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,)
)
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.)

THE STATE OF VERMONT'S RESPONSE TO DEFENDANT QUIROS'S SUR-REPLY

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Defendant Quiros argues in his Sur-Reply In Response to the State of Vermont's Reply Memorandum ("Sur-Reply") that: (1) he cannot be jointly and severally liable for the ill-gotten gains of the Limited Partnership Defendants; (2) prejudgment interest has already been paid in full and cannot support an asset freeze; and (3) evidence related to the sale of the Brickell Key property does not establish an increased risk that Quiros is likely to dissipate assets. None of the arguments provides a basis to deny the State's motion.

A. Quiros is Jointly and Severally Liable for at Least $118 Million.

Quiros may be jointly and severally liable for the funds raised by the Defendant Limited Partnerships, even though he was "not the owner of those investments (or even a general or limited partner in the limited partnerships)." Sur-Reply at 3. William Stenger, who was employed by and answered to Quiros, was the President of the General Partner for Phases I through VI and both Quiros and Stenger were members of the General Partner for Phase VII. Because Quiros exercised control over Stenger, and because he had Stenger transfer Limited Partnership funds into Raymond James Accounts on which Quiros was the only signatory, Quiros was able to take control of and misuse the investor funds raised by each Limited Partnership Defendant. On these facts, there is a clear basis to impose joint and several liability on him to disgorge the funds that were raised by Limited Partnership Defendants.

Quiros argues that even if joint and several liability is appropriate, only profits earned on the $350 million raised by the Limited Partnership Defendants are properly subject to disgorgement; according to Quiros, the Limited Partnership Defendants did not earn any profits for which he could be liable. Sur-Reply at 3 (referencing cases cited in the Opposition at 11). In making this argument, Quiros refers to a citation in his Opposition to *CFTC v. British Am. Commodity Options Corp.*, 788, F.2d 92, 93 (2d Cir. 1986), for the proposition that

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"disgorgement is ordered only with respect to those profits that were illegally derived by the defendant." Opposition at 11. But this case supports the State's position, not Quiros's. The *British American Commodity* court merely stated that "where benefits result from both lawful and unlawful conduct, the party seeking disgorgement must distinguish between the legally and illegally derived profits." 788 F.2d at 93. However, the *British American Commodity* Court then noted that the disgorgement order entered below was entirely proper because the court had a problem finding "any activity that was lawful" where there was a "systematic and pervasive fraud." *Id.* That same analysis applies here. The full amounts raised by the Defendants and transferred to Quiros's exclusive control were raised through a systemic and pervasive fraud,. The full amounts raised by the Limited Partnership Defendants are properly subject to disgorgement.

Next, Quiros points to "two exhibits detailing the disgorgement analysis offered into evidence by the SEC in the SEC Action," which, he argues, "corroborates Mr. Quiros's position that under the SEC analysis his maximum liability in disgorgement was between $55 million to $79 million." Sur-Reply at 4. That is simply incorrect. The document and testimony cited merely illustrate that Quiros took more fees than he was entitled to take under the public offering memoranda.[1] It has no impact on the disgorgement analysis where Quiros is jointly and severally liable for disgorgement of the ill-gotten amounts raised by the Limited Partnership Defendants that he wholly controlled.

More important, after the hearing on the SEC's request for a preliminary injunction and continuation of its asset freeze where this very evidence was presented, the United States District Court held that **"up to $200 million in misused investor funds are subject to disgorgement."**

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[1] In fact, Exhibit D is a table that concludes by identifying the "Fees Taken in Excess of Allowed," and nothing in the document refers to disgorgement. Opposition, Ex. D.

Gallagher Aff., Ex. S at 34 (emphasis added). The testimony and documents cited by Quiros provide no more support for his position now than they did in the SEC action. Like the District Court, this Court should hold that $200 million is the starting point for the disgorgement calculation, with a credit of $82 million for the funds paid by Quiros to settle with the SEC. Accordingly, the State has shown that $118 million, at a minimum, is a reasonable approximation of the amount that can properly be subject to an asset freeze, an amount well beyond the value of the assets disclosed by Quiros.

B. The Amount of Prejudgment Interest Due Exceeds the $2.5 million Paid to Date.

Quiros acknowledges that the Court may freeze assets to ensure that prejudgment interest remains available but argues "[t]he court in the SEC action already awarded prejudgment interest as part of the Final Judgment in that case." Sur-Reply at 5. According to Quiros, "[b]ecause prejudgment interest has already been paid by Mr. Quiros, it cannot supply a basis for an asset freeze in this case." *Id.* at 5. It is true that Quiros was ordered to pay $2,515,798 in prejudgment interest in that case, but this hardly means that he has paid the full amount owing in prejudgment interest. And Quiros has not cited even one case that would support his argument.

The $2.5 million paid in prejudgment interest is a very small portion of the amount due in on prejudgment interest. A short example will suffice to illustrate that Quiros has paid a miniscule amount of the prejudgment interest owed to the State. In July 2008, Quiros used $7 million of Phase II investor funds to purchase Jay Peak Resort. At 12% simple interest, this amounts to $840,000 a year. When multiplied by the number of years to date on which prejudgment interest will be calculated, $9,240,000 is owed to the State in prejudgment interest on this $7 million alone, which far exceeds the $2.5 million paid by Quiros in prejudgment interest under the SEC settlement. And that is just one portion of one Phase. Accordingly, the

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Court may enter an asset freeze to ensure that funds are available to pay all prejudgment interest that may be due and owing upon an entry of final judgment in this case.

C. The Sale of Brickell Key Shows that Quiros Did Not Cooperate With the SEC and Is Likely to Dissipate Assets.

Quiros argues that the State improperly cited new evidence that Mr. Quiros's wife had sold the Brickell Key property as evidence that he is likely to dissipate assets. The reality is that the State raised the issue of the Brickell Key sale because Quiros argued that he had been entirely cooperative with the SEC. The facts surrounding the sale of Brickell Key property establish that Quiros was far from cooperative with the SEC, and his lack of cooperation is further evidence, if any were needed, that dissipation is likely in the absence of an asset freeze.

Quiros argues that his disclosure of an asset owned by his wife demonstrates that he "has been totally cooperative." Sur-Reply at 6. But the reality is that Quiros negotiated a settlement with the SEC in which he agreed to turn over the Brickell Key property, even though it had already been sold. The SEC did not learn of the sale from Quiros, but from the State, after the settlement had been negotiated. This hardly demonstrates the cooperation that should give this Court assurance that an asset freeze is unnecessary because Quiros is cooperative and forthcoming.

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. Once again, Quiros has offered nothing to suggest otherwise. Accordingly, the State respectfully requests that this Court grant the State's motion for an asset freeze.

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DATED at Montpelier, Vermont this 3rd day of April 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April 2018, I served the *State of Vermont's Response to Quiros's Sur-Reply* by sending same via email and via first class mail, postage prepaid, to the following:

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DATED at Montpelier, Vermont this 3rd day of April 2018.

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