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.,
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.
_____/

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S RESPONSE TO NON-PARTY LAWYERS' MOTION TO INTERVENE

I. Introduction

Plaintiff Securities and Exchange Commission objects to the Expedited Motion to Intervene (DE 303) filed by the former lawyers of Defendant Ariel Quiros, who are now non-

parties to this case and have no standing to be heard. The Court should deny the motion ("Intervention Motion") for two reasons. First, there is no motion currently pending before this Court addressing whether Quiros' receipt of insurance proceeds for defense fees and costs requires modification of this Court's asset freeze orders. Quiros' current lawyers withdrew (DE 301) the previously-filed motion (DE 288) addressing that issue. In short, there is nothing for the two law firms that formerly represented Quiros to intervene in. On that basis alone, the Court should deny the Intervention Motion.

Second, to the extent the Court treats the Intervention Motion as an independent attempt by the former lawyers to intervene, Section 21(g) of the Securities Exchange Act of 1934 ("Exchange Act") operates as a bar to their intervention under these circumstances. The lawyers have no legitimate legal basis to ask the Court to independently address *their* right (not Quiros' right) to receive fees under an insurance policy that is not before the Court. For both reasons, the Court should deny the Intervention Motion and cancel the hearing scheduled for April 12, 2017.

II. Relevant Factual Background

At the outset of the case, the Court entered an order freezing all of Quiros' assets as part of the Commission's requested emergency relief (DE 11). When it entered the preliminary injunction against Quiros, the Court ordered the asset freeze to remain in place (DE 238). On March 13, 2017, Quiros' former lawyers filed an expedited motion for clarification or modification of the asset freeze ("Modification Motion"), seeking a ruling from the Court that Quiros' receipt of insurance proceeds to pay his defense costs and fees did not violate the asset freeze (DE 288). The Court set a hearing on that motion for March 29, 2017 (DE 293).

Before the hearing date, Quiros retained new counsel. Quiros' current lawyers entered a notice of appearance on March 25, 2017 (DE 294), and Quiros' former lawyers acknowledged

they no longer represented him in their motion to withdraw filed March 29, 2017 (DE 298). Quiros' current counsel then quickly filed an agreed motion to postpone the March 29 hearing on the Modification Motion for a brief time so they could get up to speed on the case and the issues (DE 295). The Court granted that motion and reset the hearing to April 12, 2017.[1]

Quiros' new lawyers then took two additional steps. First, they filed another unopposed motion to modify the asset freeze to allow their receipt of $100,000 of insurance proceeds to pay defense costs and fees (DE 300).[2] The Court granted that motion the same day it was filed (DE 302). Second, the new lawyers withdrew the previously-filed Modification Motion[3] on which the Court had scheduled the April 12 hearing (DE 301), thus negating any reason for the hearing. It was only after that withdrawal that Quiros' former lawyers moved to intervene to appear at the hearing (DE 303).

III. Argument

A. There Is No Longer A Pending Modification Motion

Procedurally, the Intervention Motion is moot, as there is no longer a pending motion addressing Quiros' right to receive proceeds without a modification of the asset freeze. When Quiros terminated his former lawyers and they moved to withdraw, those lawyers lost the ability to advocate or argue on Quiros' behalf for anything, including modification of the asset freeze or

[1] Quiros' former lawyers complain new counsel did not notify them of their intent to seek postponement of the March 29 hearing, but there was no notice required or any reason for notice to be given. The former lawyers retained no ability to represent Quiros at the hearing or argue the Modification Motion on his behalf. In contrast, Quiros' former lawyers expressly violated Local Rule 7.1(a)(3) by failing to confer with Qiros' new lawyers, the Commission, and the Receiver, prior to filing their motion.

[2] The Modification Motion did not identify a specific amount of proceeds Quiros wanted to receive to pay defense costs and fees, but the Commission understands from the Receiver the amount at issue in that motion was $1 million.

[3] Quiros' current counsel at first filed a motion to withdraw the Modification Motion (DE 299). However, they did not need permission to withdraw the Modification Motion since it was Quiros' motion, and those lawyers later filed the notice of withdrawal of both the Modification Motion and DE 299. Both motions are therefore no longer pending before the Court.

payment of insurance proceeds for defense fees and costs. Quiros, through his current lawyers, has taken his course of action in this Court with regard to insurance proceeds. He: (1) withdrew his motion seeking a modification of the asset freeze to allow open-ended payment of insurance proceeds for his defense costs and fees; and (2) filed an agreed motion for a smaller-scale modification of the asset freeze to allow payment of a specific fee to his current lawyers. Quiros seeks no other ruling from the Court at this time; thus there is no reason for the April 12 hearing and nothing for his former lawyers to intervene in. Accordingly, the Court should deny the Intervention Motion and cancel the April 12 hearing.

B. Quiros' Former Lawyers Have No Independent Right To Intervene In This Action

Quiros' former lawyers appear to be left arguing that they have an independent right to intervene to ask the Court to authorize payment of defense costs and fees under the insurance policy to *them*. To the extent the Court is willing to consider the Intervention Motion in that context (and it should not), the Intervention Motion fails to address Section 21(g) of the Exchange Act, which does not allow for intervention by the former lawyers under these circumstances. Section 21(g) provides in pertinent part that:

> . . . no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

15 U.S.C. §78u(g)(1).

Although the language of the statute does not mention intervention, many federal courts have held that, nonetheless, the statute operates as an "impenetrable wall" to a third party intervening in a Commission enforcement action absent the Commission's consent. *SEC v. Wozniak*, No. 92 C 4691, 1993 WL 34702 at *1 (N.D. Ill. Feb. 8, 1993) (denying motion to intervene by investor who asserted he was a victim of the fraud alleged in the Commission's

complaint because the Commission would not consent).

Other courts have followed suit. For example, in *SEC v. Homa*, No. 99 C 6895, 2000 WL 1468726, (N.D. Ill Sept. 29, 2000), *aff'd* 17 Fed. Appx. 441 (7th Cir. 2001) (unpublished), the district court denied a motion to intervene by one of the defendant's creditors. The court found that "the language of Section 21(g) is plain and unambiguous," and that language "clearly bars [the creditor] joining the SEC's enforcement action as a party." *Id.* at *2. *See also SEC v. Cogley*, No. 98CV802, 2001 WL 1842476 at *3-*4 (S.D. Ohio March 21, 2001) (denying bankruptcy trustee's motion to intervene in enforcement action and finding that "after reviewing the legislative history, and reviewing other cases that have discussed this issue, this Court comes to the inescapable conclusion that Section 21(g) bars intervention"); *SEC v. Benger*, No. 09 C 0676, 2010 WL 724416 at *8-*11 (intervention by non-party in SEC enforcement action barred where the intervention concerned issues peripheral to the enforcement action and would result in the consolidation or coordination with other cases); *SEC v. One or More Unknown Traders*, 530 F. Supp. 2d 192, 194-95 (D.D.C. 2008) (Section 21(g) barred defendant's cross claims).

Even those courts that have held Section 21(g) did not automatically bar a third party from intervening have expressed skepticism about allowing wholesale intervention in Commission enforcement actions. *See, e.g., SEC v. Credit Bancorp Ltd.*, 194 F.R.D. 457, 468 (S.D.N.Y. 2000) (allowing permissive intervention on the unique facts of the case but noting that "intervention has been traditionally disfavored, given courts' hesitation to allow scores of investors and other interested persons from becoming full-fledge parties to governmental enforcement actions").

Section 21(g) should operate to bar Quiros' lawyers from intervening in the instant proceeding. Just as in *Homa*, the former lawyers are no more than potential creditors of Quiros

for payment of attorneys' fees. They aren't even arguing for payment of defense fees and costs for *Quiros*. As noted above, they no longer represent him and cannot advocate for him. Both the Modification Motion and the insurance policy the former lawyers attached as an exhibit to the motion (DE 288-1 and 288-2), make clear that any right to insurance coverage inures in *Quiros*, not in the former lawyers. *See, e.g.*, Modification Motion at 3 ("Quiros is an insured under a Directors and Officers ("D&O") Policy that provides coverage for his defense . . ."). Thus, in intervening now, they are asking the Court to rule that *they* are entitled to payment of Quiros' defense fees and costs. But as they themselves noted in the Modification Motion, "*the question of whether there is coverage for defense costs is a non-issue in this proceeding, and in any event is before a different court.*" DE 288 at 4 n.3 (emphasis added).[4]

Quiros' former lawyers are stuck with their own arguments. They cannot now in good faith argue that the issue of their entitlement to defense fees and costs *is* before this Court when they expressly stated the opposite was true less than a month ago. In attempting to intervene now, they are essentially asking this Court to step into an insurance policy dispute already before another Court and rule on disputed issues of fact regarding insurance coverage and who is entitled to insurance proceeds – issues that have *nothing* to do with the issues in this Commission enforcement action. To the extent they have a complaint about Quiros terminating them at this stage of the case or their right to receive insurance proceeds for their past work, their complaint is with Quiros, and the proper forum for resolution of it is either in the ongoing lawsuit over insurance proceeds or for them to file a separate action against Quiros. It has nothing to do with this case, and accordingly, just as in *Homa*, Exchange Act Section 21(g) should bar their attempted intervention in this case.

[4] Quiros filed an action in this District against the insurance company seeking payment of defense costs and fees. *Quiros v. Ironshore Indemnity, Inc.*, Case No. 16-cv-25073-MGC (S.D. Fla.).

IV. Conclusion

For all of the aforementioned reasons, the Court should deny the Intervention Motion (DE 303) and cancel the April 12 hearing.

April 6, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 6, 2017, 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.

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SEC v. Ariel Quiros, et al.
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