UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARIEL QUIROS, *et al*.,

Defendants, and

JAY CONSTRUCTION MANAGEMENT, INC., *et al*.,

Relief Defendants.
_____/

LEÓN COSGROVE, LLC AND MITCHELL, SILBERBERG & KNUPP'S MOTION TO MODIFY ASSET FREEZE FOR THE PAYMENT OF ATTORNEYS' FEES BASED ON CHANGED CIRCUMSTANCES

León Cosgrove, LLC ("LC") and Mitchell, Silberberg & Knupp, LLP ("MSK"), who each are former counsel to Defendant Ariel Quiros ("Quiros"), hereby move for modification[1] of the Court's Order Granting Plaintiff Securities and Exchange Commission's Motion for Temporary Restraining Order, Asset Freeze, and Other Emergency Relief ("Asset Freeze Order") [DE 11] to allow payment of their attorneys' fees. LC and MSK may move directly for this relief, without intervening, as parties affected by the injunction. *United States v. Bd. of Sch. Commrs. of City of Indianapolis*, 128 F.3d 507, 511 (7th Cir. 1997) ("[A]ny person bound and significantly constrained by an equitable decree may present evidence to show that the decree

[1] LC and MSK do not believe that the Asset Freeze Order extends to payments of defense by an insurance carrier, either pursuant to an insurance policy or an interim funding agreement, and do not waive the issue by making this motion. However, in light of the Court's contrary statements on the issue, LC and MSK move to modify the Asset Freeze Order to allow such payments, which are made from *Ironshore's* funds, not Quiros's.

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should be lifted even if the primary wrongdoer is someone else."); *FTC v. Global Mktg. Group*, 2008 U.S. Dist. LEXIS 46848, at *2, 2008 WL 2477641 (M.D. Fla. June 17, 2008) (allowing a third party to modify an injunction over a Receiver's objection); *SEC v. Versos Partners, Inc.*, 2015 U.S. Dist. LEXIS 135638, at *2 (S.D. Ind. Oct. 5, 2015) (allowing a third party to modify an asset freeze).

I. INTRODUCTION

LC and MSK previously sought payment of attorney fees that they incurred in the defense of Quiros by way of motions to allow such payments out of Quiros's frozen assets. The Court largely denied those requests, concerned about preserving assets to cover investor losses. Now, the Receiver has secured a monumental $150 million settlement from Raymond James, which assures investors will not suffer out-of-pocket losses and – given that the value of assets still frozen by the Court likely *exceed* $150 million *more* – means there are ample funds available for very large additional payments to investors or the Government (including for punishment), if they are warranted or agreed to.

There is no principled reason to deny the relief requested. The terms of the settlement with Raymond James allow for the creation of a fund of $25 million, to be used to pay *plaintiffs'* attorneys' fees related just to the settlement of the claims against Raymond James. The Court has also allowed Quiros's *new* counsel, Damian & Valori, to be paid "up-front" $275,000 from frozen assets. By contrast, LC and MSK were to be paid in arrears and were only denied payment after incurring time and money defending Quiros.

Over the course of nearly a year, LC and MSK incurred $3,058,203.86 in fees and hard costs defending Quiros in separate lawsuits brought by the SEC, the State of Vermont, a court-appointed receiver, and an army of highly sophisticated plaintiffs' lawyers. This amount is

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actually very low, considering the number of matters, the seriousness of alleged wrongdoing, potential criminal exposure, complicated factual and legal issues, and very large amount in controversy. Indeed, it is only 12% of the amount plaintiffs' lawyers seek (and the Receiver has approved) in the settlement with *one* of the parties in its cases related to Jay Peak.

Quiros – and his new counsel – are equitably estopped from objecting to payment to LC and MSK, or claiming the amounts billed are inappropriate or excessive. Quiros repeatedly induced continued work by MSK and LC by supporting his prior fee applications to this Court on behalf of LC and MSK, promising payment to LC and MSK, and expressing satisfaction and gratitude with the work performed.

This Motion sets out the factual background supporting LC and MSK's present request – how this Court's rulings, and timing of such rulings, led LC and MSK to believe they would be compensated for their services, and why the Receiver's successes *vis-à-vis* Raymond James substantially alleviates any risk of investors not being made whole. LC and MSK ask that this Court allow:

1. A payment of up to $1,000,000.00 to be paid by the insurer under the Interim Funding Agreement ("IFA"). The IFA is a private agreement between Ironshore Indemnity ("Ironshore") and Quiros, designating MSK and LC as third-party beneficiaries. (Declaration of Scott Cosgrove at ¶¶ 4–6.) The IFA explicitly allowed payments only to specifically "Approved Firms," including LC and MSK. Thus, by the IFA's express terms, payments cannot be used to pay Damian & Valori's bills. (*Id.*) As the Court's previous rulings indicate that the Court believes payments under the IFA to be within the scope of the asset freeze (a

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belief the LC and MSK understand to be mistaken), LC and MSK have filed this Motion.

2. A payment of $2,058,203.86 to be paid from frozen assets, such as the sale of the Setai Condominium. LC and MSK offer several potential mechanisms for payment of LC and MSK.

LC and MSK ask that the Court rule forthwith, to allow LC and MSK to receive payment or to appeal without delay. If this Motion is denied, LC and MSK furthermore ask the Court to use its equitable powers to retain control over and not disperse frozen assets sufficient to compensate LC and MSK fully for their services, until such time as the Eleventh Circuit rules on this matter or circumstances change to allow such payment to be made.

II. FACTUAL AND PROCEDURAL BACKGROUND

The following facts summarize prior filings and the arguments set forth therein, each of which is incorporated fully herein by reference (including all supporting documentation).

A. April-May 2016: The Asset Freeze and the Initial Request for Attorney Fees

The SEC filed the instant action on April 12, 2016 and immediately commenced proceedings to enter a temporary restraining order, asset freeze, and other relief, including the appointment of a receiver. [DE 1–15.] The Court granted the emergency relief, including the appointment of Michael I. Goldberg as receiver (the "Receiver"), and the parties commenced litigation of a preliminary injunction. [DE 11–13, 17.]

On April 19, 2016 (*i.e.*, prior to incurring nearly all of the attorney's fees now owing), LC and MSK (on behalf of Quiros) moved this Court for a ruling allowing the use of frozen assets to pay for his attorneys to defend him. [DE 39 at 14–16.] On May 27, 2016, the Court granted that motion, stating:

> [T]he Court does find that Quiros should be able to pay reasonable living expenses and to retain and pay counsel. The Setai Condominium, if sold or mortgaged, would be a source of such funds.

[DE 148 at 3.] The Court noted that the Court "cannot assume the wrongdoing before judgment in order to remove the [D]efendants' ability to defend themselves. (*Id.*, quoting *Fed. Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 565 (5th Cir. 1987).)

In or around August 2016, the Setai condominium was mortgaged in anticipation that, in accordance with the Court's prior Order [DE 148], the proceeds would be used to defray attorney and expert costs. LC and MSK understand that the Receiver now intends to sell the condominium.

B. <u>May 2016: The Preliminary Injunction Proceedings</u>

The hearing on the preliminary injunction was held on May 10, 2016. Following the hearing, the SEC submitted Proposed Findings of Fact and Law, one primary aim of which was to make the asset freeze so encompassing that there should be no allowance for Quiros to pay his attorneys. [DE 152.]

In the course of seeking an asset freeze, the SEC made (and the Court presumably accepted as true) several questionable claims:

- Quiros's net worth was very small and nowhere remotely close to $200 million (as Quiros said), even though such net worth included two ski resorts, several companies that he wholly owned, and a number of luxury properties. [DE 152 at 83] ("Quiros has claimed his net worth is close to $200 million, which as we discussed extensively in Section XIII is preposterous.") In fact, it now appears clear that Quiros's claims regarding his net worth were much closer to reality than the SEC's claims.

- That the potential "disgorgement judgment" against Quiros was $156 million. [DE 152 at 83.] As the SEC surely knew, this total included amounts incurred long before the statute of limitations for SEC disgorgement claims, under the Eleventh Circuit's exacting limitations rule. 28 U.S.C. § 2462; *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016). It also grossly overstated the net profits from wrongdoing (whether held by Quiros or, joint and severally, with any entity Quiros controlled) that are the proper subject of disgorgement. *SEC v. Video Without Boundaries, Inc.*, 2010 U.S. Dist. LEXIS 141520, at *15, 2010 WL 5790684 (S.D. Fla. Dec. 8, 2010); *SEC v. McCaskey*, Case No. 98 Civ. 6153, 2002 U.S. Dist. LEXIS 4915 (S.D.N.Y. Mar. 26, 2002); *SEC v. Calvo*, 378 F.3d 1211, 1216 (11th 2014).

- The SEC offered specious arguments to expand its disgorgement claim against Quiros indefinitely. These arguments have now been conclusively rejected by the Supreme Court. On June 5, 2017, the United States Supreme Court *unanimously* confirmed that disgorgement in an SEC matter "operates as a penalty under § 2462" and "any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued." *Kokesh v. SEC*, 137 S. Ct. 1635, 1645 (2017). Accordingly, in long-running schemes (like Ponzi schemes and FCPA violations), the SEC is limited to claims that accrued within five years of the commencement of the action. (The Supreme Court expressly left open the question of whether or not the SEC is able to seek *any* disgorgement in enforcement proceedings, a judicially created remedy that has no statutory support.) *Id*. at 1642 n.3. In this case, notably, the allegedly fraudulent purchase

of Jay Peak occurred in 2008 and cannot form the basis of any SEC claim, whether seeking penalties or disgorgement.

- That the Jay Peak Resort was worth $41.6 million, not $87 million dollars. [DE 152 at 83–84.] In fact, recent public statements by the Receiver, discussed below, suggest the claimed value was too low and that the true value is in excess of $100 million.

- That the Jay Peak Resort had $60 million in debt. This amount double-counted money included in the "disgorgement amount" consisting of allegedly improperly commingled funds, recovery of which by the SEC was in itself time-barred. (*Id.*)

The SEC's calculations were essentially approximations that were rife with inaccuracies, double and triple counting, and clearly time-barred claims, all of which tended to militate in favor of an unjustifiably large asset freeze. Nevertheless, without waiving their right to appeal the issue, for the purposes of this motion, LC and MSK accept these calculations as true. That is, even if the SEC's representations to this Court last year were accurate and in accordance with *Kokesh*, the asset freeze is now far too encompassing and operating to unfairly deprive LC and MSK of compensation for their services.

C. May-October 2016: Quiros's Attorneys Incur Substantial Costs

Relying on the Court's assurances in it prior order [DE 148] and Quiros's assurances that he would support applications to the Court for attorneys' fees, LC and MSK incurred substantial bills on behalf of Quiros. This included significant out-of-pocket expenses as well as opportunity costs.

Quiros submitted three fee applications to the Court:

- On May 6, 2016, Quiros moved this Court for payment of MSK and other lawyers' fees and costs. [DE 109.] The Motion sought payment of $204,852 to pay MSK's fees, as well as additional amounts for other lawyers and experts. Quiros was informed of this Motion and explicitly supported the application. The Court did not rule on this Motion until October 20, 2016. [DE 232.]

- On July 25, 2016, Quiros moved this Court for additional payment of LC, MSK, and other lawyers' fees and costs. [DE 192.] The Motion sought payment of $573,590 to pay MSK's legal fees, $7,700 to pay LC's fees, and certain other amounts for other law firms. Quiros was informed of this Motion and explicitly supported the application. The Court did not rule on this Motion until October 20, 2016. [DE 232.]

- On September 27, 2016, Quiros moved this Court for additional payment of LC, MSK, and other lawyers' fees and costs. [DE 219.] The Motion sought payment of $497,243 to pay MSK's legal fees, $37,076 to pay LC's fees, and certain other amounts for other law firms. Quiros was informed of this Motion and explicitly supported the application.

D. <u>October 2016: The Court Awards About 5% of the Attorney Fees Incurred</u>

On October 20, 2016, the Court awarded MSK and other law firms only $80,000 out of more than $1.5 million incurred and owing (not including amounts billed in September and October). [DE 232.] The Court had given no prior indication that such a small percentage of defense counsels' fees would be paid. A payment of $80,000 represented a massive loss for Quiros's legal advisers. At the October 20, 2016 hearing, the Court did state, however, that LC

and MSK could apply for further fees. [Hearing Transcript at 31 ("So, that is my decision for today. That doesn't preclude counsel to petition the Court again . . .")].

E. November-December 2016: LC Secures Funding for Quiros's Defense

Without any assurance of further payment, LC and MSK were on the verge of withdrawing as counsel. They stepped up efforts against Ironshore, an insurance company which had previously declined coverage under a policy providing liability coverage for Q Resorts' directors and officers, including Quiros. In January 2017, LC and MSK had secured the IFA to cover primarily *prospective* fees and costs for specified law firms. (Cosgrove Decl. ¶ 4–6.) The IFA was confidential. (*Id.*) Ironshore reserved its rights and contests any obligation to actually pay for Quiros's defense costs under any insurance policy. However, Ironshore's promise to pay under the IFA does not depend on any finding of coverage under the policy. Ironshore agreed to make certain payments under the IFA regardless of—and prior to—the outcome of any coverage litigation.

F. December 2016: The Receiver is Notified that Quiros's Defense Would Be Paid Through Insurance

At or about this time (*i.e.*, early December), counsel for Quiros told the Receiver over the telephone and in writing that they intended to use insurance proceeds to be paid. (Declaration of David B. Gordon ("Gordon Decl.") ¶ 6.) The Receiver did not object in any way, nor did he indicate that he felt insurance proceeds were part of the asset freeze. LC and MSK understand that the SEC also was fully apprised that LC and MSK intended to be paid through insurance.

G. December 2016-March 2017: Quiros Authorizes Submission of Bills To Insurer and Induces Further Performance from LC and MSK

Quiros supported the submission of the amounts being incurred by LC and MSK to Ironshore for payment under the agreement LC had secured. (*Id.* ¶ 3.) He repeatedly implored

LC and MSK to keep working for him, even though he owed both firms mounting amounts of money. (*Id.* ¶ 3-5.)

H. February-March 2017: The Receiver Tries to Thwart Payment To LC and MSK and Blames the SEC

Rather than call LC or MSK to discuss the matter directly, a representative of the Receiver called Ironshore to object to payment, *right as Ironshore was about to pay LC and MSK*. When LC and MSK confronted the Receiver, he put the blame on an unyielding position being demanded by the SEC.

I. February 2017-Present: The Receiver and SEC Provide No Authority Supporting Extending an Asset Freeze to Insurance Proceeds Used for Defense Costs

At no time has the SEC or Receiver provided any authority to the District Court or LC and MSK that insurance money used for defense costs is part of an asset freeze. The case most on point is actually contrary to this claim, and specifies that insurance funds used for defense costs are *not* part of an asset freeze: *SEC v. Morriss*, No. 4:12-CV-80 (CEJ), 2012 U.S. Dist. LEXIS 64465, at **6, 16 (E.D. Mo. May 8, 2012) ("The SEC's argument is directed [at] the efforts of defendants to gain access to their own assets placed under an asset freeze. Morriss is not asking the Court to release frozen assets and the SEC's argument has no application here. . . . [T]he asset freeze order previously entered does not bar Federal from disbursing proceeds to pay Morriss's defense costs in accordance with the policy's terms and conditions.").[2] The form

[2] Other cases from the analogous context of bankruptcy receivers support this holding. *SEC v. Narayan*, No. 3:16-cv-1417-M, 2017 U.S. Dist. LEXIS 14424, at **12–13, 19 (N.D. Tex. Feb. 2, 2017) (rejecting receiver's attempt to enjoin advancement of defense costs where "the Receiver apparently seeks to preserve the Policy proceeds as 'a significant asset of the estate' for future distribution to claimants against the Receivership Estate, rather than as a defendant seeking defense costs or liability protection"); *In re Taylor Bean & Whitaker Mortg. Corp.*, 2010 Bankr. LEXIS 6532, at *7 (M.D. Fla. Sept. 14, 2010) ("many courts have made a distinction between insurance policies owned by a debtor and the proceeds payable under the policies, holding that the proceeds are not property of the estate where the debtor owns the policies but has no interest in the proceeds."); *In re CHS, Elecs., Inc.*, 216 B.R. 538, 542 (Bankr. S.D. Fla. 2001).

Asset Freeze Order submitted by the SEC in this case, and adopted by this Court, contains language that is *identical* to the asset freeze order at issue in *Morriss*. And with knowledge of the ruling in *Morriss*, the SEC continued to use the same language in its form asset freeze order in this case.

J. March 2017: A Motion to Clarify / Modify the Asset Freeze That Should Not Have Been Necessary

Now concerned that the Receiver and SEC might allege that taking insurance money was a violation of this Court's Order freezing Quiros's assets, Quiros – in an abundance of caution – moved the Court on March 13, 2017 for clarification or modification of the asset freeze to allow payment to LC and MSK from the IFA. *See* Quiros's Motion for Expedited Clarification or Modification of Asset Freeze Order. [DE 288.] LC and MSK viewed the merits of the motion as very strong, given the lack of any contrary authority and any contrary language in the Asset Freeze Order itself.

K. March 2017: An Apparently Coordinated Effort to Fire LC and MSK Prior To Payment of Fees

Rather than file an opposition, the Receiver and SEC coordinated with Quiros's new counsel, Melissa Damian Visconti of Damian & Valori, to prevent a hearing:

- On Saturday, March 25, 2017, without prior notice to LC or MSK, new counsel appeared for Mr. Quiros. [DE 294.] This was two days before the SEC and Receiver's Opposition to the Motion for Clarification was due.

- On March 27, 2017, and again without consulting with LC or MSK, Damian & Valori requested to continue the hearing on the Motion for Clarification [DE 295], and the hearing was continued to April 12, 2017 [DE 296].

- Then, on March 31, 2017, Damian & Valori filed the Motion To Withdraw The Motion For Clarification [DE 299], thus risking leaving unsettled whether Ironshore's payment to LC and MSK would violate asset freeze.

- Immediately after withdrawing the Motion for Clarification, Damian & Valori filed an Agreed Motion To Modify Asset Freeze Order [DE 300], which asked the Court to confirm that Ironshore could pay new counsel without violating the asset freeze.

- So, while the SEC and Receiver had *opposed* payments to LC and MSK, they had *allowed* it for Quiros's new counsel.

L. March 2017: New Counsel Claims She Wants LC and MSK to Be Paid

Subsequently, Ms. Visconti provided an express assurance that she wanted Quiros's prior counsel to be paid (and that she "didn't want lawyers not to get paid"), and that she was impressed with the legal work she had seen thus far. (Gordon Decl. ¶ 10.) In fact, Ms. Visconti has done the opposite. It appears she was trying to gain assistance during the transition, in an unavailing attempt to secure funds for herself to which she was not contractually entitled. Ms. Visconti has subsequently sought to block any payments for MSK and LC for a year's work.

M. March 2017: The Court Awards Money to New Counsel to which New Counsel Have no Contractual Right

On March 31, 2017, the Court issued an order granting the Agreed Motion, stating: "The Asset Freeze Orders [ECF Nos. 11 and 238] are modified to authorize Ironshore Indemnity, Inc. to pay $100,000 to Damian & Valori LLP, without prejudice to Damian & Valori LLP's ability to request the payment of additional defense costs under the Policy at a later date."

Recently, the Receiver and Damian & Valori have filed a further application for $175,000 in additional funds (again from otherwise frozen assets) to pay Damian & Valori's bills. Again, the Court granted the application. [DE 346.] Thus, Damian & Valori's close relationship with the Receiver has secured that Damian & Valori is paid in advance, while Appellants have been paid nothing, despite being owed $3 million.

N. March 2017-April 2017: LC and MSK Attempt to Intervene

LC and MSK then moved to intervene. [DE 303.] The Court denied this request, but based its ruling on a misunderstanding of the issues:

> "The Court does not find it appropriate to resolve a private attorney's fee issue between Quiros and his prior counsel in this action."

[DE 310.]

In fact, LC and MSK did **not** ask this Court "to resolve a private attorney's fee issue between Quiros and his prior counsel in this action." They asked only that the Court follow a long line of authority in clarifying that its Asset Freeze Order [DE 11] does not apply to insurance proceeds for defense costs (whether paid pursuant to the policy or the IFA). The relief sought had nothing to do with any issue between Quiros and his prior counsel.

O. April 2017: LC and MSK Seek Reconsideration

LC and MSK then moved for reconsideration of the Court's denial of its motion to intervene. [DE. 311.] Unfortunately, this ruling [DE 312] depended on certain factual and legal predicates that do not appear to be correct:

- First, the Court – without citing any authority or addressing the contrary authority cited by LC and MSK – concluded that insurance proceeds used for defense costs are subject to the asset freeze. The Court also relied on the apparent view of *current* counsel for both Quiros and the SEC regarding the proper scope of an

asset freeze. But the scope of an asset freeze with regard to an affected third-party is a function of law, not the collusive preferences of the parties or their lawyers. And, as explained below, a third party affected by an injunction has as much standing as a party to contest the scope of an injunction.

- Second, the Court mistakenly believed that the ongoing insurance litigation before Judge Cooke concerned the funding source from which LC and MSK would be paid. But, the ongoing litigation concerned potential payment under an *insurance policy*. The IFA was a *separate, private contract* through which the insurer agreed to pay LC and MSK, in order to make sure that those firms did not quit in early December 2016. The ongoing coverage litigation before Judge Cooke does not concern that narrow agreement, because Ironshore already agreed to pay LC and MSK under the IFA regardless of the outcome of the coverage action.

- Third, the Court claimed that LC and MSK were asserting claims "on behalf of Quiros" through their attempt to intervene. This was incorrect. LC and MSK were asserting claims on their own behalf. Moreover, the position taken by LC and MSK cannot in any way impact Quiros's coverage arguments or positions, because the IFA is an island apart from the contested issues regarding the insurance policy.

- Fourth, the Court incorrectly assumed that "Quiros was able to obtain an agreement to release some of the insurance proceeds at issue." LC and MSK do not believe Quiros ever secured any agreement from any insurer to pay his new counsel. Instead, LC and MSK obtained Ironshore's agreement to release

insurance proceeds under the IFA. Such funds were expressly for the purpose of compensating LC and MSK, which the Court mistakenly barred.

P. April 2017: The Receiver Settles with Raymond James

On April 18, 2017, the Receiver moved for settlement between the Receiver, Interim Class Counsel, and Raymond James. [DE 315.] The proposed settlement provided in pertinent part:

- Payment of $150 million by Raymond James. (*Id*. at 2.)
- Payment to all past-due contractors (*i.e.*, those owed money for their services at Jay Peak and Q Burke resorts). (*Id*.)
- Payment to all past due vendors and trade creditors. (*Id*.)
- Full reimbursement to all investors who will be unable to get their green cards (the primary "return" on their investments.) (*Id*. at 3.)
- A $25 million fund to pay *plaintiffs'* attorneys. (*Id*. at 11.)

Q. April 2017: The Court Allows the Use of Frozen Assets to Pay New Counsel "Up-Front" for Services

On April 26, 2017, after refusing payment to LC and MSK, the Court allowed frozen assets to be used to pay new counsel's fees. [DE 320.] New counsel's claim that such amounts will be reimbursed through insurance is without legal or factual support. [DE 319.][3]

III. MODIFICATION OF THE ASSET FREEZE IS APPROPRIATE

LC and MSK will not repeat the arguments made elsewhere that frozen assets can be used for defense costs. *See e.g., 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

[3] Furthermore, new counsel's claim that LC and MSK interfered with payment by Ironshore is untrue. LC and MSK believe that Ironshore is acting based on its own analysis of the law and facts. LC and MSK have not taken a position on the payment to new counsel under the insurance policy.

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 at 3.] The arguments in the above-referenced pleadings are incorporated by reference.

Modification of an injunction is proper "when there has been a change of circumstances between entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original form inequitable." *See Polaris Pool Sys. v. Great Am. Waterfall Co.*, 2006 U.S. Dist. LEXIS 7220, at *10, 2006 WL 289118 (M.D. Fla. Feb. 7, 2006); *see also In re Consol. Non-Filing Ins. Fee Litig.*, 431 F. App'x 835, 839 (11th Cir. 2011) ("[The] two prong test requires the moving party to establish, first, that a significant change in circumstances warrants revision of the decree and, second, that the proposed modification is suitably tailored to the changed circumstance."); *see also Ala. v. U.S. Army Corps of Eng'rs*, 357 F. Supp. 2d 1313, 1317 (N.D. Ala. 2005).

A third party affected by an injunction may bring a motion to modify and narrow a Preliminary Injunction order. *United States v. Bd. of Sch.Commrs. of City of Indianapolis*, 128 F.3d 507, 511 (7th Cir. 1997) ("[A]ny person bound and significantly constrained by an equitable decree may present evidence to show that the decree should be lifted even if the primary wrongdoer is someone else."); *FTC v. Global Mktg. Group*, 2008 U.S. Dist. LEXIS 46848, at *2, 2008 WL 2477641 (M.D. Fla. June 17, 2008) (allowing a third party to modify an injunction over a Receiver's objection); *SEC v. Versos Partners, Inc.*, 2015 U.S. Dist. LEXIS 135638, at *2 (S.D. Ind. Oct. 5, 2015) (allowing a third party to modify an asset freeze).[4] In this

[4] Notably, a motion to modify need not meet the requirements for an intervention. *CFTC v. Battoo*, 66 F. Supp. 3d 1095, 1096 (N.D. Ill. 2014), *aff'd sub nom. CFTC v. Battoo*, 790 F.3d 748 (7th Cir. 2015) (considering but denying motion to modify preliminary injunction after

case, the asset freeze has operated to prevent authorization of payment to LC and MSK, and to cause them to work without compensation.

Modification of the asset freeze is proper here because the Receiver has secured a $150 million settlement against an alleged aider and abettor of Quiros, Raymond James. Upon approval, this massive settlement inarguably changes the economics surrounding the asset freeze. As the motion to approve the settlement makes clear [DE 315 at 11], all investors who did not receive their green cards will now receive reimbursement of their principal investments. Plaintiffs' attorneys will likely get $25 million.

Substantial assets remain subject to the asset freeze, including Quiros's many luxury properties, the Jay Peak Resort, and the Q Burke resort. It is true those properties have not been sold, but the Receiver has indicated publicly that he expects the value of Jay Peak *alone* to be well North of $100 million (far greater than the $41.6 million value erroneously given to Jay Peak last year by the SEC).

Following the announcement of the proposed settlement, the Receiver held a press conference, extolling the benefits to investors and the State of Vermont from the largest EB-5 settlement ever. According to a press report from the leading Vermont news organization covering the alleged fraud at Jay Peak, the Receiver intends to get top dollar for the ski resorts:

> When the properties, Jay Peak and Burke Mountain, are eventually sold, the remaining 670 or so investors will receive proceeds from the transactions, Goldberg said. The receiver said he had no idea at this point how much either property would sell for, or whether the investors would get all of their money back. ***"They could go***

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previously denying motion to intervene); *CFTC v. Wilkinson*, 2016 U.S. Dist. LEXIS 165703, *10, 2016 WL 7014066 (N.D. Ill. Nov. 30, 2016); *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1093 **3-5 (9th Cir. 2010). If a court finds that a proposed consent judgment is unduly one-sided, calls for unfair actions against a nonparty, or would be unworkable or difficult to apply or enforce, it can reject or modify it. *NLRB v Brooke Industries*, 867 F2d 434, 435 (7th Cir. 1989).

> ***for $100 million, they could go for $500 million,"*** he said. "I don't know the price right now."

"Updated: Raymond James Agrees to Pay $150 million in EB-5 Fraud Settlement," April 13, 2017 https://vtdigger.org/2017/04/13/brokerage-firm-eb-5-fraud-case-agrees-150m-settlement/ (emphasis added.)

If the SEC's earlier claims regarding the proper scope of the asset freeze (which were factually unsupported) are accepted as true, then the SEC's claims for disgorgement are $156 million, and there are clearly now enough assets to cover all out-of-pocket losses suffered by investors. [DE 152 at 83.] The Receiver has already secured a $13.3 million payment from Citibank. [DE 231, 268, 282.] Adding the total received from Raymond James and Citibank, there are $163.3 million available to defray investor losses and expenses, before profits the Receiver has secured from resort operation. Beyond this amount, the asset freeze encompasses assets worth more than $150 million *in addition to* the $163.3 million that the Receiver has already secured from Raymond James. Even if the Court accepts the SEC's view that Jay Peak is worth $41.6 million (a claim the Receiver will surely dispute, as it sells the property), there are more than enough assets available to make investors whole and cover any outstanding disgorgement claims (i.e., the *net* profits held by Quiros and any entity he controlled and with which he could be joint and severally liable). There will even be plenty of money for private plaintiffs or the SEC to punish and penalize Quiros, if is the Court deems appropriate.

The Receiver's settlement therefore makes it exceedingly unlikely that investors will suffer any out-of-pocket losses as a result of wrongdoing. The central justification for the asset freeze offered by the SEC and Receiver (namely, that the frozen assets are much less than investor losses and that investors need to be protected) falls apart in light of the $150 million settlement from Raymond James. The Receiver's willingness to pay plaintiffs' lawyers $25

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million also undermines any argument that attorneys should come after investors. In our system of advocacy, both sides have equal dignity and purpose.

IV. SUGGESTED MEANS FOR PAYING LC AND MSK

There are several possible ways that payment could be made to LC and MSK: First, the Court could allow payment to proceed under the IFA, by which Ironshore specifically agreed to pay LC and MSK, and in reliance on which LC and MSK continued to act as counsel for Quiros after December 2016. (Again, this is *not* the insurance policy being separately litigated, but a different contract under which Ironshore is ready, willing, and able to pay LC and MSK.) The total amount incurred by LC and MSK under the IFA is $1,000,000.00. The Court would merely be allowing the insurer to make payment in fulfillment of its own contractual obligations. As with any submission to an insurance carrier, whether the amount is paid would be a matter between the insurer, Quiros, and LC/MSK.

Second, the Court should allow payment of the balance owed to LC and MSK for their services, or $2,058,203.86. This could be accomplished either from the sale of the Setai Condominium, as the Court initially ordered, or from the liquidation of any other frozen asset.

V. QUIROS SHOULD BE ESTOPPED FROM OBJECTING TO PAYMENTS THAT HE ALREADY APPROVED

Quiros supported all of the fee applications to this Court, as well as the submissions to the insurer. (Gordon Decl. ¶¶ 3-5.) He induced further performance by expressing gratitude to counsel and begging them for sympathy:

> **"*David, I just want to thank you for your efforts, and to please stay next to me until it's over. I believe in your efforts and talent. We will get a break soon. The law and truth has to prevail. Thank you on all fronts. It must be hard …*"**
>
> -- Ariel Quiros in a text to David Gordon of MSK, March 9, 2017 (i.e., 16 days before he terminated León Cosgrove and MSK).

Quiros is thereby estopped from now claiming that he does not consent to such payments. None of this is to suggest that the Court's order precludes Quiros from contesting fees charged. He may do so in some other forum. The Court has already indicated that it does not want to resolve a fee dispute, and LC and MSK agree that this not the place for Quiros to do so. But, to allow Quiros to procure legal services through promises only to renege on the eve of payment does nothing to protect investors and the public from Quiros (the stated purpose of the asset freeze), but rather allows this Court and its asset freeze to become a mechanism to take unfair advantage of LC and MSK.

VI. REQUEST TO RETAIN JURISDICTION OVER AMOUNTS SUFFICIENT TO PAY LC AND MSK

LC and MSK respectfully request that the Court rule on this matter expeditiously. To the extent the Court denies the relief requested in whole or in part, LC and MSK ask the Court to retain jurisdiction over currently frozen assets sufficient to pay LC and MSK fully for their services, until such time as the Eleventh Circuit rules on LC and MSK's appeal or facts otherwise develop that satisfy the Court that payment to LC and MSK is proper.

VII. CONCLUSION

For the foregoing reasons, LC and MSK respectfully request that the Court modify its Asset Freeze Order to allow LC and MSK to be paid for their services in this matter.

Local Rule 7.1(a)(3) Certification

Pursuant to Local Rule 7.1(a)(3), counsel for LC and MSK conferred with counsel for the Receiver, counsel for the SEC, and counsel for Quiros regarding the issues raised in this motion. The SEC and Quiros oppose the motion. The Receiver stated that he was "not sure" that he agreed with the motion, but demanded to see the motion before committing to a position.

Dated: August 4, 2017

Respectfully submitted,

By: *s/ Scott B. Cosgrove*

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Former Counsel for Defendant Ariel Quiros

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this on August 4, 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/ Scott B. Cosgrove
Scott B. Cosgrove

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

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

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARIEL QUIROS, *et al.*,

Defendants, and

JAY CONSTRUCTION MANAGEMENT, INC., *et al.*,

Relief Defendants.
_____/

DECLARATION OF SCOTT B. COSGROVE IN SUPPORT OF MOTION TO MODIFY ASSET FREEZE

I, Scott B. Cosgrove, declare:

1. I am an attorney at law duly licensed to practice law in the State of Florida and before this Court. I am a partner in the law firm of León Cosgrove, LLC ("LC"). Unless otherwise noted, I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

2. In November and December 2016, LC and Mitchell, Silberberg & Knupp, LLP ("MSK") represented Ariel Quiros ("Quiros") in various matters related to Jay Peak, Burke Resort, AnC Biopharm, and related securities offerings. At that point in time, Quiros's fee application to this Court had been denied, other than a payment of $80,000.

3. LC then engaged in negotiations with Ironshore Indemnity ("Ironshore"), an insurer. Quiros contended that Ironshore owed Quiros coverage for defense costs related to the various Jay Peak Matters. Ironshore disputed that it was obligated to defend or indemnify Quiros.

4. By early December 2016, LC had secured an agreement between Quiros and Ironshore. That agreement was called an Interim Funding Agreement ("IFA"). The terms of the IFA are confidential. By the terms of the IFA, the IFA cannot be submitted in Court without the consent of Ironshore and Quiros.

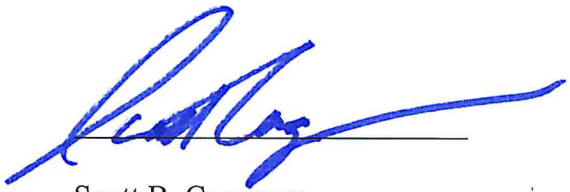
5. However, IFA's are agreements that insurers and insureds commonly use to allow prospective payment of fees to defense counsel (and thereby ameliorate bad faith liability for an insurer), while an insurer is contesting coverage in a separate coverage action. Importantly, they are separate contracts from an underlying insurance policy that is being contested.

6. In pertinent part, the IFA here provided that LC and MSK would continue as counsel for Quiros and agree not to withdraw as counsel. In exchange, Ironshore would agree to pay the *prospective* fees of specifically designated defense counsel, including LC and MSK. (The IFA created no obligation to pay Damian and Valori LLP or other lawyers not specifically designated in the IFA.)

7. Ironshore agreed not to seek reimbursement from LC or MSK of amounts paid for defense costs to LC and MSK, even if Ironshore prevailed in the related coverage action. So, though the coverage action was ongoing and though Ironshore reserved its rights under the policy, payment to LC and MSK under the IFA was in no way dependent on the outcome of the coverage action; it was assured under the IFA regardless of the outcome.

I declare under penalty of perjury under the laws of the State of Florida that the foregoing is true and correct.

Executed August 3, 2017, at Miami, Florida.



Scott B. Cosgrove

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARIEL QUIROS, *et al.*,

Defendants, and

JAY CONSTRUCTION MANAGEMENT, INC., *et al.*,

Relief Defendants.
_____/

DECLARATION OF DAVID B. GORDON IN SUPPORT OF MOTION TO MODIFY ASSET FREEZE

I, David B. Gordon, declare:

1. I am an attorney at law duly licensed to practice law in the State of New York and was formerly admitted *pro hac vice* before this Court. I am, through my professional corporation, a partner in the law firm of Mitchell Silberberg & Knupp LLP ("MSK"). Unless otherwise noted, I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

2. MSK formerly represented Ariel Quiros ("Quiros") in this matter.

3. During the course of MSK's representation, Quiros was kept informed of developments in the case and fully informed of the amounts he was incurring in defense costs.

4. Quiros was informed of each of the fee applications made to this Court. He authorized each of these submissions.

5. Quiros never communicated to me any dissatisfaction with the work being

performed or objected to the amounts being charged; to the contrary, Quiros praised the work being performed and repeatedly implored MSK not to quit as his counsel.

6. In or about early December 2016, I personally informed the Receiver Michael I. Goldberg ("Goldberg") that MSK and LC planned to use insurance funds to cover legal fees of defense counsel. I then sent Goldberg a copy of the coverage complaint. Goldberg stated absolutely no objection to this arrangement.

7. Months later, as MSK and LC were about to be paid by Ironshore, I understand that representatives of Receiver Michael I. Goldberg reached out to Ironshore to prevent the payment.

8. I have reviewed all of the bills MSK submitted to this Court and to Ironshore. The amounts billed by MSK to defend Quiros in these matters fairly and accurately represent the scope of work that MSK performed.

9. MSK's engagement with Quiros requires that any fee dispute be brought in an arbitration in New York. Quiros has not initiated any such fee dispute.

10. During a conversation with Melissa Visconti immediately after her substitution in this case, she provided her express assurance that she wanted Quiros's prior counsel to be paid (and that she "didn't want lawyers not to get paid"), and that she was impressed with the legal work she had seen thus far.

I declare under penalty of perjury under the laws of the State of New York and Florida that the foregoing is true and correct.

Executed August 4, 2017, at New York, New York.

David B. Gordon

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