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, and

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

Additional Defendants.
_____/

DACCACHE PLAINTIFFS' RESPONSE TO PLAINTIFF'S MOTION TO STRIKE NOTICE OF OBJECTION TO ANY SETTLEMENT BETWEEN QUIROS AND THE RECEIVER WHICH INCLUDES A BAR ORDER

The SEC does not dispute that the Daccache Plaintiffs have a substantial interest in the terms of any settlement between Quiros and the Receiver, in that the economic rights of the Daccache Plaintiffs would be impacted by any settlement which seeks a bar order precluding them from maintaining their direct claims against Quiros. The Daccache Plaintiffs understand that Quiros and the Receiver are currently in settlement discussions and that there is a very real prospect that such settlement would include a request for entry by the Court of such a bar order. Accordingly, the Daccache Plaintiffs filed their Notice of Objection to Any Settlement Between Quiros and the Receiver Which Includes a Bar Order (the "Notice") [D.E. 460] to put the parties on notice of their position, in the hopes of obviating the need for protracted proceedings on this issue by having the parties avoid the offending position.

Because the SEC cannot argue that the Daccache Plaintiffs have no interest in this proceeding, it instead advances three arguments in moving to strike the Daccache Plaintiffs' Notice. None of these arguments constitute grounds for this Court to strike the Notice.[1]

First, the SEC argues that the Daccache Plaintiffs do not have standing to assert their significant economic rights because they did not move to intervene in this case. The SEC contends that Section 21(g) of the Exchange Act prohibits intervention in an SEC enforcement action absent the SEC's consent. However, many courts have rejected this argument, finding that Section 21(g) does not preclude intervention in an SEC enforcement action. *See S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943, 949–51 (8th Cir. 1983) (disagreeing with district court's statement that "[t]here is no intervention as a matter of right in Securities and Exchange Commission claims" in that the purpose of Section 21(g) "is simply to exempt the Commission from the compulsory consolidation

[1] The "Daccache Plaintiffs" are the putative class Plaintiffs in *Daccache et al., v. Raymond James & Associates, Inc., et al.*, Case No. 16-CV-21575-Moreno (the "Daccache Action")

and coordination provisions applicable to multidistrict litigation. It does not say that no one may intervene in an action brought by the SEC without its consent. It does not mention Fed. R. Civ. P. 24, nor does Rule 24 contain any clause giving special privileges to the SEC."); *S.E.C. v. Dresser Industries, Inc.*, 628 F.2d 1368, 1390 (D. C. Cir. 1980) (en banc), *cert. denied*, 449 U.S. 993 (1980) (recognizing that employees of a corporation under SEC investigation could seek to intervene in future SEC proceedings to protect their interest in maintaining confidentiality of certain documents and to assert alleged attorney-client privilege); *S.E.C. v. Credit Bancorp, Ltd.*, 194 F.R.D. 457, 466 (S.D.N.Y. 2000) ("Given that the language of Section 21(g) does not specifically prohibit intervention in SEC enforcement actions, and the persuasive reasoning of those cases that have rejected Section 21(g) as an absolute bar to intervention, Section 21(g) does not bar intervention in this case.); *S.E.C. v. Prudential Sec. Inc.*, 171 F.R.D. 1, 3 (D.D.C. 1997) ("While there is significant authority which suggests that section 21(g) bars all private cross-claims, counter-claims, and third-party claims to SEC enforcement actions to which SEC does not consent, there is no persuasive authority which suggests that section 21(g), likewise, bars ***intervention*** in all SEC enforcement actions."). (Emphasis in original).

Regardless, the Daccache Plaintiffs have not moved to intervene in this action, and courts have further recognized that even absent intervention, due process requires that an affected party in an SEC proceeding be permitted to be heard with respect to matters that have "a profound impact upon their interests." *Credit Bancorp*, 194 F.R.D. at 466–69. Thus, in that case, the court denied intervention as of right under Rule 24(a) to customers of an investment firm placed in receivership because even without the right to intervene, the customers would have an opportunity to be heard with respect to their interests, stating:

> While the proposed intervenors paint a stark picture of their potential plight were the Court to deny intervention as of right, **it is not at all clear that participation in an enforcement action is an all-or-nothing affair.** In analogous SEC or CFTC enforcement actions, non-party investors often participate in summary proceedings determinative of their entitlement to receivership assets. **Indeed, were the Court to deny Credit Bancorp's customers an opportunity to be heard concerning any distribution plan, it is conceivable that the due process rights of those nonparties would be compromised.** A number of courts have relied on the existence of this form of participation in denying investors' motions to intervene in enforcement actions.

Id. at 467 (emphasis supplied, citation omitted). The court went on to allow permissive intervention under Rule 24(b), noting that the customers who were the defrauded victims were likely to "have extensive participation in this case whether or not intervention is allowed." *Id.* at 468.

Further, the parties to this action and to the Daccache Action have previously filed pleadings in each other's cases, and have appeared at hearings in both cases. As the SEC points out in its Motion to Strike, the Daccache Plaintiffs previously filed pleadings in this action addressed to the settlement with Raymond James, and the SEC did not object to such filings. Similarly, the Receiver filed notices of various settlements reached in this action in the Daccache Action [Daccache Action, D.E. 96, 133, 230, 235], and appeared at hearings in the Daccache Action [*Id.*, D.E. 164, 278]. Thus, the SEC's argument that the Daccache Plaintiffs may not file this Notice simply because they take a position contrary to the SEC's position, rings hollow.

Second, the SEC argues that the Daccache Plaintiffs' Notice is premature, because there is nothing to object to at this time. However, the SEC overlooks that the Daccache Plaintiffs did not file an objection, but simply filed a Notice advising of their position based on the current status of the settlement negotiations between Quiros and the Receiver. The logic of this is clear – an ounce of prevention is worth a pound of cure. We wish to put the affected parties on notice that the Daccache Plaintiffs will object to a bar order, because we hope they will take this into consideration in their negotiations and not propose one, thus obviating the need for an objection.

The basis for filing the Notice is similar to the reason that a request for intervention was permitted by the court in *S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943 (8th Cir. 1983). There, the Eight Circuit disagreed with the district court's conclusion that a creditor should be denied intervention in an SEC enforcement action because it did "not allege a present, direct interest but rather a possible interest which may hypothetically be injured if particular events do not occur." *Id.* at 948. As the Court noted: "Although the intervenor cannot rely upon an interest which is wholly remote and speculative, intervention as of right may be based upon an interest which is contingent upon the outcome of the litigation." *Id.* The Court rejected the argument that the mere "possibility that a potential judgment may be more difficult to collect is not sufficient 'impairment' to support intervention as of right." As the Court observed, if the district court ordered the target corporation's frozen assets "disgorged" to defrauded investors, the creditor would be unable to obtain satisfaction of its claims. Thus, the creditor had a "sufficiently direct interest to support intervention."

Similarly in this case, the Daccache Plaintiffs have a direct interest in the very real and imminent prospect that a settlement may be reached between Quiros and the Receiver which includes a request for entry of a bar order that will impair the Daccache Plaintiffs' claims. This interest is more than "hypothetical" and is worthy of protection at this time.

Finally, the SEC argues that the Notice should be stricken because counsel for the Daccache Plaintiffs did not confer with the affected parties under Local Rule 7.1(a)(3). However, that Rule only requires that the parties confer prior to filing any "motion" in a civil case. The Notice filed by the Daccache Plaintiffs is not a motion; therefore, this Rule is inapplicable.

For these reasons, the SEC's Motion to Strike should be denied.

Respectfully submitted,

Paul Aiello, Esq.
Florida Bar No. 0909033
paiello@bennettaiello.com
Michael P. Bennett, Esq.
Florida Bar No. 0775304
mbennett@bennettaiello.com
Jeremy R. Kreines, Esq.
Florida Bar No. 101119
jkreines@bennettaiello.com
BENNETT AIELLO
The Ingraham Building, Eighth Floor
25 Southeast Second Avenue
Miami, Florida 33131
Telephone: (305) 358-9011
Facsimile: (305) 358-9012

/s/ Harley S. Tropin
Harley S. Tropin, Esq.
Florida Bar No. 241253
hst@kttlaw.com
Thomas A. Tucker Ronzetti, Esq.
Florida Bar No. 965723
tr@kttlaw.com
Dyanne E. Feinberg
Florida Bar No. 371548
def@kttlaw.com
Maia Aron, Esq.
Florida Bar No. 17188
ma@kttlaw.com
Tal J. Lifshitz, Esq.
Florida Bar No. 99519
tjl@kttlaw.com
KOZYAK TROPIN & THROCKMORTON LLP
2525 Ponce de Leon Blvd., 9th Floor
Coral Gables, FL 33134
Telephone: (305) 372-1800
Facsimile: (305) 372-3508

Daniel C. Girard, Esq.
dcg@girardgibbs.com
Adam E. Polk, Esq.
aep@girardgibbs.com
Angelica M. Ornelas, Esq.
amo@girardgibbs.com
GIRARD GIBBS LLP
601 California Street, 14th Floor
San Francisco, California 94108
Telephone: 415.981.4800

Kathleen M. Donovan-Maher, Esq.
kdonovanmaher@bermandevalerio.com
Steven Buttacavoli, Esq.
sbuttacavoli@bermandevalerio.com
Mark A. Delaney, Esq.
mdelaney@bermandevalerio.com
Nathaniel L. Orenstein, Esq.
norenstein@bermandevalerio.com
BERMAN DEVALERIO
One Liberty Square
Boston, Massachusetts 02109
Telephone: (617) 542-8300
Facsimile: (617) 542-1194

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed on March 15, 2018, 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 via transmission of Notices of Electronic Filing generated by CM/ECF.

By: /s/ *Harley S. Tropin*

SERVICE LIST

Via E-Mail	**Via E-Mail**
Jeffrey C. Schneider, Esq. jcs@lklsg.com **Levine Kellogg Lehman Schneider + Grossman LLP** 201 South Biscayne Boulevard 22nd Floor, Miami Center Miami, Florida 33131 *Attorney for the Receiver, Michael Goldberg*	Stanley H. Wakshlag, Esq. shw@knpa.com Deborah S. Corbishley, Esq. dsc@knpa.com Kenney Nachwalter, P.A. Four Seasons Tower Suite 1100 1441 Brickell Avenue Miami, Florida 33131 *Counsel for Raymond James & Associates, Inc.*