

**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 RAYMOND JAMES'S RESPONSE TO INTERIM CLASS COUNSEL'S
SUPPLEMENTAL MOTION TO ADDRESS THE COURT'S CONCERNS AND
APPROVE DISBURSEMENT OF ATTORNEYS' FUND AND TO RECEIVER'S
RESPONSE TO SUPPLEMENTAL MOTION TO ADDRESS THE COURT'S
CONCERNS AND APPROVE DISBURSEMENT OF ATTORNEYS' FUND**

Defendant, Raymond James & Associates, Inc. (“Raymond James”), hereby submits its response to Class Counsel’s Supplemental Motion to Address the Court’s Concerns and Approve Disbursement of Attorneys’ Fund (“Supplemental Motion”) (DE 354), and to Receiver’s Response to Supplemental Motion to Address the Court’s Concerns and Approve Disbursement of Attorneys’ Fund (“Receiver’s Response”) (DE 358), and states as follows:

1. This Court, in its approval of the Settlement Agreement on June 30, 2017, authorized the use of \$25 million to establish the Attorneys’ Fund to be disbursed in accordance with the terms of the Settlement Agreement (DE 353 at ¶ 3). Thus the Court’s task now is to determine if it should award the full amount as requested and agreed to, or some lesser amount.

2. The Settlement Agreement provides that: “The Receiver supports, and Raymond James agrees not to oppose or otherwise object to, the application by Class Counsel and the other plaintiffs’ attorneys for the award of attorneys’ fees and expenses in an aggregate amount not to exceed twenty-five million dollars (\$25,000,000.00).” (DE 315-1 ¶ 3 (d)(viii)). Subject to court approval, these funds were earmarked to pay “plaintiffs’ attorneys in the Investor Class Action, the Other Investor Actions, or who otherwise claim to represent Investors ...” (*Id.*)

3. Raymond James stands behind its agreement. Accordingly, it has no objection if the Court allows the fee award as requested.

4. If, however, the Court determines that a lesser amount below the \$25 million should be awarded, the Court should be aware of the provision of the Settlement Agreement that contemplates what should happen. The Settlement Agreement provides that “in the event that the District Court in the SEC Action approves the total amount to be disbursed from the Attorneys’ Fund that is less than the full amount held in the Attorneys’ Fund, that difference

shall be promptly disbursed as follows:

Seventy-five percent (75%) to Raymond James; twenty-five percent (25%) to the Receiver to be used for the benefit of the Receivership Estate.” (*Id.*)

This provision was a negotiated term agreed to by all parties, and there were no objections raised by anyone.

5. At the June 30 approval hearing, the Court expressed its concern that none of the Attorneys’ Fund would be used to pay the Receiver and expressed its intent “to review the breakdown and review the justification for the fees.” (Tr. 8-9, 25-27, 37)

6. Following the hearing, on July 3, Interim Class Counsel, in response to the Court’s concerns, filed the Supplemental Motion (DE 354).

7. In its Supplemental Motion, Interim Class Counsel acknowledged the applicability of the 75/25 reversion to Raymond James and the Receiver in the event that the Court approved a total fee award that is less than the full amount in the Attorneys’ Fund (*Id.* at 3). The Supplemental Motion also stated that: “The Settlement Agreement does not allow the use of the Attorneys’ Fund in any other manner.” (*Id.*)

8. Interim Class Counsel also posits that, while the Attorneys’ Fund is subject to this Court’s approval, the Settlement Agreement between the parties cannot be rewritten, citing to *Holmes v. Cont’l Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983). (*Id.*)

9. Raymond James agrees with these assertions made by Interim Class Counsel as summarized in paragraphs 7 and 8 above.

10. The Receiver, the SEC and Interim Class Counsel have agreed to allow for the entire \$25 million Attorneys’ Fund to be paid to Investors’ counsel, and that “all participating firms have agreed that if the \$25 million Attorneys’ Fund is awarded pursuant to the Notice of Proposed Allocation of the Attorneys’ Fund (DE 343), the participating firms will voluntarily

contribute \$1,352,651.20 to the receivership estate, which is the entire amount of the Receiver's second fee application, which was filed on July 7, 2017 (DE 357)." (DE 358), (DE 359). That would allow Investors' counsel to retain \$23,647,348.80.

11. Although Raymond James was advised by Receiver's counsel of the proposed arrangement, its consent was not sought.

12. Raymond James does not object to the proposed arrangement if the Court determines that the \$25 million Attorneys' Fund should be awarded in its entirety to Investors' Counsel.

13. However, as provided by the Settlement Agreement as approved by the Court, should the Court approve a total amount to be disbursed to Investors' Counsel from the Attorneys' Fund that is less than the \$25 million full amount held in the Attorneys' Fund, Raymond James remains entitled to receive 75% of the amount not awarded, and the Receiver is entitled to 25%. The provision was specifically bargained for by the parties, and should not be abrogated without all of their consent.

14. The Supplemental Motion also suggests the possibility of an evidentiary hearing to discuss what transpired at the mediation, including all counsel, the mediator, as well as a representative of Raymond James who attended the mediation. Raymond James opposes such evidentiary hearing, as it would violate the mediation privilege as embodied in Local Rule 16(g)(2) and 44.405, Fla. Stat.

15. Raymond James is agreeable to mediating the issues raised by the Supplemental Motion, the Receiver's Response and this Response.

Dated July 10, 2017

Respectfully Submitted,

/s/ Stanley H. Wakshlag _____

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CERTIFICATE OF SERVICE

I hereby certify that on this on July 10, 2017, 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/ Stanley H. Wakshlag
Stanley H. Wakshlag

SERVICE LIST
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Case No. 16-cv-21301-DPG
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