

**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

_____ /

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

² See 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 SEEKING AUTHORIZATION TO MODIFY
INTERIM DISTRIBUTION AND SUPPORTING MEMORANDUM OF LAW**

**THE RECEIVER URGES INVESTORS TO CONSULT WITH THEIR
IMMIGRATION COUNSEL ON AN IMMEDIATE BASIS TO DETERMINE
ELIGIBILITY UNDER THE EB-5 REFORM AND INTEGRITY ACT OF 2022**

Michael I. Goldberg, the court-appointed Receiver (the “Receiver”), hereby files this *Motion for Authorization to Modify the Interim Distribution* (the “Motion”). In support of this Motion, the Receiver states as follows:

Introduction

1. The Interim Distribution Plan (defined below), approved by the Interim Distribution Order (defined below), authorizes the Receiver to make payments totaling: (i) \$14,000,000.00, to those investors who do not have approved I-829 petitions in Hotel Phase II, Penthouse Phase III, Golf and Mountain Phase IV, Lodge and Townhouses Phase V, Stateside Phase VI, and Q Burke Phase VIII; and (ii) \$5,500,000.00, to those investors who do have approved I-829 petitions in Hotel Phase II, Penthouse Phase III, Golf and Mountain Phase IV, Lodge and Townhouses Phase V, Stateside Phase VI, and Q Burke Phase VIII.

2. Through this Motion, the Receiver seeks the authority to modify the terms of the Interim Distribution Plan, instead making payments totaling \$19,500,000 to all investors eligible for an Interim Distribution— regardless of the status of their I-829 petitions— on a pro rata and immediate basis. The Receiver believes this modification of the Interim Distribution to be in the best interests of all investors, for the reasons set forth herein.

Background

3. 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].

4. 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 at ¶1.

The MSK Settlement

5. David Gordon and Mitchell Silberberg & Knupp, LLP ("MSK") represented the Receivership Entities and other individuals, including Quiros, during the SEC investigation of the Receivership Entities. Because the Receiver contended that Gordon and MSK, in representing the Receivership Entities, breached their duties and failed to provide reasonably adequate legal services to the Receivership Entities, causing the continued violations of federal securities laws

³ The "Receivership Defendants" are Jay Peak, Inc. "Jay Peak", 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."

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and continued commingling and misappropriation of partnership funds, the Receiver sued MSK in the United States District Court for the Southern District of Florida, in a case styled as *Goldberg v. Mitchell Silberberg & Knupp, LLP et al.*, Case No. 1:19-cv-21862-MGC (S.D. Fla.) (the “Receiver Action”).

6. Likewise, on October 5, 2018, Kozyak Tropin & Throckmorton and other counsel filed a putative class action on behalf of the putative class plaintiffs named therein (“Putative Class Plaintiffs”), in the United States District Court for the District of Vermont in a case styled as *Qureshi, et al. v. Mitchell Silberberg & Knupp, LLP, People’s United Bank, et al.*, Case No. 2:18-cv-163 (the “Putative Class Action”). The defendants included, among others, Gordon and MSK.

7. After years of litigation in the Receiver Action and the Putative Class Action, extensive discovery, and two separate mediations, the Putative Class Plaintiffs, MSK, and the Receiver settled the Putative Class Action and the Receiver Action for Thirty-Two Million Five Hundred Thousand Dollars (\$32,500,000.00) (the “Settlement Amount”) on the terms and conditions set forth in the corresponding settlement agreement (the “MSK Settlement Agreement”).

8. The MSK Settlement Agreement was submitted to this Court for approval on June 4, 2021 [ECF No. 667] (the “Settlement Motion”). On July 29, 2021, the Court granted the Settlement Motion on a final basis [ECF No. 690], overruling an objection filed by Quiros [ECF No. 672].

The Interim Distribution Motion and Order

9. On December 16, 2021, the Receiver filed his *Amended Motion for Authorization to Make an Interim Distribution and Supporting Memorandum of Law* [ECF No. 706] (“Interim Distribution Motion”). The Interim Distribution Motion sought authorization from the Court to

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make an Interim Distribution totaling \$20,000,000 to all eligible investors with allowed claims, pursuant to the terms of an Interim Distribution Plan, as outlined in the MSK Settlement Agreement.

10. Specifically, the Interim Distribution Plan proposed payments totaling: (i) \$14,000,000.00, to those investors who do not have approved I-829 petitions in Hotel Phase II, Penthouse Phase III, Golf and Mountain Phase IV, Lodge and Townhouses Phase V, Stateside Phase VI, and Q Burke Phase VIII (Class 1 Claimants); (ii) \$5,500,000.00, to those investors who do have approved I-829 petitions in Hotel Phase II, Penthouse Phase III, Golf and Mountain Phase IV, Lodge and Townhouses Phase V, Stateside Phase VI, and Q Burke Phase VIII (Class 2 Claimants); and (iii) \$500,000 to those investors in Biomedical Phase VII who did not redeploy their funds into another project (Class 3 Claimants).

11. The Interim Distribution Motion also sought approval of Interim Distribution Procedures, wherein prior to receipt of an Interim Distribution, all eligible investors were to execute and return an Interim Distribution Form disclosing certain relevant information and attesting to the status of their respective I-829 petitions under penalty of perjury.

12. On December 16, 2022, the SEC filed a *Limited Objection to the Receiver's Amended Motion For Authorization To Make An Interim Distribution* [ECF No. 707] (the "Limited Objection"). The Limited Objection opposed the proposed distribution to Class 3 Claimants as the distribution would involve reimbursement of Class 3 Claimants' \$50,000 administrative fee rather than the return of their primary \$500,000 partnership investment (which they had already received). Limited Objection, p. 1. The Limited Objection also made clear that the SEC believed Class 1 and Class 2 Claimants should receive the same pro rata distribution, rather than the tiered structure proposed in the Interim Distribution Motion, and were forgoing objecting for that reason

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only because the Receiver had made representations that he intended to reconcile the claims of all investors, with the goal of pro rata treatment, at the time of any final distribution. *Id.* p. 5, n.3.

13. On January 3, 2022, the Court entered an Order granting, in part, and denying, in part, the Interim Distribution Motion [ECF No. 709] (the “Interim Distribution Order”). The Interim Distribution Order approved the structure of the Interim Distribution payments to Class 1 Claimants and Class 2 Claimants, but ordered the Receiver to keep the \$500,000 in funds earmarked for the Class 3 Claimants in trust pending further order of the Court. Interim Distribution Order, p. 2.

14. The Interim Distribution Order also approved the Interim Distribution Form, which contained a notice to claimants that—depending on their current immigration status—if they elected to receive a return of any portion of their EB-5 investment, they might lose any EB-5 priority and eligibility to obtain conditional or unconditional permanent residence status that they might have. Interim Distribution Order, p. 3.

15. Because of the foregoing, the Interim Distribution Form allowed eligible claimants to opt to: (i) participate in the Interim Distribution (Option 1); (ii) forfeit their right to participate in the Interim Distribution (Option 2); or (iii) ask the Receiver to hold claimant’s Interim Distribution in trust in a non-interest bearing account until such time as the Receiver makes a Final Distribution (Option 3).⁶

16. In January of 2022, the Receiver served the Interim Distribution Form upon all known investors in Hotel Phase II, Penthouse Phase III, Golf and Mountain Phase IV, Lodge and

⁶ The Receiver made no representations whatsoever in the Interim Distribution Form as to whether forfeiting the interim distribution in its entirety [Option 2] or requesting the receiver hold an interim distribution in trust pending Final Distribution [Option 3] preserves an investor’s rights or otherwise affects the immigration process. The Interim Distribution Form advised investors to discuss the Interim Distribution opportunity with their own legal immigration counsel to confirm eligibility and in order to understand any immigration risks.

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Townhouses Phase V, Stateside Phase VI, and Q Burke Phase VIII as identified in the investor lists in the possession of the Receiver at the mailing addresses identified therein. The completed Interim Distribution Form was due back to the Receiver on or before March 31, 2022.

Modification of the Interim Distribution

17. To the best of the Receiver's knowledge there are 652 investors eligible to participate in the Interim Distribution. To date, close to 20%, or 117 of the investors, have not returned their Interim Distribution Form. Without the completed Interim Distribution Form, the Receiver has no way to accurately categorize the investors as Class 1 Claimants or Class 2 Claimants. Attempting to obtain completion of the outstanding 117 Interim Distribution Forms from investors (not all of whom are fluent in English) would prove time consuming and administratively expensive. And eligible investors who have completed and return the Interim Distribution Form, would be prejudiced by the attendant delay.⁷

18. Moreover, because the settlement funds funding the Interim Distribution were received by the Receiver in 2021, each EB-5 investor received a 2021 partnership Schedule K-1 reflecting his or her taxable prorated share of the settlement in March of 2022. Generally, the IRS considers a settlement payment to be taxable unless it is compensation for the "physical personal Injury" of a recipient. EB-5 Partners were reported their share of the settlement in 2021 when the Receivership received the money on their 2021 partnership Schedule K-1s. The amount shown as settlement income represents the investors share of payment received by the Receivership for the defendant's alleged actions that allowed the EB-5 investor fraud identified by the SEC, to continue unabated affecting hundreds of investors in eight (8) separate EB-5 partnerships. The income was reported in 2021 because that is when the funds were actually received by the Receivership on

⁷ Receiver's staff have received numerous calls from investors anxious for funds from the Interim Distribution.

behalf of the EB-5 investors.

19. Given that the Receiver is unable to classify approximately 20% of the eligible investors as Class 1 Claimants or Class 2 Claimants and in light of the tax consequences as reflected on each investor's respective Schedule K-1, the Receiver now seeks Court authority to make pro rata payments totaling \$19,500,000 to all investors eligible for an Interim Distribution (including the 117 claimants who have not yet returned their Interim Distribution Form) regardless of the status of their I-829 petitions, on an immediate basis. The Receiver still intends to honor the elections of those investors who have selected Option 2 or Option 3 on their Interim Distribution Claim Form.

20. The reason the Interim Distribution Plan made a distinction between those investors who received approval of their I-829 petitions (Class 1 Claimants) versus those investors who did not (Class 2 Claimants) was because of the premise that those investors who have not obtained approval of their I-829 petition were arguably damaged to a greater extent than those who have obtained approval of their I-829 petition.

21. Notwithstanding the terms of the initial Interim Distribution Plan, it was always the goal of the Receiver to treat all investors in Jay Peak (regardless of the status of their I-829 petitions) on an equal basis to the best of his ability. Accordingly, the Receiver intended to reconcile the claims of all investors, regardless of the status of their I-829 Petitions, on a final basis, accounting for any funds received from the Interim Distribution at the time of the Receiver's final distribution, and to the extent possible at that time, make the necessary distributions so that all investors will have been treated equally in the eyes of the Court at that time.

22. However, on March 15, 2022, the United States enacted the EB-5 Reform and Integrity Act of 2022 (the "2022 Act") as part of a large omnibus budget package of legislation.

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The 2022 Act may mitigate or even eliminate the damage suffered by investors whose I-829 petitions have not been approved, as it adds protection for innocent investors who suffer termination or debarment of their Regional Center, New Commercial Enterprise or Job Creating Enterprise. The 2022 Act provides that as long as their investment arrangements were generally qualified, within 180 days of such adverse action (and notice) they can associate with replacement entities and even make additional investment (which may include proceeds from claims or recoveries) to meet investment and job creation requirements without losing priority date or child status protection. Children of investors who gained conditional residence and then lost it by entity termination or debarment or got I-829 denied may keep their child status in connection with a second petition filed by the parents within one year.

23. In light of the unanticipated administrative challenges, tax consequences, and intervening legislative changes, the Receiver believes that an equal—and speedy—distribution of the full \$19,500,000 without regard to the investor’s I-829 status to be in the best interests of all eligible investors.

Relief Requested

24. Through this Motion, the Receiver seeks entry of an Order: (i) modifying the Interim Distribution Plan as approved in the Interim Distribution Order; (ii) authorizing pro rata payments totaling \$19,500,000 to all investors eligible for an Interim Distribution, regardless of the status of their I-829 petitions (with the exception of any investors who may have opted to

forfeit their right to participate in the Interim Distribution (Option 2)); and (iii) any such other relief as the Court may deem just and proper.

Memorandum of Law

25. 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 primary goal of an equity receivership is to provide a conduit through which assets can be held, liquidated and distributed to the particular beneficiaries of the receivership, in this case the investors. *SEC v. Wencke (Wencke II)*, 783 F.2d 829, 837 n. 9 (9th Cir. 1986).

26. The district court likewise has broad equitable power in determining whether to approve a receiver's proposed plan of distribution for assets of the receivership estate. *Duff v. C. Sleep Diagnostics, LLC*, 801 F.3d 833 (7th Cir. 2015). Modifying the Interim Distribution Plan as previously approved in the Interim Distribution Order, and authorizing the Receiver to instead remit pro rata payments totaling \$19,500,000 to all investors eligible for an Interim Distribution, regardless of the status of their I-829 petitions (with the exception of any investors who may have opted to forfeit their right to participate in the Interim Distribution (Option 2)) provides for a just and equitable distribution of assets.

27. Modification of the Interim Distribution Plan and Interim Distribution Order is warranted. Making payments on a pro rata basis eliminates the need to obtain Interim Distribution Forms from the 117 investors who have yet to return them, reducing administrative expense and allowing the Receiver to process payments on a significantly faster basis. Pro rata payments to investors will also provide investors with recovery in a manner more consistent with already issued schedule K-1s. Finally, the damage model underlying the disparate treatment, i.e. the possibility that some investors may not achieve their desired immigration status through the I-829 petition

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process, may no longer be accurate given the enactment of the EB-5 Reform and Integrity Act of 2022

28. In light of the forgoing, the Receiver respectfully requests that the Court enter an Order: (i) modifying the Interim Distribution Plan as approved in the Interim Distribution Order; (ii) authorizing pro rata payments totaling \$19,500,000 to all investors eligible for an Interim Distribution, regardless of the status of their I-829 petitions; and (iii) any such other relief as the Court may deem just and proper. A proposed Order is attached hereto and incorporated herein as **Exhibit A**.

LOCAL RULE 7.1 CERTIFICATION OF COUNSEL

29. Pursuant to Local Rule 7.1(a)(3), undersigned counsel hereby certifies that counsel for the Receiver has conferred with counsel for the Putative Class Plaintiffs as well as Counsel for the Securities and Exchange Commission. Neither party has any objection to the relief requested herein.

Dated: May 2, 2022

Respectfully submitted,

/s/ Catherine Kretzschmar
Michael I. Goldberg, Esq.
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Catherine Kretzschmar, Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this May 2, 2022 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 and posted on the Receivership's website.

By: /s/ Catherine Kretzschmar
Catherine Kretzschmar, Esq.

EXHIBIT “A”

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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SECURITIES AND EXCHANGE COMMISSION,

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Additional Receivership Defendants

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

² See 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].

**ORDER GRANTING MOTION SEEKING AUTHORIZATION TO MODIFY
INTERIM DISTRIBUTION AND SUPPORTING MEMORANDUM OF LAW**

This matter came before the Court upon the filing of Michael I. Goldberg's, the Court-appointed receiver (the "Receiver") *Motion for Authorization to Modify the Interim Distribution* (ECF No. ---) (the "Motion"). The Court, having reviewed the Motion, being advised that counsel for the Securities and Exchange Commission and counsel for the Putative Class Plaintiffs³ have no objection to the relief requested in the Motion, and finding that the Receiver has made a sufficient and proper showing in support of the relief requested therein,

IT IS ORDERED, ADJUDGED AND DECREED, as follows:

1. The Motion is **GRANTED**.
2. The modification of the Interim Distribution Plan and the Interim Distribution Order is hereby **APPROVED**.
3. The Receiver is authorized to make an Interim Distribution, totaling \$19,500,000.00, to all investors in Hotel Phase II, Penthouse Phase III, Golf and Mountain Phase IV, Lodge and Townhouses Phase V, Stateside Phase VI, and Q Burke Phase VIII on a pro rata basis, regardless of the status of each investor's I-829 petition.
4. The Receiver is authorized, but not instructed, to honor the elections of those investors who previously selected Option 2 or Option 3 on their Interim Distribution Claim Form.
5. The Receiver is to continue to reserve \$500,000.00 from the Interim Distribution pending further order of this Court.

³ Capitalized terms not otherwise defined herein shall take on the meaning ascribed to them in the Motion.

DONE AND ORDERED in Chambers at Miami, Florida this ____ day of May, 2022.

DARRIN P. GAYLES
UNITED STATES DISTRICT COURT JUDGE

Copies to:

Counsel of Record