solely to criminal defendants

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<sup>5</sup> That number does not include two lawyers at GrayRobinson, Quiros’ former local counsel, whose bill in the Third Motion is a duplicate of a bill from GrayRobinson in the Second Motion.

possessing legitimate, uncontested assets.”), *cert. denied sub nom.*, 493 U.S. 876 (1989).

Further, in civil litigation such as this, Quiros does not have a Sixth Amendment right to counsel. *SEC v. Prater*, 296 F. Supp. 2d 210, 218 (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.

As explained in great detail in the Commission’s Response to Quiros’ Second Request for Fees (DE 199), MSK is trying to bill at rates charged in more expensive legal markets than the Southern District of Florida. Nonetheless, Quiros claims in his Second Motion that MSK’s rates are “objectively reasonable.” DE 192 at 8. This claim is primarily 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, MSK only has three offices (in very large and expensive legal markets – 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. Simply put, MSK is a New York City based boutique law firm that is trying to charge large firm, New York City rates that greatly exceed the prevailing rates in this District. DE 199 at 5-8. The Court should not allow MSK to import its New York City rates to

this District. Second, Gold admits in his declaration the data contains “outliers.” As further explained in our Response, the data in Gold’s declaration is nothing more than a series of “outliers” that contain glaring omissions, illogical conclusions, and apples-to-oranges comparisons. *Id.*

For examples of the prevailing rates in this market, we need look no further than the rates charged by partners and associates at the South Florida firms Quiros himself has hired to represent him. Only one lawyer, the lead partner on the case at Berger Singerman, Quiros’ first local counsel, charged rates anywhere near what MSK is charging for its top partners on the case – \$695 an hour. The other partner on the case at Berger Singerman billed at \$550 an hour. Partners and of counsel lawyers at Quiros’ other two local counsel firms – Leon Cosgrove and GrayRobinson – billed at \$585, \$415, \$465, and \$350 an hour, respectively. The blended rate of all six lawyers at the three firms is \$510 an hour for partners. That is far below the rates MSK is charging, and a rate far more reasonable and in keeping with the prevailing rates in this market. The associates at Berger Singerman – the only local counsel using associates on this case – billed at \$235 to \$295 an hour.

As purported proof that the MSK rates are not too high, Quiros cites to the Receiver in this case, Michael Goldberg, being awarded attorneys’ fees in another case at the rate of \$638 an hour. DE 219 at 3. However, this does not help Quiros’ cause, because it ignores the fact that in this case, Goldberg is significantly discounting his rate and the rates of other partners at his firm to no more than \$395 an hour to conserve scarce resources for investors. Goldberg has further testified that partners working for him are billing at rates of \$260 an hour to \$395 an hour, again in an effort to take as little as possible from the Receivership estate and leave more for

investors.<sup>6</sup> Quiros' request for attorneys' fees shows no such interest in investors' well-being by taking any reasonable discount. Rather, it seeks to gauge them by depleting the Receivership estate's minimal cash resources by billing at exorbitant New York City rates.

Finally, the Court should closely review the individual tasks in each of the bills submitted by Quiros' law firms, particularly MSK. The bills contain numerous charges for tasks such as searching for and reviewing news articles about the case, updating and managing pleading files, getting new attorneys up to speed (it is hardly reasonable to use 39 attorneys and expect investors to pay for getting *each of them* up to speed), multiple meetings and conferences classified as "project management," and for preparing and filing the fee applications themselves. None of these tasks can remotely be considered reasonable, and have little to do with actually defending Quiros against the charges in this case. The Court should not allow MSK to bill for them.

#### **V. Conclusion**

In conclusion, the Commission still maintains the Court should deny all three Quiros Motions for more than \$1.5 million to pay his attorneys' fees and expenses, whether using the Setai Condominium or any other frozen asset. However, given that the Court has already ordered that Quiros' lawyers should receive some amounts, the Commission proposes the following reasonable limitations on what those lawyers should be paid, given that investor assets will be used to pay them:

- First, the Court should only allow fees and expenses to be paid for work in this action and only for work done through the preliminary injunction briefing, which was filed on May 27th.
- Second, the Court should limit the rates Quiros' lawyers can charge to a maximum of \$395 an hour, and a maximum of \$260 an hour for associates, as the Receiver and other

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<sup>6</sup> In his Motions, Quiros tries to paint an inaccurate picture that only the Receiver is charging at rates below \$400 an hour. However, this is simply not the case as the Receiver *and the attorneys working for him* are all billing at rates below \$400 an hour.

partners and associates working for him, are billing in this action.<sup>7</sup>

- Third, the Court should order deleted any entries for tasks such as searching for and reviewing news articles about the case, updating and managing pleading files, getting new attorneys up to speed, multiple meetings and conferences classified as “project management,” and for preparing and filing the fee applications themselves.

The Court should order Quiros’ attorneys to re-submit their bills (with an opportunity for the Commission and the Receiver to review them) in accordance with these dictates.

Respectfully submitted,

October 13, 2016

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### **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on October 13, 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

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<sup>7</sup> Alternatively, if the Court chooses to award higher rates, partner rates should be limited to \$510 an hour (the blended rate of Quiros’ local counsel partners and of counsel), and \$295 for associates.

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.

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Case No. 16-CV-21301-GAYLES

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