DINSE

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Ritchie E. Berger, Esq.
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March 30, 2018

**Via Hand Delivery**

Donna Waters, COM
Vermont Superior Court
Washington Civil Division
65 State Street
Montpelier, VT 05602

**Re: State of Vermont, et al. v. Ariel Quiros, et al.**
**Docket No. 217-4-16 Wncv**

Dear Donna:

For filing with the Court in the above-referenced matter, enclosed please Defendant Ariel Quiros's:

- *Motion for Leave to File Sur-Reply in Response to the State of Vermont's Reply in Further Support of Its Motion for an Asset Freeze;*
- *Sur-Reply in Response to the State of Vermont's Reply in Support of Its Motion for Asset Freeze; and*
- *Certificate of Service*

I would appreciate it if you would provide this to Judge Teachout immediately as there is a hearing on this matter scheduled for Monday, April 2, 2018 at 1 pm. Thank you for your assistance.

Sincerely,

DINSE, KNAPP & McANDREW, P.C.

Ritchie E. Berger

REB/pjg
Enclosures
cc: Kate T. Gallagher, Esq.
David Cleary, Esq.
Michael Goldberg, Esq.

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**STATE OF VERMONT**

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 217-4-16 Wncv

STATE OF VERMONT, )
)
THROUGH SUSAN L. DONEGAN, IN HER )
OFFICIAL CAPACITY AS COMMISSIONER )
OF THE VERMONT DEPARTMENT OF )
FINANCIAL REGULATION, )
)
and )
)
ATTORNEY GENERAL WILLIAM SORRELL, )
)
Plaintiffs, )
v. )
)
ARIEL QUIROS; WILLIAM STENGER; )
Q RESORTS, INC.; JAY PEAK, 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 SUITES )
STATESIDE L.P.; JAY PEAK GP SERVICES )
STATESIDE, INC.; JAY PEAK BIOMEDICAL )
RESEARCH PARK L.P.; and ANC BIO )
VERMONT GP SERVICES, LLC, )
)
Defendants. )

**CERTIFICATE OF SERVICE**

I, Ritchie E. Berger, Esq., certify that I have today caused Defendant Ariel Quiros's:

1) **Motion for Leave to File Sur-Reply in Response to the State of Vermont's Reply in Further Support of Its Motion for an Asset Freeze; and**

**2) Sur-Reply in Response to the State of Vermont's Reply in Support of Its Motion for Asset Freeze**

to be served on counsel by e-mail at:

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*Receiver for Defendants Q Resorts, Inc.; Jay Peak, 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 Suites Stateside L.P.; Jay Peak GP Services Stateside, Inc.; Jay Peak Biomedical Research Park, L.P.; and AnC Bio Vermont GP Services, LLC.*

DATED at Burlington, Vermont, this 30th day of March 2018.

DINSE, KNAPP & McANDREW, P.C.

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**STATE OF VERMONT**

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 217-4-16 Wncv

STATE OF VERMONT,

THROUGH MICHAEL S. PIECIAK, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE VERMONT DEPARTMENT OF FINANCIAL REGULATION,

and

ATTORNEY GENERAL THOMAS J. DONOVAN, JR.,

Plaintiffs,

v.

ARIEL QUIROS; WILLIAM STENGER; Q RESORTS, INC.; JAY PEAK, 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 SUITES STATESIDE L.P.; JAY PEAK GP SERVICES STATESIDE, INC.; JAY PEAK BIOMEDICAL RESEARCH PARK L.P.; and ANC BIO VERMONT GP SERVICES, LLC,

Defendants.

**DEFENDANT ARIEL QUIROS'S MOTION FOR LEAVE TO FILE SUR-REPLY IN RESPONSE TO THE STATE OF VERMONT'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR AN ASSET FREEZE**

Defendant Ariel Quiros ("Mr. Quiros") hereby moves for permission to file a brief

sur-reply to Plaintiff State of Vermont's Reply in Further Support of Its Motion for an Asset Freeze, a copy of which is appended here.

A sur-reply memorandum is warranted under the circumstances because the State's Reply raises new arguments not raised in its original Motion and submits new evidence not previously submitted with its Motion. Given the severe burdens and limitations the State asks the Court to impose on Mr. Quiros, fairness requires that Mr. Quiros have a full opportunity to respond to the State's new arguments. *Town of Colchester v. Vermont Dept. of Taxes*, Docket Nos. S0861-10 CnC, S0933-10 CnC, S1524-10 CnC, 2011 WL 8472917, at n.4 (Vt., Super. Ct. Aug. 24, 2011) (J. Toor) (considering surreply filed by the State and holding that the defendant's objections—that the surreply was filed without a motion and set forth duplicative arguments—are not "reason[s] to disregard the surreply"); *In re: Appeal of Colchester*, Docket No. No. S0933-10 CnC, 2011 WL 346535 (J. Toor) (Vt., Super. Ct. Jan. 28, 2011) (allowing a surreply to clarify the arguments); see also *Needham v. Coordinated Apparel Grp., Inc.*, 174 Vt. 263, 265 n.1, 811 A.2d 124, 126 (2002) (granting appellees motion to file a surreply brief).

Mr. Quiros has consulted with counsel for the State, who did not assent to the instant Motion.

WHEREFORE, Defendant Ariel Quiros respectfully requests that this Court permit the filing of and consider the attached sur-reply in making a determination on the State's Motion.

DATED at Burlington, Vermont, this 30th day of March 2018.

DINSE, KNAPP & McANDREW, P.C.

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*Admitted Pro Hac Vice*

*Counsel for Defendant, Ariel Quiros*

cc: Counsel of record

**STATE OF VERMONT**

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 217-4-16 Wncv

STATE OF VERMONT,

THROUGH MICHAEL S. PIECIAK, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE VERMONT DEPARTMENT OF FINANCIAL REGULATION,

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ATTORNEY GENERAL THOMAS J. DONOVAN, JR.,

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ARIEL QUIROS; WILLIAM STENGER; Q RESORTS, INC.; JAY PEAK, 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 SUITES STATESIDE L.P.; JAY PEAK GP SERVICES STATESIDE, INC.; JAY PEAK BIOMEDICAL RESEARCH PARK L.P.; and ANC BIO VERMONT GP SERVICES, LLC,

Defendants.

**DEFENDANT ARIEL QUIROS'S SUR-REPLY IN RESPONSE TO THE STATE OF VERMONT'S REPLY IN SUPPORT OF ITS MOTION FOR ASSET FREEZE**

The State's Reply pointedly ignores the facts and law that govern—and require denial of—its request for an asset freeze. Instead, the State focuses great emphasis on the fact that Mr. Quiros's disgorgement in the SEC action, together with other settlements to date, will not suffice

to enable the refund of the more than $350 million invested in the limited partnerships at issue. While that may be true, it is also irrelevant. Under well established law, not disputed by the State, it is not the total amount of investments that is the proper measure of disgorgement, but rather the alleged ill-gotten gains—and, indeed, the vast majority of the funds were used for the actual construction of facilities, as was intended. The State's focus on the total investments serves only to distract from the fact that it has offered no affirmative, relevant evidence of additional funds for which Mr. Quiros might properly be liable in disgorgement. Absent such evidence, the State has failed to carry its burden to justify an asset freeze and its motion must be denied.

### A. There Is No Basis in Law or Fact to Argue that Mr. Quiros Is Subject to $350 Million in Disgorgement.

The lynchpin of the State's argument for an asset freeze is its contention that Mr. Quiros "is jointly and severally liable for the ill-gotten gains of the Partnership Defendants that raised over $350 million from investors . . . ." Reply at 1. Nowhere in their Reply does the State cite any authority for that proposition—and, in fact, it is directly contrary to law.

It is true that a defendant may be jointly and severally liable for *disgorgement* where closely related codefendants share in illegal profits. However, such joint and several liability does not extend to legal damages, which is transparently what the State seeks here—for, indeed, the State has no lawful basis to request disgorgement of the $350 million in limited partnership investments raised through the EB-5 Program. Mr. Quiros is not the owner of those investments (or even a general or limited partner in the limited partnerships), and did not keep any of the funds invested in the limited partnerships beyond the amounts set forth in the SEC's disgorgement analysis. More important, established law—which the State's arguments fail to acknowledge or dispute—unambiguously provides that disgorgement may be based only on ill-

gotten gains. In other words, disgorgement applies solely to *profits* illegally derived by a defendant, and not on the entirety of investments directed to the purportedly fraudulent venture. *See* Mr. Quiros's Memorandum in Response at page 11 (setting forth the well-established law defining and describing "disgorgement"). Simply stated, the amounts invested in the limited partnerships are the legal remedy the State seeks to recover in this case, not an equitable remedy that can serve as a basis for disgorgement. *See Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) (prejudgment asset freeze may not restrain funds to ensure future satisfaction of a potential award of money damages); *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005) (even when a plaintiff asserts both legal and equitable claims, an asset freeze attaches only to funds that are the subject of the equitable claims.).

The State's arguments would only make sense if the limited partnerships had earned a profit of $350 million—which, of course, runs contrary to the State's entire case, which is based on the theory that the investments purportedly caused losses to the limited partnerships. The State does not nor could it argue with a straight face that Mr. Quiros (or anyone else) pocketed the $350 million invested in the limited partnerships as profit. Those funds were used for the construction of the properties that are the subject of those limited partnerships. The only evidence offered regarding illegal profits or ill-gotten gains derived by Mr. Quiros is the SEC's estimate that Mr. Quiros allegedly derived $55 million to $79 million from the investor funds; the remaining funds were undeniably used to benefit investors by building the facilities that were the subject of their investments.

The State attempts to support its arguments on Mr. Quiros's liability in disgorgement with an affidavit from the Receiver, Michael Goldberg, but then overstates the evidence. The State characterizes Mr. Goldberg's affidavit as "attest[ing] that even after factoring in the funds

derived from the SEC and Raymond James & Associates' settlements, $264 million remains properly subject *to disgorgement . . . .*" *See* Reply at 1-2 (emphasis added). Not so, nowhere in the affidavit does the Receiver even mention the word "disgorgement." Nor, for that matter, does his affidavit in any way support a showing that further disgorgement is warranted above and beyond that already disgorged in the federal case.

Mr. Quiros, in contrast, has offered detailed, relevant evidence in support of his position. Contrary to the State's bald assertion that Mr. Quiros's argument "that he has paid all that is owed in disgorgement is without a legal or factual basis," *see* Reply at 2, Mr. Quiros submitted two exhibits detailing the disgorgement analysis offered into evidence by the SEC in the SEC Action. *See* Response Memorandum, Exhibits D and E. That analysis corroborates Mr. Quiros's position that under the SEC's analysis his maximum liability in disgorgement was between $55 million to $79 million—i.e., less than he has already agreed to disgorge in the SEC Action. The State's only effort to rebut that evidence is a citation to *arguments* made by SEC lawyers in filings with the Court. *See* Reply at 3 ("Quiros makes this argument [that the SEC was seeking $55 million to $79 million] even though *the SEC stated in its opposition to a motion* filed by Quiros... that 'Quiros is, at a minimum, liable for more than $170 million in disgorgement and prejudgment interest . . . "). Of course, arguments by counsel are not evidence. *See Lipton v. Nature Co.*, 71 F.3d 464, 469 (2d Cir. 1995); *see also Allen v. Coughlin*, 64 F.3d 77, 80 (2d Cir. 1995) ("'Mere conclusory allegations or denials' in legal memoranda or oral argument are not evidence . . ."); *Fletcher v. Atex, Inc.*, 6 F.3d 1451, 1456 (2d Cir. 1995); *Romero v. DHL Express, Inc.*, No. 12-CV-1942 VEC RLE, 2015 WL 1315191, at *4 (S.D.N.Y. Mar. 24, 2015); *Land Ocean Logistics, Inc. v. Aqua Gulf Corp.*, 68 F. Supp. 2d 263, 269 (W.D.N.Y. 1999). The State's citation to legal argument, without providing any actual evidence, cannot satisfy the

State's burden of showing a reasonable approximation of the amount of funds subject to disgorgement. (*See* Response Memorandum at 10 (citing cases explaining that the State bears this burden)).

Puzzlingly, the State also argues that Mr. Quiros "does nothing to rebut the strong inference that arises from sworn testimony generated in the SEC action and presented to this Court by the State." *See* Reply at 3. But the State never presented a single piece of evidence or sworn testimony from the SEC action showing that an amount greater than $55 million to $79 million is subject to disgorgement. Only Mr. Quiros submitted evidence and sworn testimony that could provide basis for calculating a disgorgement amount—and that evidence requires denial of the State's Motion.

### B. The Final Judgment Against Mr. Quiros in the SEC Action Included Prejudgment Interest, and thus the Potential for Prejudgment Interest Cannot Support an Asset Freeze Here.

The State also argues that this Court may freeze assets to ensure that prejudgment interest remains available. Reply at 5. While Mr. Quiros does not disagree that courts have held that it may be within the court's discretion to freeze assets to assure funds are available to satisfy an award of prejudgment interest along with disgorgement, the point is irrelevant here. The court in the SEC action already awarded prejudgment interest as part of the Final Judgment in that case. *See* Exhibit A to Response Memorandum (the Final Judgment in the SEC action). Because prejudgment interest has already been paid by Mr. Quiros, it cannot supply a basis for an asset freeze in this case.

Moreover, the case relied on by the State in support of its argument that the court may award prejudgment interest merely states that prejudgment interest, along with disgorgement, is "possibly" a basis for an asset freeze. *SEC v. Gonzalez de Castilla*, 145 F. Supp. 2d 402

(S.D.N.Y. 2001). The State cites no authority holding that prejudgment interest on a *legal remedy* sought may be a basis for an asset freeze. Again, even if prejudgment interest on disgorgement amounts may support an asset freeze, that prejudgment interest on disgorgement has already been paid by Mr. Quiros in the SEC action.

### C. The State's New Evidence on the Risk of Dissipation, While Improper, Only Serves to Support Mr. Quiros's Opposition to a Freeze.

In its Reply, the State submits evidence for the first time in support of its claim that Mr. Quiros is likely to dissipate assets. It is not appropriate to raise issues for the first time in a reply, and the Court should disregard this new evidence offered by the State. *See In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 11, 185 Vt. 296, 969 A.2d 144 ("Issues not raised in [an] original brief may not be raised for first time in [a] reply brief."); *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 1 n. 2, 176 Vt. 356, 848 A.2d 310 ("Arguments raised for the first time in a reply brief need not be considered.").

Moreover, the evidence submitted by the State—relating to a sale of property by Mr. Quiros's wife—does not establish any increased risk that Mr. Quiros is likely to dissipate assets. To the contrary, Mr. Quiros's disclosure of his wife's property, owned solely in her name and not subject to the asset freeze in the SEC action, demonstrates an overly cautious disclosure by Mr. Quiros, not a risk of dissipation or hiding of his own assets. This is consistent with the view of the Receiver in the SEC action, charged with marshaling assets in the SEC action; Mr. Goldberg attests that Mr. Quiros has been totally cooperative with the Receiver in identifying

and turning over assets, and that he is not aware of Mr. Quiros dissipating any assets. *See* Exhibit A (Affidavit of Michael Goldberg).[1]

**Conclusion**

The State has failed to satisfy its burden of demonstrating any legal basis for an asset freeze under the circumstances of this case. For that reason, Mr. Quiros submits that the Court should deny the State's Motion for a Freeze of Mr. Quiros's Assets.

DATED at Burlington, Vermont this 30th day of March 2018.

DINSE, KNAPP & McANDREW, P.C.

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*Admitted Pro Hac Vice*

*Counsel for Defendant, Ariel Quiros*

cc: Counsel of record

[1] Mr. Quiros submits Mr. Goldberg's affidavit in response to the State's new evidence in its Reply. Mr. Quiros respectfully submits that in the event this Court considers the State's newly introduced evidence, it should also consider Mr. Goldberg's affidavit.

# EXHIBIT A

**STATE OF VERMONT**

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 217-4-16 Wncv

STATE OF VERMONT,

THROUGH MICHAEL S. PIECIAK, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE VERMONT DEPARTMENT OF FINANCIAL REGULATION,

and

ATTORNEY GENERAL THOMAS J. DONOVAN, JR.,

Plaintiffs,

v.

ARIEL QUIROS; WILLIAM STENGER; Q RESORTS, INC.; JAY PEAK, 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 SUITES STATESIDE L.P.; JAY PEAK GP SERVICES STATESIDE, INC.; JAY PEAK BIOMEDICAL RESEARCH PARK L.P.; and ANC BIO VERMONT GP SERVICES, LLC,

Defendants.

**AFFIDAVIT OF MICHAEL I. GOLDBERG**

I, Michael I. Goldberg, having been duly sworn, hereby swear and depose as follows:

1. I am over eighteen (18) years of age.
2. I have personal knowledge of the matters in this affidavit.
3. I am an attorney licenses to practice law in the State of Florida and a partner at Akerman LLP, I am resident in Akerman's Fort Lauderdale, Florida office.
4. On April 13, 2016, in connection with *SEC v. Quiros*, et al., 16-CV-21301-DPG (U.S. District Court, Southern Federal District of Florida) (the "SEC Action"), I was appointed by the Federal District Court to act as Receiver for the defendant limited partnership and corporate entities in that case. DE #13 (the "Appointment Order").
5. The Appointment Order provides that I, as Receiver, am charged with administering the defendant limited partnerships and corporations and directs that I have "full and exclusive power, duty and authority to...take whatever actions are necessary for the protection of the investors." *Id.* at 2. I was also subsequently appointed receiver over other related entities, including Burke Mountain, which are not defendants in this case.
6. The District Court recently approved a settlement between the SEC and defendant Ariel Quiros, pursuant to which Mr. Quiros consented to turn over the Jay Peak Resort and the Burke Mountain Resort, as well as 14 other pieces of real property and some cash in satisfaction of a disgorgement judgment amount of $81,344,166. SEC Action at DE #450.
7. Prior to entry of the Final Judgment in the SEC Action, Mr. Quiros voluntarily consented to and did turn over to the Receivership Estate significant real properties, including the properties known as the Bogner Facility and the Renaissance Property

in Newport, Vermont, as well as a condominium known as the Setai Condominium in New York.

8. In my capacity as Receiver, I have been marshaling and collecting assets on behalf of the Receivership Estate. Mr. Quiros has worked cooperatively with me and has turned over or is working with me to finalize the turnover of all of the above-described assets to the Receivership Estate.
9. I have no knowledge of Mr. Quiros dissipating any assets.

Dated at Fort Lauderdale, Florida this 29th day of March 2018.

Michael I. Goldberg

State of Florida

County of Broward

Came before me the above-mentioned Michael Goldberg and swore the above is true to the best of his knowledge information and belief.

Notary

My commissions expires:

JILL E. PARNES
MY COMMISSION # FF 227062
EXPIRES: May 5, 2019
Bonded Thru Notary Public Underwriters