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.,
GSI OF DADE COUNTY, INC.,
NORTH EAST CONTRACT SERVICES, INC.,
Q BURKE MOUNTAIN RESORT, LLC,

Relief Defendants.

Q BURKE MOUNTAIN RESORT, HOTEL
AND CONFERENCE CENTER, L.P.
Q BURKE MOUNTAIN RESORT GP SERVICES, LLC,

Additional Receivership Defendants
_____/

RECEIVER'S OPPOSITION TO LEON COSGROVE, LLC AND MITCHELL SILBERBERG & KNUPP'S MOTION TO MODIFY ASSET FREEZE FOR THE PAYMENT OF ATTORNEYS' FEES AND EXPENSES

INTRODUCTION

The Court should deny Leon Cosgrove and Mitchell Silberberg & Knupp's Motion to Modify Asset Freeze for Payment of Attorneys' Fees Based on Changed Circumstances [ECF No. 384] ("Motion") because there are no changed circumstances that warrant modifying the asset freeze to pay Defendant Ariel Quiros' former lawyers.[1]

[1] The Receiver also joins the arguments advanced by the SEC in its opposition to the Motion filed contemporaneously herewith.

The Motion is nothing more than Leon Cosgrove ("LC") and Mitchell Silberberg and Knupp's ("MSK") opportunistic attempt to capitalize on the Receiver's efforts to benefit the Receivership Estate through the Raymond James settlement, so that they may obtain their outstanding fees from representing Quiros.[2] LC and MSK incorrectly claim the settlement has somehow left the Receivership Estate flush with cash such that the circumstances have changed with respect to paying their attorneys' fees. Additionally, LC and MSK's self-serving arguments completely fail to contemplate the true purpose of the asset freeze, the terms of the Raymond James settlement, or that all of the requested fees arose from representing Quiros in his individual capacity and not from representing any entity under Receivership control. They also fail to fully and completely appreciate the context of this dispute and the contingencies that impact the entire Receivership Estate and the Receiver's mission.

The Receivership Estate was never intended to benefit LC or MSK, particularly as it relates to the Raymond James settlement. The Court should find that the circumstances surrounding the asset freeze have not changed as a result of the settlement and deny the Motion.

ARGUMENT

I. LC and MSK Have Failed to Show that the Changed Circumstances Warrant Modification of the Asset Freeze

Modification of the asset freeze is only appropriate if LC and MSK can establish: (1) "that a significant change in either factual conditions or law has occurred" and (2) that "the proposed modification is suitably tailored to the changed circumstances." *F.T.C. v. Garden of Life, Inc.*, No. 06-80226-CIV, 2012 WL 1898607, *2 (S.D. Fla May 25, 2012) (citing *Sierra Club v. Meiburg*, 296 F.3d 1021, 1033 (11th Cir. 2002)); *U.S. v. Prewett*, No. 8:07-cv-1575-T-

[2] While Quiros has not admitted wrongdoing, the Court made extensive findings that the evidence submitted in the preliminary injunction proceedings showed Quiros had committed fraud. [ECF No. 238].

33MAP, 2013 WL 71826, at * 3 (M.D. Fla. Jan. 7, 2013) (citing *Rufo v Inmates of Suffolk County Jail*, 502 U.S. 367, 393 (1992))[3]. LC and MSK's burden to modify the asset freeze is high and the Motion fails to carry that burden. *Garden of Life*, 2012 WL at * 2.

To determine whether a significant change in either factual conditions or the law has occurred, this Court must examine the purpose of the asset freeze as it relates to this litigation. *U.S. v. City of Miami*, 2 F.3d 1497, 1504 (11th Cir. 1993) (noting that the first step in determining whether modification is appropriate is considering the purpose of the Court's Order). Here, the SEC sought the asset freeze both to preserve assets under Quiros' control for a potential disgorgement judgment that would potentially benefit defrauded investors, and to preserve the assets of the Receivership Estate for the benefit of its creditors and approximately 854 investors. Despite the Raymond James settlement, the asset freeze is still required for both purposes.

To fully benefit the investors, the assets subject to the freeze in the Receivership Estate must be sufficient to: (i) ensure the Receiver can complete construction on all phases of the Receivership Entities and related projects; (ii) ensure the Receiver can create sufficient jobs to satisfy the requirements of the EB-5 program; (iii) ensure there is sufficient cash flow to administer the operations of the Receivership Entities; and (iv) make investors whole by refunding their principal investment if the Receiver is unable to satisfy the EB-5 criteria despite his best efforts. The Raymond James settlement alone is not sufficient to address each of these concerns. Therefore, LC and MSK's contention that the Raymond James settlement "inarguably" changes the economics of the asset freeze and the circumstances surrounding it (Motion at 17) is

[3] The *Rufo* test is the standard for modification of the asset freeze. To satisfy the requirement LC and MSK must show that (1) there has been "a significant change in either the factual conditions or the law that warrants revision of the decree" and (2) that "the proposed modification is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 384, 391.

flatly contradicted by the facts of the condition of the Receivership Estate. Moreover, this Court cannot overlook LC and MSK's improper attempt to cast themselves as intended beneficiaries of the Receivership Estate when, in reality, they did not benefit the estate. They are counsel for an individual defendant and have never represented the Receivership Estate.

The two bases for LC and MSK's request for funds are the claims that: (1) there are enough assets in the Receivership Estate to permit payment of their fees; and (2) there are enough frozen assets in Quiros' name or under his control to satisfy a potential disgorgement judgment against him. Neither claim is true as discussed both below and in the SEC's response.

A. Circumstances Have Not Changed Because the Raymond James Settlement Was Purposefully Allocated to Benefit the Receivership Estate Only

As the Court is aware, the Raymond James settlement does not represent a free-flowing cash surplus to the Receivership Estate. Rather, every cent paid into the Receivership Estate by Raymond James is accounted for and designated in a manner that will facilitate the administration of the Receivership Estate, including, among other things: (i) finishing incomplete phases of various projects in order to permit investors in those phases to continue participating in the EB-5 program; (ii) providing refunds to those investors who will be unable to satisfy the requirements of the EB-5 program despite the Receiver's best efforts; and (iii) financing the necessary administration of the Receivership Estate. [ECF No. 315 at 10-11]. The Receiver has also earmarked funds that will be held in escrow because, although he is optimistic, he cannot guarantee that a sufficient number of jobs will be created for the Phase VIII (QBurke) investors. *Id.* at fn. 1. Moreover, as further discussed below, the Receivership needs all funds it presently has, plus substantial additional funds, since the Receiver needs to raise more than 260 million dollars to return the principal investments of investors in Phases II through VI. Thus, LC and

MSK's argument in their Motion that the Raymond James settlement will make all investors whole because of a cash infusion into the Receivership Estate is wrong.

B. LC and MSK Overstate the Effect of the Value of Jay Peak on Disgorgement

In furtherance of their argument that the Raymond James settlement will make investors whole, LC and MSK also cite to comments made by the Receiver in a newspaper article about the potential value of the Jay Peak resort at sale to suggest that Quiros has enough assets to satisfy any disgorgement judgment against him. (Motion at 17.)[4] The article relied on by LC and MSK specifically states that the Receiver "*ha[s] no idea what the property will sell for or whether the investors would get all of their money back.*" *Id.* at 17 (emphasis added). While LC and MSK attempt to exploit the Receiver's optimism by taking it out of context, it is quite clear that, until an actual sale occurs, there is no way to place a definitive value on the Jay Peak resort. Just as importantly, the Motion also fails to consider the total investment made by the Phase II-VI investors when it attempts to leverage the value of the Receivership Estate in favor of LC and MSK's fees. The Phase II-VI investors have approximately $264 million invested in the project. An outright sale, even at an estimated value of $100 million for Jay Peak, will not make these investors whole. Additionally, uncertainty exists with respect to an outright sale of the entire property, the final impact on the investors when all of the projects undertaken by the various partnerships are completed, and the extent to which sufficient jobs can be created to satisfy the

[4] LC and MSK also contend the Receiver agreed to their use of insurance proceeds to pay their attorneys' fees (Motion at 9; Gordon Decl. ¶ 6) and that the Receiver's resistance to their use of the insurance proceeds stems from a position taken by the SEC (Motion at 10). This is not the Receiver's position on the proper use of the insurance proceeds, and the Receiver never told anyone his position on this issue was due to the SEC. It is the Receiver's own position, and the Receiver has intervened in Quiros' lawsuit against the insurance company seeking coverage, to state his own claim to the proceeds. Moreover, these purported statements by the Receiver have absolutely no bearing on whether LC and MSK have met their burden to modify the asset freeze under *Rufo*.

EB-5 requirements. In their self-serving attempt to leverage the value of the Receivership Estate to pay their fees, LC and MSK completely overlook the contingencies that impact the value of the resort and the investors. Thus, the estimated value of the Receivership Estate is no basis to claim that circumstances have changed.

LC and MSK also overstate Quiros' interests in the Jay Peak resort. The Receiver's estimates regarding a sale of the property contemplate a sale of the entire resort, including its facilities and the projects undertaken by the various limited partnerships. However, Quiros only owns a fractional interest in the Receivership Estate that is limited to the resort land and ski facilities, not the hotels and the other projects. As a result, a sale of the resort alone will not ensure sufficient assets are available from Quiros to satisfy any disgorgement the Court may order.

Thus, the facts show LC and MSK have not come anywhere close to meeting their burden of showing a significant change in circumstances. LC and MSK cite to *In re Consolidated Non-Filing Ins. Fee Litigation*, 431 Fed. App'x 835 (11th Cir. 2011) and *Polaris Pool Systems, Inc. v. Great American Waterfall Co.*, No. 8:05CV1679TTGW, 2006 WL 289118 (M.D. Fla. Feb. 7, 2016) as they argue that circumstances have changed as a result of the settlement. (Motion at 16). However, the holdings of these cases work against LC and MSK's position. In *Consolidated*, the Court ultimately concluded that the appellant had not met its burden to demonstrate changed circumstances, finding it had not shown complying with the consent decree was "substantially more onerous or that the decree [was] unworkable because of unforeseen obstacles." 431 Fed. App'x 835 at 842. Similarly, in *Polaris* the Court failed to find changed circumstances, noting it was by the defendant's own conduct that the consent decree needed to remain in place. 2006

WL 289118, at * 6. Thus, LC and MSK failed to satisfy the first prong of the *Rufo* test because the circumstances have not changed. The Motion should be denied.

II. The Proposed Modification is not Suitably Tailored to the Circumstances

LC and MSK's attempt to satisfy the second prong of the *Rufo* test is equally unavailing. LC and MSK propose, among other things, to pay their fees out of the proceeds from the sale of the Setai Condominium, which the SEC's evidence showed Quiros bought with investor proceeds. However, the Setai is no longer a frozen asset belonging to Quiros, but rather is property of the Receivership Estate to which the Receiver holds complete title. [ECF No. 346]. And, as set forth more fully in the Receiver's unopposed motion [ECF No. 380], the proceeds from any sale of the Setai will now go to the benefit of the Receivership Estate. Hence, the proposal of LC and MSK to use the Setai proceeds is not suitably tailored to the circumstances because it would benefit them to the detriment of defrauded investors.

Here, like the movants in *Consolidated* and *Polaris*, LC and MSK have failed to show that changed circumstances warrant modification of the asset freeze because the Motion makes assumptions about the changed circumstances and how the asset freeze may be modified that are not only self-serving, but inaccurate. The Motion should be denied.

The notion that LC and MSK should receive their fees because the Raymond James settlement contains a provision to pay attorneys' fees (Motion at 17) is disingenuous. The attorneys being paid under the Raymond James settlement are the attorneys who worked on behalf of the victims to bring money into the Receivership Estate for the benefit of investors [ECF No. 343]. In contrast, LC and MSK neither represented the Receivership Estate nor brought any money into the Receivership. Yet they seek payment of attorneys' fees out of Receivership assets that will otherwise go to the benefit of investors. Again, for this reason, the

proposed change to the asset freeze by LC and MSK is not suitably tailored to the circumstances, and the Court should therefore deny the motion.

CONCLUSION

In light of the foregoing, the Receiver respectfully requests the entry of an Order denying the Motion.

Dated: August 31, 2017

Respectfully submitted,

AKERMAN LLP
Three Brickell City Centre
98 Southeast Seventh St., Ste. 1100
Miami, Florida 33131
Telephone: (305) 374-5600
Facsimile: (305) 349-4554

By: */s/ Naim S. Surgeon*
Naim S. Surgeon, Esq.
Florida Bar No.: 101682
Email: naim.surgeon@akerman.com

Counsel for the Receiver

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this August 31, 2017 via the Court's notice of electronic filing on all CM/ECF registered users entitled to notice in this case as indicated on the attached Service List.

By: */s/ Naim S. Surgeon*
Naim S. Surgeon, Esq.

SERVICE LIST

1:16-cv-21301-DPG Notice will be electronically mailed via CM/ECF to the following:

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

Christopher E. Martin, Esq.
Senior Trial Counsel
SD Florida Bar No.: A5500747
Direct Dial: (305) 982-6386
Email: martinc@sec.gov
almontei@sec.gov, benitez-perelladaj@sec.gov
SECURITIES AND EXCHANGE COMMISSION
801 Brickell Avenue, Suite 1800
Miami, Florida 33131
Telephone: (305) 982-6300
Facsimile: (305) 536-4154
Attorneys for Plaintiff

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

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

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

David B. Gordon, Esq.
Email: dbg@msk.com
MITCHELL SILBERBERG & KNUPP, LLP
12 East 49th Street – 30th Floor
New York, New York 10017
Telephone: (212) 509-3900

Jean Pierre Nogues, Esq.
Email: jpn@msk.com
Mark T. Hiraide, Esq.
Email: mth@msk.com
MITCHELL SILBERBERG & KNOPP, LLP
11377 West Olympic Blvd.
Los Angeles, CA 90064-1683
Telephone (310) 312-2000

Mark P. Schnapp, Esq.
Email: schnapp@gtlaw.com
Mark D. Bloom, Esq.
Email: bloomm@gtlaw.com
Danielle N. Garno, Esq.
E-Mail: garnod@gtlaw.com
GREENBERG TRAURIG, P.A.
333 SE 2nd Avenue, Suite 4400
Miami, Florida 33131
Telephone: (305) 579-0500
J. Ben Vitale, Esq.
Email: bvitale@gurleyvitale.com
David E. Gurley, Esq.
Email: dgurley@gurleyvitale.com
GURLEY VITALE
601 S. Osprey Avenue
Sarasota, Florida 32436
Telephone: (941) 365-4501
Attorney for Blanc & Bailey Construction, Inc.

Stanley Howard Wakshlag, Esq.
Email: swkshlag@knpa.com
KENNY NACHWALTER, P.A.
Four Seasons Tower
1441 Brickell Avenue
Suite 1100
Miami, FL 33131-4327
Telephone: (305) 373-1000
Attorneys for Raymond James & Associates Inc.

Melissa Damian Visconti, Esquire
Email: mdamian@dvllp.com
DAMIAN & VALORI LLP
1000 Brickell Avenue, Suite 1020
Miami, Florida 33131
Telephone: 305-371-3960
Facsimile: 305-371-3965

Attorneys for Ariel Quiros