

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 09-20526-CIV-GOLD/MCALILEY

KLAUS HOFMANN,

Plaintiff,

v.

EMI RESORTS, INC., et al.,

Defendants.

INTERIM ORDER FOLLOWING HEARING ON PRELIMINARY INJUNCTION;
PRELIMINARILY APPOINTING SPECIAL MASTER

THIS CAUSE is before the Court following a preliminary injunction hearing held on April 1, 2, and 9, 2009, and May 19, 2009. In addition to the merits of a preliminary injunction, I heard argument from the parties on various topics, including jurisdiction, venue, statement of a RICO claim, alignment of the parties, and the potential role of a Special Master in this case. For reasons to be discussed in detail in a subsequent order, I conclude that there is sufficient basis for me to exercise jurisdiction over this matter, both in terms of personal jurisdiction over the Defendants and subject matter jurisdiction over the claims that are in front of me. With respect to subject matter jurisdiction, without ruling on Defendants' Motion to Dismiss for Failure to State a RICO Claim [DE 207] at this juncture, I call the parties' attention to the Supreme Court's recent decision in *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 129 S.Ct. 1862 (2009), in which the Supreme Court reaffirmed that it is in a federal district court's discretion to exercise supplemental jurisdiction over state law claims after it dismisses the claims over which it had original jurisdiction. *Id.* at 1666-1667 (holding that district court's decision to exercise statutory

supplemental jurisdiction over state law claims after dismissing federal RICO claim is a discretionary choice). Therefore, even if I conclude that Plaintiffs have failed to state a RICO claim, I would have the right to exercise jurisdiction over the remaining claims. I now turn to significant issues in this case, and explain how the case will proceed.

I have reviewed the hundreds of pleadings filed in this case, and have heard the evidence and arguments presented over four days of hearings. At this juncture, I have serious concerns that neither side is being fully candid with the Court, disclosing all that I need to know about important issues in this case, and acting in the best interests of the investors, some of whom are Plaintiffs to this suit.

On the Plaintiffs' side, and I refer here to both the Hofmann and the Aguilar Plaintiffs, of great concern to me are the multiple suits filed by Plaintiffs. Plaintiffs came to this Court for relief on March 3, 2009. Subsequently, while arguing in front of me that courts in other jurisdictions could not afford Plaintiffs proper relief, Plaintiffs sought relief in the Turks and Caicos, and after a preliminary injunction hearing had been scheduled in front of me, in the Dominican Republic.

Of additional discomfort is the lack of candor Plaintiffs have exhibited with both the Turks and Caicos and Dominican Republic courts. For example, Plaintiffs obtained an ex parte temporary restraining order in the Turks and Caicos on March 6, 2009. Upon motion of the defendants, the Turks and Caicos court discharged the temporary restraining order on April 9, 2009. In explaining the discharge and commenting on Plaintiffs' actions in obtaining the ex parte temporary restraining order and publishing it on the internet before providing proper notification to the defendants, the Turks and Caicos court stated,

This case causes me some disquiet. The timing of an application of this

nature at the same time as a similar action in Florida, the failure to mention so many clearly important material facts in an affidavit prepared by an attorney specifically for an ex parte application, the subsequent manner in which the order was published and the failure to take similar action to advise of the amendment to the original order all add to that disquiet.

[DE 209-2, ¶ 24].

In the midst of the Florida and Turks and Caicos actions, Plaintiffs also sought relief in the Dominican Republic. Here too Plaintiffs were less than candid with the court. On March 20, 2009, Hofmann and the proposed intervenors [see DE 4] filed a Motion for Order to File a Preventive Injunction and Registration of a Temporary Court-Ordered Lien [DE 332-3], quoting at length from my March 3, 2009 order granting Hofmann a temporary restraining order [DE 5], but failing to inform the Dominican Republic Court of the orders declining to extend the temporary restraining order, including Magistrate Judge McAliley's March 17, 2009 Order Declining to Extend Temporary Restraining Order [DE 95] and my March 17, 2009 Order denying Hofmann's "appeal" from Judge McAliley's decision [DE 98]. The Aguilar Plaintiffs followed the same course, quoting at length from my temporary restraining order in the fact section of their motion for interim relief [DE 315-9], filed March 30, 2009, but neglecting to mention the expiration of the temporary restraining order and the Court's reluctance to extend it upon multiple motions.¹

Finally, it appears that neither the Hofmann nor Aguilar Plaintiffs notified the Dominican Republic Court of my April 24, 2009 striking of Plaintiffs' renewed motion for a temporary restraining order [DE 222]. In its May 1, 2009 orders granting the Hofmann and

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Given the dates the Hofmann and Aguilar Plaintiffs filed suit in the Dominican Republic, March 20 and 30, 2009, respectively, just a few days after Magistrate Judge McAliley and I declined to extend their ex parte temporary restraining order, I have to question whether Plaintiffs were forum shopping.

Aguilar Plaintiffs injunctive relief, the Dominican Republic court quoted extensively from my temporary restraining order [DE 315, 332-34, 332-25], over a month after the temporary restraining order expired and was not renewed. Such withholding of information from the courts in the Turks and Caicos and the Dominican Republic can only lead me to further question what information is being withheld here.

Also disconcerting is the effect this multiplicitous - and duplicitous - litigation will have on innocent investors. Not only has there been a tremendous drain of resources, "several hundreds of thousands of dollars" [May 19, 2009 Tr. 46:10-12], due to the payment of legal fees and costs in three jurisdictions, but the injunction obtained in the Dominican Republic enjoins the very resources which I may have used or need to use to accord relief in the suit before me.

In addition to the problems posed by the various actions, I am uncomfortable with Plaintiffs' failure to disclose fully the interests of Impact and James Catledge in Plaintiffs' suits and potentially in the Elliott properties. The parties will recall, by way of example, Norm Sorenson's failure to disclose his connections to Impact in his affidavit to the Court [see DE 175, 291:23-292:17], and Levi Rogers' lack of candor in conveying that James Catledge himself had told Rogers that Catledge had a fifty percent interest in the certain Elliott properties [see DE 175, 238:20-240:13]. Further, there is some indication that it is Impact, through James Catledge, that is controlling the litigation before me. See DE 324-2, James Catledge Declaration dated April 14, 2009 ("*My company* is currently suing Fred and Derek Elliott in Federal District Court in Florida . . ." (emphasis added)); see also DE 196, April 9, 2009 Tr. 20:20-21 (The Court: You're Catledge's lawyers. Mr. Diaz: We have been since October.).

Based on the interests and influence of Impact and Catledge, I have real concerns about the ability of the Hofmann and Aguilar attorneys to properly and adequately represent the interests of all investors. I also question whether the attorneys have done so to date. I have discussed with the parties that suits in California, Idaho, and Utah name Impact and Impact-related individuals, including James Catledge, as defendants; that these suits present securities law-based claims, which are notably absent here; and that certain Plaintiffs' attorneys represent Mr. Catledge in some of these suits. For example, in late April 2009, well after the action before me had commenced and preliminary injunction hearings were conducted, Diaz, Reus & Targ LLP, attorneys for the Aguilar Plaintiffs, filed a Motion for Limited Admission in the Idaho suit, a securities-based action launched by the State of Idaho, Department of Finance, Securities Bureau, which names, along with Derek Elliott and certain Elliott Companies, the following defendants: Impact Net Worth, James Catledge, and John Thomson. [DE 324-25]. Further, I have discussed with the parties my concerns and confusion that, while Hofmann purchased his interests in the Elliott properties through John Thomson and never met with the Elliots, Impact and John Thomson are not named defendants in the Hofmann suit. [DE 175, 76:17-77:4; 78:24-79:14; 89:17-90:11]. I therefore fear that the real interests of innocent investors could fall by the wayside through the course of these litigations.

My concerns about candor and the interests of the investors are not limited to the Plaintiffs, but equally extend to the Defendants. Starting with the management of the Elliott properties, Fred Elliott testified that he was not involved in day-to-day management of the Elliott properties from 2003 until June 2008, leaving control to the "young guard", his son Derek Elliott [DE 177, April 2, 2009 Tr. 128:21-129:1]. Fred Elliott was uninvolved in the

decision to purchase Juan Dolio: "I was not involvedThe announcement was made to me that the purchase was being made." [DE 177, April 2, 2009 Tr. 129:19-23]. Noticeably quiet in the record is the role Derek Elliott played in the decision making during this time, or the relationship between Derek Elliott and James Catledge when Derek was in control. I reserve on this issue for further comment, but note that, based on Derek Elliott's evasive answers in two depositions, I am left with a concern that Derek Elliott, the person in charge of the Elliott business when Hofmann made his purchase and when the decision to purchase Juan Dolio was made, was inadequately informed, or is hiding information from the Court.

I am also disturbed by the inconsistent information Defendants have provided on the DMK Trust Account at the Citibank branch in Tamarac, Florida.² Based on initial concerns about the account, I asked the Defendants at the April 9, 2009 hearing about the monies collected from the Juan Dolio promissory notes and deposited into the trust account. I was left with the understanding that \$29 million had been derived from the prepayment of the notes and the sale to Aviati and that the trust account was located in the Dominican Republic. See DE 196, April 9, 2009 Tr. 44:12-14 (Mr. Bellido: Your Honor, Mr. Fred Elliott did inform us that the trust accounts are in Santo Domingo in the Dominican Republic. They are with the DMK lawyers.). In their April 20, 2009 court-ordered status report, the Defendants clarified that only \$605,000 had been prepaid on the Juan Dolio promissory notes (rather than \$16 million), Aviati had paid only \$405,000 (rather than \$13 million), and the trust account was located in Florida (rather than the Dominican Republic)

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Account Name: De Marchena Kaluche & Asociados, A.S. (The Bungalows Juan Dolio Escrow Account); Account Number: 3200721823.

[DE 208, pp. 11-12]. Thereafter, in the court-ordered Business Plan filed May 1, 2009, Defendants stated that they may have to pay back the \$450,000 received from Aviati, plus costs and interest [DE 241-2, p. 10].

Amount of money collected aside, I have questions about whether the monies in the DMK Trust Account have been spent in accordance with the representations made by Fred Elliott to investors in the documentation preceding the October 14, 2008 Elliott Conference Call:

To facilitate the completion of our collective Juan Dolio hotel, all funds and proceeds of the sale and pre-payment of the promissory notes have been directed to DMK Lawyers in trust. This is trust account which is dedicated to the completion of our hotel from this receivable. The trust account assures the opening of the hotel which is the protection of you [sic] asset and the payment of non use fees moving forward.

[Elliott Conference Call for All Agents and Clients, October 14, 2008; Preliminary Injunction Hearing Plaintiffs' Exhibit 10]. The accounting on the DMK Trust Account [DE 242-2] shows intercompany transfers of tens of thousands of dollars and checks written out of order. It has been suggested that the account is not exclusive to the Elliotts and the Juan Dolio project and can be accessed by various individuals [May 19, 2009 Tr. 117:10-23]. Therefore, I simply cannot determine whether the funds actually went towards the construction and completion of Juan Dolio.

Additionally, I have been unable to ascertain how much money is needed to complete the project. I was told in early April that \$8 or \$9 million was required to complete Juan Dolio [DE 177, 137:11-14; DE 196, 12:2-6], yet the business plan states that almost \$13 million is needed for completion [DE 241-2, p. 3]. Defendants' representation at the May 19, 2009 hearing that the difference between these figures was furniture [May 19, 2009 Tr. 62:12-19] does not reconcile the numbers, as the \$1 million of furnishings [DE

241-2, p. 3] does not fill the \$4 to \$5 million gap.

Defendants have also not been forthcoming about the decision to purchase the Miches property, and whether funds dedicated to Juan Dolio were diverted to the purchase, compromising the completion of Juan Dolio. The business plan does not reflect the sale of the Miches property as a potential source of funding for Juan Dolio completion, and it is unclear whether it is a workable source of funding. In sum, without knowing how much is needed to complete the project, how much is available to fund the completion, or the viability of the business plan, it is significantly difficult to protect the interests of the investors and further the completion of Juan Dolio.

My chief concern, then, is that there are many hundreds of people from the United States who have invested in the properties at issue. Accordingly, this Court is strongly motivated to assume jurisdiction over their interests. Yet it is not clear how to structure relief to give these investors either their investment back or a return on their investment, if liability is determined, and I am not convinced that the current alignment of parties will fully protect the investors' interests. As previously stated, and I emphasize, the actions of the parties are unnecessarily dissipating the assets of both Plaintiffs and Defendants. Plaintiffs' strategy of litigating in three different jurisdictions has cost investors hundreds of thousands of dollars, and may potentially threaten the ability of innocent investors to get full relief down the road. The Elliotts are claiming millions of dollars of damages from the Plaintiffs' ex parte preliminary injunction in the Turks and Caicos [DE 324-11]. The money to defend the litigation and to fund the counterclaims apparently comes from funds that could be available to complete Juan Dolio.

At the same time, I am hesitant to impose a receiver over this action without having

a viable plan in mind. For instance, I do not even know, because (amazingly) the parties have not told me, if pursuant to the mortgage documents, the appointment of a receiver could trigger a foreclosure by lenders, potentially jeopardizing everyone's interests. Therefore, at this juncture, I conclude that it is best to appoint a Special Master to investigate and recommend resolution of the many issues present in this case. I appoint Thomas E. Scott, Esquire to this role. Mr. Scott is a named partner in the law firm of Cole, Scott & Kissane, P.A. Based on his prior experience as the former United States Attorney for the Southern District of Florida, a Circuit Judge for the Eleventh Judicial Circuit for Miami-Dade County, Florida, and a United States District Court Judge for the Southern District of Florida, Master Scott can understand and address the complicated civil and commercial issues at hand. I envision Master Scott's role to involve two phases -- the first an investigation, and the second a recommendation.

The scope of the Master's duties will address the key concerns that have risen to date in this case. With respect to the Juan Dolio project, the Special Master, through accountants and real estate experts that he may retain, would review the accounting of the DMK Trust Account, including control over the account and incoming and outgoing funds. The Master would also assess the viability of the business plan, ascertain the cost to complete the Juan Dolio project, and determine if alternative sources of funding, such as a sale of the Miches property, could be used to complete the project and should be included in the business plan. The Special Master would evaluate the mortgage and other closing documents relating to the investments, and determine whether appointing a receiver would trigger a foreclosure right or otherwise have legal consequence. The Master would also investigate the potential diversion of Juan Dolio monies to other Elliott

businesses, including whether such diversion was at the behest of James Catledge. The Master could then recommend an injunction that is narrowly tailored so as to maximize the return to investors and not jeopardize completion of the Juan Dolio or Cofresi projects.

The Special Master would also serve as this Court's liaison with the courts in the Turks and Caicos and the Dominican Republic and recommend whether this Court should request the Turks and Caicos and Dominican Republic courts to refrain from taking action in the interests of comity, as Plaintiffs elected to first file suit here. Additionally, the Master would recommend whether Plaintiffs should be enjoined from filing suit elsewhere, given the tremendous drain on Plaintiffs' and Defendants' resources posed by the duplicative litigation, and recommend alternate remedies of an anti-suit nature, again to ensure that the limited resources available are used efficiently to further the goals of the investors.

Further, the Special Master would work with the parties to reach a confidentiality agreement, devise a discovery plan, and coordinate expert and fact discovery. To streamline discovery and avoid unnecessary disputes, I would grant Master Scott subpoena power to get records directly from the parties and require the parties to go through the Special Master before filing "emergency" motions with the Court.

To ensure that the cases are litigated so as to offer the investors full relief, the Special Master would verify Impact and Catledge's interest in the Elliott properties and the litigation, recommend proper alignment of the parties, including whether Plaintiffs need to be grouped by their investment vehicle, and recommend how to coordinate among the various suits.

Finally, the Special Master would investigate the potential sources of funding for his services, and the services of a receiver if I were to appoint one. The Special Master would

recommend to the Court an allocation of costs and expenses among the parties.

Before the Special Master can begin his work, I need to determine the budget for and funding of his services, including those of any accountants or other experts he deems necessary. Master Scott shall therefore meet with the parties in the next two weeks. Within the next thirty days, the Master shall establish with the parties a confidentiality agreement and discovery plan, and submit to the Court an initial report which includes a revised scope of his duties (if he and the parties deem it necessary), a budget proposal indicating the funding necessary for each phase of his proposed duties, and recommendations on the manner in which the case should proceed.

The budget for the Master's initial services is \$10,000, and I conclude that Plaintiffs and Defendants shall bear equally the cost of these initial services. Accordingly, Plaintiffs and Defendants shall deposit \$5,000 each into the Special Master's escrow account by May 29, 2009. Per my *ore tenus* order on May 19, 2009, I instructed Defendants that the funds in the DMK Trust Account may not be withdrawn pending further Court order [May 19, 2009 Tr. 115:7-15]. I now permit the Defendants to use the funds in the DMK Trust Account towards their portion of the fees for the Master's initial services, but otherwise continue to enjoin the withdrawal of funds from this account, pending further Court order.

As for the Master's continuing services, I note with no undue criticism that the Plaintiffs' actions in enjoining the Elliott Defendants' funds in the Dominican Republic will potentially affect my ability to order Defendants to fund the Master's services, as a significant sum of Defendants' resources are tied up by that injunction. I therefore reserve to order both Plaintiffs and Defendants to put money in an escrow account to fund the Master's continuing services pending final allocation of costs, to order the Plaintiffs to

request modification of the injunction in the Dominican Republic if that injunction is not otherwise dissolved, or to order any other relief necessary to fund the Special Master or receiver's services.

I reserve ruling on the preliminary injunction motion and allow the record to be supplemented by the Master's conclusions and reports. As discussed in detail above, due to the apparent lack of candor and actions of both Plaintiffs and Defendants, I simply cannot determine what is best for the investors and rule on the preliminary injunction motion at this juncture. Further, after receiving the reports from the Master, I reserve to appoint the Master as a receiver in this action, if I deem it necessary.

In the meantime, Plaintiffs may go forward with the requested deposition of Fred Elliott [see DE 306]. The deposition shall last no more than 2 hours, including 1 hour for the Plaintiffs, and 1 hour for the Defendants; shall be taken by June 5, 2009; and shall be limited to the accounting on the DMK Trust Account, the Juan Dolio business plan, and the Account-related documents obtained from Citibank. As with all depositions, the parties shall promptly file the transcript with the Court.

The purpose of this Order is not only to lay out the issues and problems presented by both Plaintiffs and Defendants, but to notify the courts in the Turks and Caicos and the Dominican Republic of the status of the proceedings before me. Additionally, I wish to notify innocent investors of the issues that have come to light. To that end, I require the Plaintiffs to promptly publish this Order in its entirety on the ECC website, <http://eclientscom.com/>,³ and I instruct the parties to file this Order with the courts in the

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It appears that Plaintiffs have published the May 7 and 8, 2009 depositions of Derek and Fred Elliott on the website, along with the Dominican Republic temporary restraining order.

Turks and Caicos and the Dominican Republic. Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Pursuant to Fed. R. Civ. P. 53, Thomas E. Scott, Esquire is preliminarily appointed as Special Master in this action.
2. The Special Master shall meet and confer with the parties by June 5, 2009.
3. By June 22, 2009, the Master shall establish with the parties a confidentiality agreement and discovery plan, and submit to the Court an initial report which includes a revised scope of his duties (if he and the parties deem it necessary), a budget proposal indicating the funding necessary for each phase of his proposed duties, and recommendations on the manner in which the case should proceed.
4. A budget of \$10,000 is allocated to fund the Special Master's initial services.
5. Plaintiffs and Defendants shall bear the costs of the Master's initial services equally. Plaintiffs and Defendants shall each deposit \$5,000 into the following trust account by May 29, 2009:


Trust Account Routing Number: 066009650
Trust Account Number: 1016023602

Northern Trust Bank
595 Biltmore Way
Coral Gables, FL. 33134

The wire transfer shall identify the style of the case, Hofmann v. EMI Resorts, and the parties shall file a notice of compliance, including a receipt or confirmation number, by May 29, 2009.

6. Defendants may direct the assets held in the DMK Trust Account (Account Name: De Marchena Kaluche & Asociados, A.S. (The Bungalows Juan Dolio Escrow Account); Account Number: 3200721823) at the Citibank branch in Tamarac, Florida towards their \$5,000 contribution. Defendants may not otherwise withdraw funds from that account, pending further Court order.
7. Plaintiffs' Joint Motion to Compel Frederick Elliott to Appear for Additional Deposition Testimony [DE 306] is GRANTED. The parties may depose Fred Elliott. The deposition shall last no more than 2 hours, including 1 hour for the Plaintiffs, and 1 hour for the Defendants; shall be taken by June 5, 2009; and shall be limited to the accounting on the DMK Trust Account, the Juan Dolio business plan, and the Account-related documents obtained from Citibank. The parties must promptly file the deposition transcript with the Court.
8. Plaintiffs shall publish this Order in its entirety on the ECC website, <http://eclientscom.com/>, by May 26, 2009. If Plaintiffs cannot publish the Order on the ECC website, they shall publish it on an equivalent website that will reach investors by May 26, 2009. Plaintiffs shall submit an affidavit of compliance, under oath, by May 27, 2009. If Plaintiffs have published the Order on an equivalent website, the affidavit shall explain why the Order was not published on the ECC website.
9. The parties shall file this Order with the courts in the Turks and Caicos and the Dominican Republic by May 28, 2009. The parties shall file a notice of compliance by May 29, 2009.

DONE AND ORDERED in Chambers at Miami, Florida at this 22 day of May,
2009.



THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
U.S. Magistrate Judge Chris M. McAliley
Special Master Thomas E. Scott
All counsel of record