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)
WILLIAM H. 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.)

STATE OF VERMONT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR AN ASSET FREEZE

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Defendant Quiros's opposition to the State of Vermont's (the "State") motion for an asset freeze is more remarkable for what it does not say than for what it says. Quiros never attempts to argue that he has not violated the Vermont Uniform Securities Act ("VUSA") or to challenge any of the sworn testimony and documents presented to the Court as part of this motion. He never explains why at least eight million dollars in investor funds were funneled to a South Korean entity that has longstanding ties to Quiros, when absolutely nothing was given to investors in return. He makes no attempt to explain the memorandum sent to him by Alex Choi, a South Korean affiliate, describing how he and Quiros intended to loot Phase VII investor funds, with $10 million going to Choi in South Korea. Quiros simply ignores the fact that he asserted his Fifth Amendment privilege when asked about this memorandum by the Securities and Exchange Commission ("SEC"), and never explains why an inference of likely dissipation does not arise from this conduct, as well as his diversion of over $50 million in investor funds to his own accounts.

Instead, Quiros relies almost entirely on the misleading argument that his settlement with the SEC has resulted in complete disgorgement. According to Quiros, he only took $50 million from investors and he has returned property valued at more than $50 million, so nothing more should be required of him. As the Defendant well knows, however, he is jointly and severally liable for the ill-gotten gains of the Partnership Defendants that raised over $350 million from investors, a sum well beyond the $50 million dollars that Quiros used for his personal benefit. The State has submitted with this motion an Affidavit from Michael Goldberg, the Court appointed receiver, in which Mr. Goldberg attests that even after factoring in the funds derived from the SEC and Raymond James & Associates' settlements, $264 million remains properly

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subject to disgorgement, and Goldberg does not believe he will recoup that sum by selling the existing properties.

Quiros has failed to rebut the evidence marshalled by the State that creates a strong inference that he violated the VUSA. His argument that he has paid all that is owed in disgorgement is without a legal or factual basis. The State has provided ample evidence showing that $264 million is a reasonable approximation of the amount currently subject to disgorgement and demonstrated a reasonable concern that Quiros will dissipate any remaining assets. Accordingly, this Court should grant the State's motion and enter an order freezing all the property that will be unfrozen upon the consummation of Quiros's settlement with the SEC.

A. There is a Strong Inference That Quiros Has Violated the VUSA.

Quiros complains that, "[r]ather than address the analysis governing determination of whether an asset freeze is warranted, the State spends near the entirety of its Motion explaining its theories of why the Court should find that Mr. Quiros allegedly committed securities fraud in connection with the Jay Peak Projects." Defendant Ariel Quiros's Opposition to the State of Vermont's Motion for an Order Freezing Defendant Quiros's Assets ("Opposition"), at 3. Quiros seems to argue that the State is spending so much time on this issue only to divert attention from its alleged failure to do enough to prevent Quiros from defrauding investors. However, even a cursory reading of the relevant case law shows that to be entitled to an asset freeze, the State must show there is an inference that Quiros has violated the VUSA. The State has identified the relevant law and facts in its memorandum to meet this fundamental aspect of its burden of proof, not to divert attention. Quiros, not the State, is the party looking to divert this Court's attention from his failure to offer facts or law to rebut the strong inference that he has violated the VUSA.

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At most, Quiros complains the State "relies entirely on evidence and exhibits developed and presented in the SEC Action" Opposition at 3, fn 4, but he never explains why reliance on this evidence is inappropriate. Factual development in the SEC action occurred sooner than in this action because the SEC sought a temporary restraining order and asset freeze, which Quiros was permitted to challenge well before a trial on the merits. The sworn statements submitted to the District Court on the injunction motions are still sworn statements by individuals with personal knowledge of the relevant facts. As such, they provide the necessary foundation for an asset freeze. While Quiros states in a footnote that "[f]ar from supporting the State's Motion, that evidence dictates that the Motion must be denied," *id.*, he never meaningfully explains why, and this bald assertion 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.

B. The State Has Met Its Burden to Show a Reasonable Approximation of the Funds Subject to Disgorgement, a Sum Far More Than $50 Million.

Quiros correctly notes that disgorgement is a method of forcing a defendant to return the ill-gotten gains derived from a fraudulent scheme, but he falsely implies that the SEC was only seeking $55 million to $79 million in disgorgement from Quiros and that he has already paid that amount. Opposition at 4-5, 11-12. Quiros makes this argument even though the SEC expressly stated in its opposition to a motion filed by Quiros to lift the asset freeze that "Quiros is, at a minimum, liable for more than $170 million in disgorgement and prejudgment interest, and potentially liable for as much as $350 million he raised from investors through his fraud." A copy of relevant sections of the SEC's Response to Defendant Ariel Quiros's Emergency Motion to Lift or Modify Asset Freeze Order is attached to the Reply Affidavit of Kate T. Gallagher as Exhibit A ("Gallagher Reply Aff."). As the SEC explained in its brief, and as Quiros well knows, Quiros may be jointly and severally liable for all the ill-gotten gains that the Partnership

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Defendants raised through their fraudulent scheme and misrepresentations. *Id.*, Ex. A at 2, 9-12; *see also SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004) ("[I]t is a well settled principle that joint and several liability is appropriate in securities law cases where two or more individuals or entities have close relationships engaging in illegal conduct"); *SEC v. Whittenmore*, 659 F.3d 1, 10 (D.C. Cir. 2011) (finding joint and several liability appropriate because of close collaboration of defendants); *SEC v. JT Wallenbrock & Assoc.*, 440 F.3d 1109, 1117 (9th Cir. 2006) (finding architect of fraud and his associated companies jointly and severally liable for firm's profits, not just his own ill-gotten gains); *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474-75 (2d Cir. 1996) (owner of securities firm found jointly and severally liable for firm's ill-gotten gains where he participated in and profited from the illegal conduct). It is unclear why Quiros persists in arguing he is only responsible for the investor funds he used for his personal benefit, an argument he knows is not supported by the case law. This argument was already rejected by the District Court in the SEC action, and with good reason. On Quiros's theory, individuals committing fraud would easily be able to benefit from their fraud simply by moving their ill-gotten gains around to friends, family, shell corporations, and the like.

Quiros's reliance on the Receiver's Interim Status Report to argue that there has been full disgorgement, Opposition at 6, fn. 7, also falls short. As the Receiver's Affidavit submitted with this reply brief makes clear, $264 million is properly subject to disgorgement at this point, even after the Receiver's and the State's settlement with Raymond James & Associates. Goldberg Aff. ¶¶ 11-13. This Affidavit alone provides the reasonable approximation of funds subject to disgorgement to support the imposition of an asset freeze on Quiros's assets, which Quiros has estimated at less than $10 million.

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In fact, the Court may properly freeze assets simply to ensure that prejudgment interest remains available. *SEC v. Gonzalez de Castilla*, 145 F. Supp. 2d 402, 415 (S.D.N.Y. 2001), *modified in part by SEC v. Ducland Gonzalez de Castilla*, 170 F. Supp. 2d 427 (S.D.N.Y. 2001). An award of prejudgment interest, like disgorgement, is designed to prevent a defendant from. profiting from his fraud. *SEC v Sargent*, 329 F.3d 34, 40 (1st Cir. 2003). In Vermont, prejudgment interest accrues at 12% per annum. 9 V.S.A. §41a(a). At this rate, prejudgment interest alone would far exceed the approximately $8-10 million in assets that will be returned to Quiros in the absence of an asset freeze by this Court.

Because Quiros ignores prejudgment interest and the fact that he may be jointly and severally liable for the ill-gotten gains of the Partnership Defendants, his legal analysis provides no basis to deny this motion. Quiros cites cases standing for the general proposition that disgorgement is designed to prevent unjust enrichment and deprive violators of ill-gotten gains, and that the State may not seek to recover funds designed to enforce legal remedies. These cases support the State's position, not Quiros's, however, because the Partnership Defendants raised over $350 million as a result of the Defendants' fraudulent scheme and misrepresentations. At present, well over $200 million of this amount has not yet been recouped. Not one of the cases cited by Quiros supports his argument that only the amounts he personally misappropriated are subject to disgorgement. Such a result would unjustly enrich Quiros at the expense of investors.

There is likewise no support for Quiros's suggestion that the State is required to trace assets and demonstrate a claim to specific assets, as he appears to argue in his Opposition. Opposition at 9-10 ("[T]he State does not seek to restore specifically earmarked funds or property in Mr. Quiros's possession"). Quiros made this argument in the District Court as well, and the SEC cited numerous cases refuting Quiros's proposition that the State must trace the

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assets directly to the fraud to freeze those assets. Gallagher Reply Aff., Ex. A, at 18-19. *See also Levi Straus & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 987 (11th Cir. 1995) ("[D]istrict court may exercise its full range of equitable powers, including a preliminary asset freeze, to ensure that permanent equitable relief will be possible"); *SEC v. Current Fin.*, 62 F. Supp. 2d 66, 68 (D.D.C. 1999) (refusing to release personal funds not directly traceable to fraud because Defendant's liability exceeded total funds frozen); *SEC v. Grossman*, 887 F. Supp. 649, 661 (S.D.N.Y 1995) ("It is irrelevant whether the funds affected by the Asset Freeze are traceable to the illegal activity."); *SEC v. Glauberman*, Civ. Action No. 525 (MBM), 1992 WL 175270, at * 2 (S.D.N.Y. July 16, 1992) (rejecting argument that funds must be traced "dollar for dollar" to the illegal activity). Consistent with this case law, the District Court rejected Quiros's argument, and it is unclear why Quiros continues to raise arguments he knows are without a factual or legal basis. This Court should reject the argument as well.

C. The State Has Demonstrated a Legitimate Concern That Quiros Will Dissipate Funds Properly Subject to Disgorgement.

Quiros argues the State has failed to establish any basis for concern that Quiros will dissipate assets because he has been cooperative with the SEC, but this argument is a gross mischaracterization of the facts and an oversimplification of the law. As the SEC stated in a memorandum of law submitted to the District Court, "even after being caught red-handed, Quiros [was] not deterred...and...continued his pattern of lying, this time to the Court." Gallagher Reply Aff., Ex. A, at 2. This hardly suggests the spirit of cooperation that would engender confidence that Quiros will not dissipate assets. It was only after many years of investigation and litigation that Quiros agreed to a permanent injunction and engaged in serious settlement discussions. He did so only after the District Court rejected each of his defenses and

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granted the SEC's motion for a preliminary injunction, leaving him nothing left to argue at a future trial. This is capitulation, not cooperation.

Quiros's lack of cooperation with the SEC is also evidenced by the fact that a property in which Quiros had an interest was sold, despite the Freeze Order, without the knowledge of the SEC. In his answers to the SEC's Interrogatories, Quiros acknowledged he had an interest in property located at 540 Brickell Key in Florida (the "Brickell Property"), which was in his wife's name.[1] After the entry of the Freeze Order, in November 2016, Mrs. Quiros sold the Brickell Property for $650,000. *Id.*, Ex. D. However, in his answers to interrogatories, served a mere three months later, Quiros continued to list the Brickell Property as an asset in which he had an interest. *Id.*, Ex. B. The SEC only learned of the sale after it had reached a settlement agreement with Quiros, when the State informed it of the sale. *Id.* ¶ 6. The sale of the Brickell Property was particularly egregious as the facts will demonstrate that investor funds can be traced directly to its purchase.

Moreover, because the facts in the cases cited by Quiros bear no resemblance to the situation here, they are easily distinguishable. In each of the cases cited by Quiros, the courts declined to order a freeze where, despite violations of the securities law there was no evidence of knowingly dishonest conduct or dissipation. For example, in *Commodity Futures Trading Comm'n v. Sterling Trading*, 605 F. Supp. 2d 1245, 1304 (S.D. Fla. 2009), the court found a freeze unnecessary because as soon as the defendant was made aware of the Commission's position that trades he made with another entity were illegal, he ceased doing business with the

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[1] The State attached a copy of Quiros's answers to Interrogatories in the SEC action to the Gallagher Affidavit. However, the document attached as Exhibit A to the Interrogatories was provided to the State later and did not include the Brickell Property. The original Exhibit A that was served on the SEC did include the Brickell property, although it had been sold three months before. Therefore, the answers to Interrogatories attached to the Gallagher Affidavit was not correct. The State has now submitted a true and correct copy of the answers to Interrogatories that were served on the SEC. Gallagher Reply Affidavit, Ex. B.

company, apprised the FTC of all financial activities with the wrongdoer, and as a result, the SEC did not even allege fraud in the Complaint against him. Likewise, in *SEC v. ABS Manager, LLC*, Civ. Action No. 13-CV-319 (GPC), 2013 WL 1164413, at *5 (S.D. Ca. March 20, 2013), the court did not freeze the assets because the defendant had consented to most of the relief requested, and it was undisputed that he had cooperated with the SEC from the inception of its investigation. In *SEC v. Schooler*, 902 F. Supp. 2d 1341, 1361 (S.D. Cal. 2012), the court modified an order freezing assets because the SEC's best evidence of dissipation was "a single example of Defendants returning money to a dissatisfied investor." Finally, in *FTC v. John Beck Amazing Profits*, Civ. Action No. 2:09-cv-4719 (FMC), 2009 WL 7844076, at * 15 (C.D. Ca. Nov. 17, 2009), the court did not order an asset freeze because the SEC's only evidence showed misleading marketing practices, and there was "no evidence that Defendants have ever previously attempted to intentionally dissipate, hide or otherwise shelter corporate or personal assets."

In contrast, where a defendant's previously fraudulent conduct involves sheltering of assets and shows the possibility of dissipation in the future, an asset freeze is fully warranted. *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009) (dissipation likely where defendant had "convinced his fellow directors and trustees to consent to diverting nearly $35 million…into his personal bank account …because [s]uch an individual is presumably more than capable of placing assets in his personal possession beyond the reach of a judgment."); *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999) (freeze warranted "[g]iven the [defendant's] history of spiriting their commissions away to a Cook Island trust"); *SEC v. Am. Br. of Trade*, 830 F.2d 431, 439 (2d Cir. 1987) (granting freeze because defendants' income was "insufficient to meet their living expenses" and "'the fraudulent nature of the appellant's violation'")

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(quotation omitted); *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972) ("Because of the fraudulent nature of appellants' violations, the court could not be assured that appellants would not waste their assets prior to refunding public investors' money"). Like the defendants in these cases, Quiros has engaged in a fraudulent scheme in which he diverted investor funds from the Partnership Defendants to his personal accounts, allowing him to purchase Jay Peak, Burke Mountain, luxury condominiums, and much more. See Gallagher Aff., Ex. K, M, and N. He funneled at least $8 million through Jay Construction Management ("JCM") to his long-standing affiliates in Korea, without receiving anything of value in return. *Id.*, Ex. V. When asked about a memorandum which shows that for no apparent reason, $10 million in investor funds from Phase VII were sent to Alex Choi in Korea, Quiros invoked the Fifth Amendment. Gallagher Reply Aff., Ex. D.[2] This invocation of the Fifth Amendment alone creates an adverse inference that money has been improperly directed to South Korea to shelter it from a judgment in this case. *SEC v. Suman*, 684 F. Supp. 2d 378, 386 (S.D.N.Y. 2010).

Quiros does not explain why the Court should not infer from these facts that dissipation is likely. Given the nature of the claims asserted against him and the funneling of assets to South Korea, dissipation is highly likely.

Moreover, Quiros himself has told the State he intends to use the assets to fund his criminal defense, thereby dissipating assets properly subject to disgorgement. Quiros's counsel told the State that because he needed the assets that will be unfrozen to pay for his criminal defense, he was unable to provide any funds to the State to settle this action, and the State should

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[2] Apparently, the reference to this testimony was not included in the State's initial motion. The State has included the testimony in the Reply Affidavit as Exhibit D. Quiros's testimony also shows that he took the Fifth Amendment when asked if he gave an additional $1,500,000 to John Kim, who worked for Mr. Choi. *Id.* He also took the Fifth Amendment when asked what happened to the money once it was sent to Korea. *Id.*

simply sign on to a deal he already made with the SEC.[3] Gallagher Reply Aff. ¶ 7. This is consistent with Quiros's previous efforts to modify the Freeze Order to allow a release of funds to pay for criminal counsel of his choice. *Id.*, Ex. C, at 14-15. According to Quiros, the failure to release funds for his criminal defense would violate his Fifth and Sixth Amendment rights, *id.*, but the District Court did not release the requested funds.

Nor is there any reason that this Court should give Quiros access to funds properly subject to disgorgement to spend on his criminal defense. The Vermont Supreme Court recently rejected just such an effort in *Lott v. O'Neill*, 2017 VT 11, 165 A.3d 1099. In *Lott*, the Court granted a motion by the estate of a murder victim to freeze a retainer provided to the criminal defense attorney. As the *Lott* Court explained, there is "no justification for the victim to subsidize the legal costs of [a defendant] in defending [a] criminal case" *id.* at ¶22, 165 Vt. at 1106, and the Fifth and Sixth Amendments does not require otherwise. The same principle applies here. Defrauded investors have no obligation to fund Quiros's legal defense.

CONCLUSION

There is a strong inference that Quiros has violated the VUSA and that absent a freeze, his assets may be dissipated, transferred or concealed. Quiros has offered nothing to suggest otherwise. Indeed, he has expressly informed the State that he intends to use the funds for his criminal defense, which is dissipation. Accordingly, the State respectfully requests that this Court grant the State's motion for an asset freeze.

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[3]It was in response to this statement that the State advised Quiros it would seek to freeze the assets. *Id.* This statement of intent to file a perfectly legitimate motion hardly constitutes a "threat," as argued by Quiros. Opposition, at 7.

REQUEST FOR ORAL ARGUMENT

The State requests oral argument. The State believes an hour of argument should be sufficient.

DATED at Montpelier, Vermont this 19th day of March 2018.

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
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By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March 2018, I served the *State of Vermont's Reply Memorandum of Law in Further Support of its Motion for an Asset Freeze by* sending same via first class mail, postage prepaid, to the following:

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DATED at Montpelier, Vermont this 19th day of March 2018.

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