

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, LLC¹
AnC BIO VT, LLC,²

Additional Receivership Defendants

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

²See Order Granting Receiver's Motion for Entry of an Order Clarifying that AnC Bio VT, LLC is included in the Receivership or in the Alternative to Expand the Receivership to include AnC Bio VT, LLC, *Nunc Pro Tunc*, dated September 7, 2018 (ECF No. 493).

RECEIVER’S MOTION FOR AUTHORIZATION TO EXECUTE PAYCHECK PROTECTION PROGRAM LOAN UNDER CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT AND SUPPORTING MEMORANDUM OF LAW

Michael I. Goldberg, the court-appointed Receiver (the “Receiver”), by counsel, hereby files this Motion for Authorization to Execute A Paycheck Protection Program loan under the Corona Virus Aid, Relief, and Economic Security Act, (the “CARES Act”) H.R. 748 P.L. 116-136. In support of this Motion, the Receiver states as follows:

PRELIMINARY STATEMENT

Due to the COVID-19 pandemic, the Receiver, in consultation with management professionals for Jay Peak Resort and Burke Mountain Resort (the “Resorts”), made the decision to temporarily close the Resorts for the safety of employees and guests. The Resorts’ non-essential employees were also furloughed as of March 14, 2020. At that time, all involved were of the belief that a temporary cessation of operations was necessary to allow the pandemic to pass and/or abate so that operations could safely resume. This decision also made complete economic sense as recreational travel in the United States ceased and it made little sense to incur the expenses associated with keeping the Resorts open.

The Resorts recently reopened with substantially curtailed operations. Present circumstances, however, suggest that it is impossible to predict with any degree of certainty whether, when, and to what extent the Resorts can resume fully normal operations. Among other things, the border between the United States and Canada remains closed, with Canadian citizens comprising a significant percentage of the Resorts’ guest population. According to U.S. officials, among them Vermont Senator Patrick Leahy, it is unclear when the border will reopen. Beyond this, the recent spike in COVID-19 cases in the United States and the potential second wave of cases predicted to coincide with the upcoming ski season make it nearly impossible to predict

future operating cashflow. Recent reports indicate that the Canadian border will not reopen in the near term to permit potential guests to travel to the Resorts from Canada. The almost certain decline in guest traffic going forward threatens the availability of cash on hand to manage the Resorts' operations. Accordingly, the Receiver has applied for and tentatively received approval for a loan under the CARES Act Paycheck Protection Program, (the "PPP"), as codified under the Small Business Act, 15 U.S.C. § 636(a) (the "SBA Act"), pending this Court's approval. Through this motion, the Receiver seeks authorization to close on the loan so that the proceeds are available to supplement the Resort's cash flow, specifically as it relates to payroll expense, so that they can hopefully weather the COVID-19 storm substantially impacting all travel related businesses.

BACKGROUND

1. Michael Goldberg is the court-appointed receiver over the Receivership Defendants³ the Relief Defendants,⁴ and Additional Receivership Defendants⁵ pursuant to the Order Granting Plaintiff Securities and Exchange Commission's Motion for Appointment of Receiver (the "Receivership Order"), dated April 13, 2016 (ECF No. 13) and the subsequent Orders expanding the receivership. *See* (ECF Nos. 60 and 493).

³ The "Receivership Defendants" are 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 Townhouse L.P., Jay Peak GP Services Lodge, Inc., Jay Peak Hotel Suites Stateside L.P., Jay Peak Services Stateside, Inc., Jay Peak Biomedical Research Park L.P., and AnC Bio Vermont GP Services, LLC.

⁴ The "Relief Defendants" are Jay Construction Management, Inc., GSI of Dade County, Inc., North East Contract Services, Inc., and Q Burke Mountain Resort, LLC.

⁵ Q Burke Mountain Resort, Hotel and Conference Center, L.P., Q Burke Mountain Resort GP Services, LLC and AnC BIO VT, LLC were added as "Additional Receivership Defendants". The Receivership Defendants, Relief Defendants, and Additional Receivership Defendants are collectively referred to as the "Receivership Entities."

2. Receivership Defendants Jay Peak Inc., Jay Peak Hotel Suite Phase II, Jay Peak Lodge & Townhouses LP and Jay Peak Hotel Suites Stateside LP own the properties that make up the Jay Peak Resort.

3. The Receiver is authorized, empowered and directed to, among other things, take immediate possession of all real and personal property of the Receivership Defendants and Relief Defendants, and to administer such assets as is required in order to comply with the directions contained in the Receivership Order, and to hold all other assets pending further order of the Court. *See* Receivership Order ¶1.

4. The Receiver is also charged with taking all necessary steps to maintain and, when possible, improve and/or sustain the cash flow of the Resorts, including making any and all efforts to efficiently manage the payroll expense of the Resorts.

The PPP Loan Program Will Provide The Receiver Valuable Assistance With Managing The Resorts' Payroll Expense

5. The Receiver, with the assistance of the court-approved management company, Leisure Hotels, LLC and Jay Peak Resort's General Manager, Steven Wright, regularly identifies opportunities to produce increased cash flow by implementing new programs; reducing energy costs; renegotiating insurance programs; and, when available, availing the Resorts of loans and other credit facilities that support normal business operations.

6. Indeed, the Receivership Order authorizes the Receiver to make or authorize such payments and disbursements from the funds and assets taken into control, or thereafter received by the Receiver, and incur, or authorize the incurrence of, such expenses and make, or authorize the making of, such agreements as may be reasonable, necessary, and advisable in discharging the Receiver's duties. *Id.* ¶ 8.

7. Further, in addition to authorizing the Receiver to employ legal counsel, accountants and other professionals, as the Receiver deems necessary, and to fix and pay their reasonable compensation and reasonable expenses, the Receivership Order authorizes the Receiver to fix and pay all reasonable expenses of taking possession of the assets and business of the Receivership Defendants and exercising the power granted by the Receivership Order, subject to approval by the Court at the time the Receiver accounts to the Court for such expenditures and compensation. *Id.* ¶ 4. Lastly, this Court has ordered that the Receiver shall continue to operate the Resorts “for the benefit of investors subject to further order of this Court.” *Id.*

8. The CARES Act gave the Small Business Administration authority to “modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency.” *See* Interim Final Rule, 13 C.F.R. Part 120. Specifically, the CARES Act amended the SBA Act and established the PPP Loan Program authorizing participating lenders to make low interest loans for payroll protection to eligible small businesses to cover payroll costs.⁶ *See* § 1102(a).⁷ Under the CARES Act, the Resorts are small businesses eligible for the PPP Loan Program.

9. Among the important features of the PPP Loan Program, Section 1106 of the SBA Act permits forgiveness of the entire loan amount to the extent that loan proceeds are used solely for the purpose of covering payroll costs. Thus, to the extent that the Receiver directs loan proceeds

⁶ Payroll costs include compensation to employees who are U.S. residents in the form of salary, wages, commissions, or similar compensation. Employee benefits, including severance payments, vacation payment, and payment of state and local taxes, also qualify as payroll costs for the purposes of the PPP Loan Program

⁷ Loans made under the PPP Loan Program have a two-year maturity date from the date a borrower obtains a loan. The interest rate on loans under the PPP Loan Program is 1%.

towards the payroll cost of the Resorts, the entire principal may be forgiven obviating any risk that the Receiver burdens the estate with additional debt.

10. The Resorts' employees are necessary for its continued operations. Moreover, many of the individuals employed by the Resorts are regular seasonal employees with experience on the resort properties that proves invaluable to guests. Therefore, maintaining appropriate payroll reserves to continue the Resorts' regular operations is critical to the Receiver. Beyond this, as the Court is no doubt aware, the EB-5 Program requires investors to not only create, but also sustain jobs throughout the period where investors receive conditional residency under approved I-526 applications.

11. At this point, Receiver cannot predict whether additional cash reserves will be required. However, the Receiver is certain that if operations remain stalled and/or limited, cash flow, including payroll, will be impacted. More importantly, health officials in both the United States and Canada have predicted a second wave of COVID-19 cases that would coincide with the upcoming ski season, making any effort to shore up cash reserves a prudent exercise of the Receiver's judgment.

12. The Resorts' limited operations currently employ approximately 90-115 employees that provide staffing across the Resorts' property in various functions, which predominantly involve mountain operations, sales, the on-premises water park, and food and beverage services for guests.⁸ Provided that the Canadian border reopens in November for the winter ski season, at least 85% of the proceeds from the PPP loan would be used to increase staffing by up to three

⁸ Payroll expense for the Resorts' operations for June 2020 were estimated at approximately \$312,238. The remaining total payroll expense, forecast from July 2020 through October 2020, is estimated at \$1,928,180, for an average monthly payroll expense of \$482,045. In contrast, average monthly payroll expense as of November 2020 is expected to increase to \$700,000 - \$900,000 per month provided that operations are able to return to normal levels for the winter ski season.

times the current staffing level, or 180-345 employees. However, the Receiver does not have to use to proceed of the PPP loan if conditions do not change. Thus, the loan proceeds provide a reserve that is available if needed.

13. City National Bank (“City National”) has approved a loan under the PPP program for \$3,253,997.00. To execute the loan documents, the Receiver must first obtain this Court’s authorization.

14. Accordingly, through this Motion, the Receiver seeks authority to execute a PPP loan, according to the terms and conditions governing such loans, as provided by the Small Business Administration. The terms and conditions governing the PPP loan are more fully described in the Borrower Application Form (“the Application”), a copy of which is attached hereto as Exhibit “A,” and the SBA Act.

MEMORANDUM OF LAW AND ARGUMENT

The district court has broad powers and wide discretion to determine relief in an equity receivership. *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992). The Receivership Order authorizes, empowers and directs the Receiver to make agreements as may be reasonable, necessary and advisable in discharging the Receiver’s duties. *See Receivership Order* ¶ 8. In consultation with his professionals, who are operating the Resorts, the Receiver believes that obtaining a loan to cover payroll costs through the PPP Loan Program is advisable and will undoubtedly benefit the receivership estate. Indeed, allowing the Receiver to take all reasonable and necessary steps to operate the Resorts will further the goals of the receivership. Obtaining the PPP loan will also permit the Receiver to manage the Resorts’ payroll expenses regardless of how operations are impacted by COVID-19. Based on the foregoing, the Receiver respectfully requests

the authority to obtain a PPP loan in accordance with the application set forth in “**Exhibit A**,” and to execute all documents necessary to secure the loan.

WHEREFORE, the Receiver respectfully requests the Court to enter an Order in the form attached as **Exhibit “B”**, approving the relief requested in this Motion and to grant such further relief as is just and proper.

LOCAL RULE 7.1 CERTIFICATION OF COUNSEL

Pursuant to Local Rule 7.1(a)(3), undersigned counsel hereby certifies that counsel for the Receiver has conferred with counsel for the Securities and Exchange Commission, who has no objection to the Motion.

Dated: July 30, 2020

Respectfully submitted,

By: /s/ Naim S. Surgeon

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this July 30, 2020 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/ Naim S. Surgeon
Naim S. Surgeon, Esq.

SERVICE LIST

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

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