

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 L.P.,
JAY PEAK GP SERVICES , 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.

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

Additional Receivership Defendants¹

RECEIVER'S MOTION TO MODIFY THE PRELIMINARY INJUNCTION
AND/OR RECEIVERSHIP ORDER TO AUTHORIZE A
STIPULATED WRIT OF ATTACHMENT FOR THE

¹See Order Granting Receiver's Motion to Expand Receivership dated April 22, 2016 [DE 60].

**BURKE CONTRACTORS AND SUBCONTRACTORS
TO PRESERVE THEIR LIEN RIGHTS AND MEMORANDUM OF LAW**

Michael I. Goldberg (the “Receiver”), in his capacity as the court-appointed Receiver for Defendants, 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 , L.P., Jay Peak GP Services , Inc., Jay Peak Biomedical Research Park L.P., and AnC Bio Vermont GP Services, LLC (collectively, “Receivership Defendants”) and Relief Defendants Jay Construction Management, Inc., GS1 of Dade County, Inc., North East Contract Services, Inc., and Q Burke Mountain Resort, LLC (collectively, “Relief Defendants”) and Additional Receivership Defendants Q Burke Mountain Resort, Hotel and Conference Center, L.P. and Q Burke Mountain Resort GP Services, LLC, (collectively “Q Burke Entities”) files this Motion to Modify the Preliminary Injunction and/or Receivership Order to Authorize a Stipulated Writ of Attachment for the Q Burke Contractors and Subcontractors to Preserve their Lien Rights (the “Motion”).

BACKGROUND

The Receivership Case

1. On April 12, 2016, the Securities and Exchange Commission (“SEC”) filed a complaint [D.E. 1] (“Complaint”) in the United States District Court for the Southern District of Florida (the “Court”) against the Receivership Defendants, the Relief Defendants, William Stenger (“Stenger”) and Ariel Quiros (“Quiros” and with the Receivership Defendants, Relief Defendants and Stenger, the “Defendants”), the principal of the Receivership Defendants,

alleging that the Defendants violated the Securities Act of 1933 and the Securities Exchange Act of 1934 by making false or materially misleading representations to investors.

2. The SEC alleged that Quiros and Stenger obtained and improperly utilized funds from foreign investors who made investments through the U.S. government's EB-5 investor program.

3. The scheme orchestrated by Quiros and managed by Stenger involved securities offerings made on behalf of seven limited partnerships connected to Defendant Jay Peak, Inc. and significant sums of investor money received on behalf of the Receivership Entities were unlawfully pledged and transferred to Q Burke Mountain Resort, Hotel and Conference Center L.P. (the "Q Burke LP.") and its general partner, Q Burke Mountain Resort GP Services, LLC (the "Q Burke GP, LLC").

4. On April 12, 2016, upon the SEC's Emergency *Ex Parte Motion* for Temporary Restraining Order, Asset Freeze and Other Relief [D.E. 4] (the "Asset Freeze Motion"), the Court entered an Order granting the Asset Freeze Motion [D.E. 11].

5. On April 13, 2016, upon the SEC's Motion for Appointment of Receiver [D.E. 7], the Court entered an Order [D.E. 13] appointing Michael Goldberg as the Receiver over the Receivership Defendants and the Relief Defendants (the "Receivership Order").

6. On April 21, 2016, upon the SEC's Unopposed Motion for an Order of Preliminary Injunction and Other Relief against the Receivership Defendants [D.E. 49], the Court entered an Order granting a Preliminary Injunction against the Receivership Defendants and the Relief Defendants [D.E. 52] (the "Preliminary Injunction").

7. On April 22, 2016, upon the Receiver's Emergency Motion to Expand Receivership [D.E. 44], the Court entered an Order Granting Receiver's Motion to Expand

Receivership [D.E. 60](the “Expansion Order”), expanding the receivership to include Q Burke, L.P. and Q Burke GP, LLC; appointing the Receiver as the Receiver over them authorized, empowered and directed to take all action with respect to them set forth in or contemplated by the Receivership Order.

8. Pursuant to 28 U.S.C. § 754, copies of the Complaint and Receivership Order were filed in the Federal District Court for the District of Vermont under Docket Number 2:16-mc-0045 on April 20, 2016, as Docket Entry 1, and a copy of the Expansion Order was filed as Docket Entry 2 on April 25, 2016.

The Burke Project

9. Q Burke Mountain Resort, LLC, Q Burke Mountain Resort, Hotel and Conference Center, L.P. and Q Burke Mountain Resort GP Services, LLC (“Q Burke Entities”) are receivership entities involved in the construction of a hotel and other facilities on Burke mountain (the “Burke Project”). The majority of the construction on the Burke Project, including the hotel, was completed in February 2016. (A tennis facility, aquatic center, and mountain bike park have yet to be completed.)

10. By contract dated on or about October 1, 2012 (“Contract”), Burke Mountain Resort, LLC retained PeakCM, LLC (“PeakCM”) to supply labor and materials for the Burke Project, located at 4600 Mountain Road, Burke Vermont.

11. PeakCM retained subcontractors and suppliers (together “Subcontractors”) to supply labor and materials to the Burke Project per the Contract, the terms of which were incorporated into their subcontracts.

12. Representatives of PeakCM and many of the Subcontractors have conferred with the Receiver and demanded payment. However, due to the diversion of funds and

mismanagement, the Burke Entities currently lack sufficient funds to pay PeakCM and the Subcontractors. PeakCM and the Subcontractors seek to preserve their lien rights under Vermont law.

Vermont Contractors Lien Laws

13. Under Vermont's contractor's lien statute, 9 V.S.A. § 1921 *et seq.*, a contract that is made to improve real property, furnish labor, or provide materials creates a contractor's lien upon the property. 9 V.S.A. § 1921(a). Within "180 days from the time when payment became due for the last of such labor performed or materials furnished" a contractor is required to record a notice of memorandum of lien in the town clerk's office where the land is located. 9 V.S.A. 1921(c). The lien recording "shall charge such real estate with such lien as of the visible commencement of work or delivery of material...." See 9 V.S.A. § 1923.

14. Within 180 days of such lien recording or 180 days from the time payment became due, the contractor is required to commence an action to perfect the contractor's lien by securing an attachment on the real property that is the subject of the lien. 9 V.S.A. § 1924. *See* V.R.C.P. 4.1 and 12 V.S.A. §§ 3291-3295 (Attachment of Real Property). *See also The Official Unsecured Creditors' Comm. of the Rainbow Trust v. Moulton Constr., Inc., (In re the Rainbow Trust)*, 216 B.R. 77, 83 (2d Cir. BAP 1997) citing *Glinka v. Hinesburg Sand & Gravel, Inc. (In re APC Construction, Inc.)*, 132 B.R. 690, 694 (D. Vt. 1991) ("Obtaining a judicial order for a writ of attachment within the three month period [now 180 days by statutory amendment] prescribed under § 1924 perfects the lien and is a requisite to preserving the statutory lien The failure to perfect a recorded notice of lien by obtaining a writ of attachment means the lien is lost").

15. In the event a Writ of Attachment is not obtained with the time limitations provided by the statutes, the lien is deemed to have expired. *Filter Equipment Co., Inc. v. International Business Machines Corp.*, 142 Vt. 499, 502 - 503, 458 A.2d 1091 (1983) ("[T]he property involved must be actually attached within the [180-day] period, and ... it is not enough that the suit be merely commenced." "Adherence to the statute ... and to the rule, is a requisite to preserving the statutory lien.")

16. PeakCM and some but not all of the Subcontractors have filed a memorandum of lien in the Town of Burke Land Records, but the time to do so has not yet expired.

17. The Receiver agrees to waive the requirement for filing a memorandum of lien for any Subcontractors that have not yet filed one in the Town of Burke Land Records.

Relief Requested

18. The Preliminary Injunction and/or the Receivership Order as written, prevents PeakCM and the Subcontractors from preserving their lien rights.

19. In order to protect PeakCM and the Subcontractors and to provide an orderly procedure to evaluate the validity of their claims, the Receiver respectfully requests the Court to authorize waiver of the requirement that a lienor record a memorandum of lien to preserve its lien right and to enter an Order authorizing a Stipulated Writ of Attachment for PeakCM and for the Subcontractors to perfect their lien rights, subject to further review and confirmation by the Receiver of the validity, priority, scope and amount of their Claims.

LEGAL ARGUMENT

The Preliminary Injunction includes an asset freeze, which provides that until further Order of the Court, the Receivership Defendants and the Relief Defendants:

“are, restrained from, directly or indirectly, transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of, or

withdrawing any assets or property, including but not limited to cash, free credit balances, fully paid for securities, personal property, real property, and/or property pledged or hypothecated as collateral for loans, or charging upon or drawing from any lines of credit, owned by, controlled by, or in the possession of, whether jointly or singly, and wherever located”

See Preliminary Injunction, at Page 5.

Moreover, the Court retains jurisdiction as follows:

“IT IS HEREBY FURTHER ORDERED that this Court shall retain jurisdiction over this matter and Defendants and Relief Defendants in order to implement and carry out the terms of all Orders and Decrees that may be entered and/or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court, and will order other relief that this Court deems appropriate under the circumstances.”

See Preliminary Injunction, at Page 9.

The Receivership Order provides, amongst other things:

During the period of this receivership, all persons ... with actual notice of this Order, are enjoined ... from in any way disturbing the assets or proceeds of the receivership or from prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Corporate Defendants and Relief Defendants.

See Receivership Order, at ¶ 15 and

No ... person or entity shall exercise any form of set-off, alleged set-off, lien, or any form of self-help whatsoever, or refuse to transfer any funds or assets of the Corporate Defendants and Relief Defendants to the Receiver’s control without the permission of this Court.

See Receivership Order, at ¶ 21.

District courts have broad powers and wide discretion to determine relief in an equity receivership. *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992). "The power of a district court to impose a receivership or grant other forms of ancillary relief . . . derives from the inherent power of a court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court of the benefit of creditors." *SEC v.*

Hardy, 803. F.2d 1034, 1038 (9th Cir. 1986). The court may therefore employ "reasonable procedures" to serve this purpose. *Id.*

In order to protect PeakCM and the Subcontractors and to provide an orderly procedure to evaluate the validity of their claims, the Receiver believes that the Preliminary Injunction and/or the Receivership Order should be modified to waive the requirement that a lienor record a memorandum of lien to preserve its lien right and to enter a Stipulated Order authorizing the execution of a Stipulated Writ of Attachment to permit PeakCM and the Subcontractors to preserve their rights. The Stipulated Writ of Attachment is attached hereto as Exhibit 1. The Receiver is not waiving any rights by agreeing to this procedure, but rather it preserves the status quo.

The modification only allows perfection of the liens before they expire and will not allow PeakCM or the Subcontractors to enforce or in any other respect act upon their liens absent further Order of the Court. The modification will preserve all rights of the Receiver to object to claims, amounts, validity, timeliness, priority and any other objection to a contractor's claim. The Receiver recommends that all liens filed should be treated *pari passu* to avoid a race to the courthouse. This will give the Receiver enough time to evaluate the claims and liens and attempt to formulate a payment plan acceptable to PeakCM and the Subcontractors. Finally, the Court should reserve jurisdiction to determine the validity of claims and liens and priority thereof as well as authorize a payment plan in the event an agreement cannot be reached. A proposed Order is attached hereto as Exhibit 2.

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to Local Rule 7.1(a)(3), the Receiver has contacted counsel for the SEC and counsel for Defendants Quiros and Stenger. The SEC and Stenger have no objection to the relief

requested. At the time this Motion was filed, the Receiver had not heard back from Quiros' counsel.

WHEREFORE, the Receiver requests the Court modify the Preliminary Injunction and/or the Receivership Order to authorize the Receiver to waive the requirement that a lienor record a memorandum of lien to preserve its lien right and to enter an Order authorizing a Stipulated Writ of Attachment to preserve the contractor's lien rights of PeakCM and the Subcontractors, and grant such other relief as is just and equitable.

Respectfully submitted,

AKERMAN LLP
350 E. Las Olas Boulevard, 16th Floor
Ft. Lauderdale, Florida 33301
Telephone: (954) 46-2700
Facsimile: (954) 463-2224

By: /s/ Michael I. Goldberg
Michael I. Goldberg, Esq.
Florida Bar No.: 886602
Email: michael.goldberg@akerman.com
Court-Appointed Receiver

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on June 3, 2016 via the Court's notice of electronic filing on all CM/ECF registered users entitled to notice in this case as indicated on the attached Service List.

By: /s/ Michael I. Goldberg
Michael I. Goldberg, Esq.

SERVICE LIST

1:16-cv-21301-DPG Notice will be electronically mailed via CM/ECF to the following:

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**SECURITIES AND EXCHANGE
COMMISSION**

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Attorney for Blanc & Bailey Construction, Inc.

EXHIBIT 1

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.,
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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.

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

Additional Receivership Defendants¹

STIPULATED WRIT OF ATTACHMENT

¹See Order Granting Receiver's Motion to Expand Receivership dated April 22, 2016 [ECF No. 60]:

To any Sheriff or Constable in the State of Vermont:

By the authority of the Federal District Court of the Southern District of Florida pursuant to the Order Granting Receiver's Motion to Modify the Preliminary Injunction and/or Receivership Order to Authorize a Stipulated Writ of Attachment for the Burke Contractors and Subcontractors to Preserve Their Lien Rights [D.E. ___] (the "Order"), a copy of which is attached to this Writ and incorporated herein, you are hereby commanded to attach the lands of Burke2000, LLC, in the Town of Burke, Caledonia County, Vermont more particularly described as:

223 Sherburne Lodge Road a/k/a 4600 Mountain Road, Town of Burke, County of Caledonia, State of Vermont, also known as Parcel No. 07070002.001 and SPAN No. 11103411243

Being all and the same lands and premises conveyed to Burke 2000, LLC by the limited warranty deed of B&I Lending, LLC, recorded at Book 80, Page 540 of the Town of Burke land records on November 1, 2000

to the values set forth in the attached Schedule A for the Subcontractors and Schedule B for PeakCM, LLC (subject to the Receiver's right to object to claims, amounts, validity, timeliness, priority and any other objection to the claims), to be held to satisfy any judgment for damages and costs that may be recovered by PeakCM LLC and the Subcontractors listed in such Schedules in any action against Q Burke Mountain Resort, LLC or its subsidiary Burke 2000, LLC to recover sums due for construction of improvements on said lands (the "Burke Project"), and make due return of this Writ with your doings thereon.

Clerk, Federal District Court

Southern District, Florida

DATED: _____

ATTACHMENT A
TO STIPULATED WRIT OF ATTACHMENT

Company	Scope of Work	Amount Owed
All Season Urethane Foam	Spray Foam	\$19,991.80
Bay State Elevator Co	Elevator	\$56,423.20
Blanc & Bailey	Framing	\$0.00 (disputed)
Champlain Door Co.	Overhead Doors	\$2,349.00
Conrad Construction, Inc	Siding/Roofing	\$245,237.90
Forbes Tile	Tile	\$31,523.86
Gardner Kilcoyne Architects	Architects	\$68,990.00
J. Hutchins Inc	Sitework	\$387,767.35
Jeffords Steel & Specialty Co	Misc Metal/Steel	\$162,591.50
Kelley Bothers of New England	Doors & Windows	\$135,094.84
Kittredge Equipment Company	Equipment	\$68,038.54
Lajeunesse Interiors, Inc	Specialties	\$78,111.40
M&M Carpet Service	Carpet	\$72,983.60
Mike's Electric, Inc	Electrical	\$491,972.60
Nicom Coatings Corp	Water/Dampproofing	\$55,558.50
North Star Masonry	Masonry	\$76,006.00
Poulin Lumber, Inc	Panels/Trusses	\$178,718.90
RG Gosselin, Inc	Concrete	\$184,328.00
Specialty Coatings, LLC	Firestopping	\$21,500.00
St. Albans Glass Co. Inc	Storefronts & Entrances	\$42,089.98
Stantec Consulting Services Inc.	Geotechnical Investigation	\$3,764.90
The Chimney Sweep Fireplace Shop	Fireplaces	\$26,960.00
Tri-State Sprinkler, Inc	Fire Suppression	\$55,303.00
Valhalla Corp	Phones	\$52,801.19
Van Deusen & Associates	Elevator Survey	\$3,519.70
VHV Company	Mechanical	\$799,421.90
Vintage Painting, Inc	Painting	\$178,893.01
Windham Millworks	Millwork	\$199,180.80
		\$3,699,121.47

Subcontractors reserve the right to claim and seek additional amounts that may be owed for interest, penalties, attorney's fees or damages.

ATTACHMENT B
TO
STIPULATED WRIT OF ATTACHMENT

Amount remaining owed to PeakCM, LLC: \$3,919,903.00 (Including amounts owed to Subcontractors)

PeakCM, LLC reserves the right to claim and seek additional amounts that may be owed for interest, penalties, attorney's fees or damages.

EXHIBIT 2

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.

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

Additional Receivership Defendants¹

**ORDER GRANTING RECEIVER'S MOTION TO MODIFY THE
PRELIMINARY INJUNCTION AND/OR RECEIVERSHIP ORDER
TO AUTHORIZE A STIPULATED WRIT OF ATTACHMENT
FOR THE BURKE CONTRACTORS AND SUBCONTRACTORS
TO PRESERVE THEIR LIEN RIGHTS**

¹ See Order Granting Receiver's Motion to Expand Receivership dated April 22, 2016 [ECF No.: 60].
{38394236;1}

THIS MATTER comes before the Court upon receiver, Michael I. Goldberg's (the "Receiver") Motion to Modify the Preliminary Injunction and/or Receivership Order to Authorize a Stipulated Writ of Attachment for the Burke Contractors and Subcontractors to Preserve Their Lien Rights [D.E. ___] (the "Motion");

WHEREAS, by Orders of this Court ("District Court") filed April 13, 2016 and April 22, 2016, the District Court appointed Michael Goldberg as receiver to take possession of, *inter alia*, all real property of Q Mountain Resort LLC; Q Burke Mountain Resort, Hotel and Conference Center, L.P. and Q Burke Mountain Resort GP Services, LLC (collectively, with their subsidiaries, the "Burke Entities"), with title to such property being vested by operation of law in the Receiver.

WHEREAS, under 28 U.S.C. § 754, the Receiver is vested with complete jurisdiction and control over the real and personal property of the Burke Entities.

WHEREAS, Q Burke Mountain Resort, LLC, contracted with PeakCM, LLC ("PeakCM") to supply labor and materials for construction of a hotel and other facilities on Burke mountain, located at 4600 Mountain Road, Burke Vermont ("Project Parcel") owned by its subsidiary Burke 2000, LLC and more particularly described as:

223 Sherburne Lodge Road a/k/a 4600 Mountain Road, Town of Burke, County of Caledonia, State of Vermont, also known as Parcel No. 07070002.001 and SPAN No. 11103411243

Being all and the same lands and premises conveyed to Burke 2000, LLC by the limited warranty deed of B&I Lending, LLC, recorded at Book 80, Page 540 of the Town of Burke land records on November 1, 2000

WHEREAS, PeakCM retained the subcontractors and suppliers (together "Subcontractors") listed on Schedule A attached to the Stipulated Writ of Attachment to supply

labor and materials to the Project Parcel per the Contract, the terms of which were incorporated into their subcontracts.

WHEREAS, under Vermont's contractor's lien statute, 9 V.S.A. § 1921 *et seq.*, a contract that is made to improve real property, furnish labor, or provide materials creates a contractor's lien upon the property.

WHEREAS, PeakCM and the Subcontractors may have construction liens for the labor and materials supplied to the Project Parcel ("Contractor Liens"), which may expire if not perfected by recording a memorandum of lien followed by a Writ of Attachment recorded in the land records for the Town of Burke, Vermont.

WHEREAS the Receiver has agreed to waive the requirement that a lienor record a memorandum of lien to perfect its contractor's lien and has stipulated that there is a reasonable likelihood that the PeakCM and the Subcontractors would recover judgment on their respective contractor's liens in an amount equal to or greater than the amounts shown on Exhibits A and B attached to the Stipulated Writ of Attachment because they have not been paid in full for labor and materials furnished to erect and alter improvements on Project and that there is no liability insurance, bond or other security available to satisfy any such judgment.

WHEREAS, the Receiver believes it is necessary for the Court to modify the Preliminary Injunction [D.E. 52] and/or the Receivership Order [D.E. 13] to the extent necessary to permit contractors and Subcontractors to perfect their lien rights under 9 V.S.A. § 1921 *et seq.*, subject to the Receiver's confirmation of the validity and extent of the amounts owed to PeakCM and the Subcontractors and/or object to the claims, amounts, validity, timeliness, priority and any other objection.

WHEREAS, the Court has been advised that all parties consent to the Motion and the relief requested therein; and

WHEREAS, the Court finds that the Receiver has made a sufficient and proper showing in support of the relief requested;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, as follows:

1. The Motion is **GRANTED**.
2. The Preliminary Injunction and the Receivership Order are modified to in order to preserve the lien rights of the Subcontractors under 9 V.S.A. § 1921 et seq. and to allow for the non-possessory attachment of Project Parcel in the form of the Stipulated Writ of Attachment, a copy of which is attached hereto as Exhibit 1, and the Clerk of the Court is directed to execute the same.
3. This Attachment is intended to preserve any Contractor Liens held by the Subcontractors listed in Schedules A and B to the Stipulated Writ of Attachment, pending a final judgment or other resolution of their claims. PeakCM and the Subcontractors shall have the right to assert additional amounts owed by contract and/or under the Prompt Payment Act, 9 V.S.A. § 4001 *et seq.*, including, but not limited to, interest, penalties, attorney's fees, and damages. The Receiver retains the right to object to claims, amounts, validity, timeliness, priority and any other objection to the claims of PeakCM and the Subcontractors.
4. The Receiver is authorized to waive and has waived the requirement that PeakCM and the Subcontractors record a memorandum of lien to preserve its lien rights.
5. PeakCM and the Subcontractors are not authorized to obtain a final judgment, enforce or in any other respect act upon their liens absent further Order of this Court.
6. Except as provided in Paragraph 4 above, the Receiver is not waiving any rights by agreeing to this procedure, but rather is seeking to preserve the status quo. The Receiver's right to object to claims, amounts, validity, timeliness, priority and any other objection to PeakCM and the Subcontractors claims are reserved.

7. Accordingly, the entry of this Order does not ratify the amounts owed to PeakCM and the Subcontractors as listed in the Schedules attached to the Stipulated Writ of Attachment, or their right to receive payment of interest, penalties, attorney's fees or damages.

8. Upon the Court approving the amounts of PeakCM and of the Subcontractors' claims, PeakCM and the Subcontractors shall release all claims on past due amounts other than the approved amounts and warrant the work they provided, as appropriate.

9. Other than as set forth herein, the Receivership Order shall remain in full force and effect.

10. This Court shall retain jurisdiction of this matter for all purposes, including but not limited to determining the validity of claims and liens and priority thereof as well as authorize payment plan in the event an agreement cannot be reached.

DONE AND ORDERED in Chambers at Miami, Florida this ____ day of June, 2016.

DARRIN P. GAYLES
UNITED STATES DISTRICT COURT JUDGE

Copies to:

Counsel of Record