

**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<sup>1</sup>  
AnC BIO VT, LLC,<sup>2</sup>**

**Additional Receivership Defendants**

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

<sup>2</sup>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 UNOPPOSED MOTION FOR AUTHORIZATION TO MAKE A SECOND INTERIM DISTRIBUTION AND SUPPORTING MEMORANDUM OF LAW**

Michael I. Goldberg, the Court-appointed Receiver, files this Unopposed Motion for Authorization to Make a Second Interim Distribution (the “Motion”). In support of the Motion, the Receiver states as follows:

**Introduction**

1. The Motion seeks authorization from this Court to make a second interim distribution totaling \$60,000,000 on a *pro rata* basis to all eligible investors in Jay Peak Phases II-VI (as defined in Footnote 3) with allowed claims. The \$60 million represents the vast majority of the net proceeds of the recent, Court-approved sale of the Jay Peak resort, with only a small amount held back at this time for payment of potential taxes and other costs.

2. If the Court approves the proposed interim distribution, it will bring the total amount distributed to defrauded Jay Peak investors to \$80 million.<sup>3</sup> The Court previously approved a \$20 million interim distribution to Phase II-VI and Phase VIII investors stemming from a settlement the Receiver reached with Mitchell, Silberberg & Knupp (“MSK”), Jay Peak’s former lawyers. *See* ECF Nos. 705, 709, and 719. The Receiver plans to propose another distribution later this year consisting of proceeds from litigation, as well as funds received from the Securities and Exchange Commission (“SEC”) from its settlement with Ariel Quiros, Jay Peak’s former principal.

3. The Receiver proposes to make an interim distribution now with the resort sale proceeds to get funds into the hands of aggrieved investors as soon as possible. The interim distribution represents a partial return of the investors’ \$500,000 investment in Jay Peak through

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<sup>3</sup> In addition to the \$80 million, the Receiver already distributed (i) \$15 million to Phase I investors; (ii) \$87 million to Phase VII investors; and (iii) approximately 15 million to trade and contractor creditors earlier in the case. Accordingly, after this distribution is completed, the Receiver will have distributed approximately \$198 million to investors and creditors to date.

the EB-5 foreign investor program. The \$500,000 represented a significant amount for many of Jay Peak's investors, in some cases constituting all their assets at the time, and the proposed interim distribution will provide immediate financial relief to those investors.

4. As discussed in more detail below, the Receiver proposes to make the second interim distribution on a *pro rata* basis to Phase II-VI investors. Courts have generally held that *pro rata* distributions in Receivership actions are the fairest way to compensate similarly situated investors, such as the Phase II-VI investors.

5. The Receiver has conferred with counsel for the SEC, who does not oppose this Motion. Accordingly, the Receiver asks the Court to approve the Motion and authorize the proposed second interim distribution.

### **Background**

6. Michael Goldberg is the Court-appointed receiver over the Receivership Defendants,<sup>4</sup> the Relief Defendants,<sup>5</sup> and Additional Receivership Defendants<sup>6</sup> 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. ECF Nos. 60 and 493.

7. The Receiver is authorized, empowered and directed to, among other things, take

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<sup>4</sup> The "Receivership Defendants" are Jay Peak, Inc. "Jay Peak," Q Resorts, Inc., Jay Peak Hotel Suites L.P. ("Phase I"), Jay Peak Hotel Suites Phase II L.P. ("Phase II"), Jay Peak Management, Inc., Jay Peak Penthouse Suites L.P. ("Phase III"), Jay Peak GP Services, Inc., Jay Peak Golf and Mountain Suites L.P. ("Phase IV"), Jay Peak GP Services Golf, Inc., Jay Peak Lodge and Townhouse L.P. ("Phase V"), Jay Peak GP Services Lodge, Inc., Jay Peak Hotel Suites Stateside L.P. ("Phase VI"), Jay Peak Services Stateside, Inc., Jay Peak Biomedical Research Park L.P. ("Phase VII"), and AnC Bio Vermont GP Services, LLC.

<sup>5</sup> The "Relief Defendants" are Jay Construction Management, Inc., GSI of Dade County, Inc., North East Contract Services, Inc., and Q Burke Mountain Resort, LLC.

<sup>6</sup> 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."

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. Receivership Order at ¶1.

8. The Receivership Order also provides that title to all property, real or personal, of the Receivership Defendants and Relief Defendants and their principals, wherever located, is vested by operation of law in the Receiver. *Id.* at ¶17.

9. In carrying out his duties, the Receiver retained Houlihan Lokey Capital, Inc. (“Houlihan Lokey”) in January 2019 to assist him with marketing and selling the Jay Peak resort. ECF Nos. 520 and 522. Working with Houlihan Lokey, the Receiver directly marketed the resort to more than 165 parties, including strategic buyers, financial buyers, family companies, and high net worth individuals. Ultimately, 57 of those parties executed the requisite non-disclosure agreements and received access to a comprehensive virtual data room and a Confidential Information Memorandum. Fifteen of those parties submitted proposals to purchase Jay Peak, the highest and best of which came from Pacific Group Resorts, Inc..

10. The Receiver subsequently filed a motion asking the Court to approve an Asset Purchase Agreement with Pacific Group and an ensuing auction procedure to finalize the resort sale, which the Court approved. The auction yielded a final sale price of \$76 million to Pacific Group, which the Court also approved. The sale closed on November 1, 2022, which resulted in the Receiver obtaining net proceeds of \$67,290,080.04.<sup>7</sup> ECF Nos. 726, 731, 734, and 739.

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<sup>7</sup> The difference between the \$76 million sale price and the net proceeds was \$5,585,844 in outstanding bond debt Pacific Group assumed, \$1,686,613.75 in season pass obligations, \$2,208,154.29 in prepaid lodging the Receiver had previously taken in that Pacific Group was bound to honor, and closing costs. ECF 739.

**The Second Interim Distribution**

11. The Receiver proposes to distribute the \$60 million in *pro rata* shares as soon as possible to each of the 529 investors in Phases II-VI, which amounts to approximately \$113,421 per eligible investor (the “Second Interim Distribution”). Because each investor gave an identical \$500,000 to the Jay Peak entities through the EB-5 program, a *pro rata* distribution is appropriate to identically partially compensate each investor. The Receiver proposes to treat all investors equally, regardless of whether the U.S. Customs and Immigration Service has approved their I-829 petitions (making their green cards permanent).

12. Although Phase I and Phase VII investors also were defrauded by Jay Peak’s former principals, they will not be eligible for distribution of the resort sale funds because the Receiver has already returned their \$500,000 investment or placed them with their approval into another EB-5 investment.

13. Jay Peak’s former principals had unilaterally converted Phase I investors’ Jay Peak shares into debt through issuance of promissory notes before the Court appointed the Receiver. With Court approval, the Receiver paid off all the Phase I investor promissory notes of \$500,000 each with funds from the Receiver’s \$150 million settlement with Raymond James early in the Receivership.

14. The Phase VII investors invested their money not in the resort, but to build a nearby biomedical research center. However, Jay Peak’s former principals only took minimal steps to begin construction of the biomedical facility, and as detailed in prior Receiver reports and motions, it was impractical for the Receiver to build the facility. Accordingly, with Court approval, the Receiver either returned Phase VII investors’ \$500,000 investments or placed those investors who agreed into another EB-5 project that would enable them to pursue their I-829 petition approvals

and potentially have their \$500,000 returned from that project. Accordingly, Phase I and VII investors are not eligible to receive a distribution from the resort sale proceeds.

15. Finally, as noted above, Phase II-VI investors previously received pro rata distributions totaling \$19,500,000 from the MSK settlement (the “First Interim Distribution”). Investors eligible for the First Interim Distribution were provided with an opportunity to elect (for immigration purposes) for the Receiver to hold their First Interim Distribution in trust in a non-interest bearing account until such time as the Receiver makes a final distribution. 42 investors in Phases II through VI selected this option; the Receiver is thus holding \$1,256,135.16 in escrow from the First Interim Distribution. The Receiver will continue to honor this election for those 42 investors for purposes of the Second Interim Distribution. Notice of this continuing election, as well as information on how to elect to receive such funds in the future will be provided directly to these investors.

#### **Memorandum of Law**

16. 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). 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 District Court also 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).

17. Because the trial court possesses such wide discretion, it has the authority “to classify claims sensibly in receivership proceedings.” *SEC v. Enter. Trust Co.*, 559 F.3d 649, 652 (7th Cir. 2009). In situations such as this one, where the total amount of allowed claims exceeds

the funds available for distribution, a trial court must devise an equitable system of distribution with the goal of treating each claimant fairly and as equally as possible. *United States v. Cabe*, 311 F. Supp. 2d 501, 504 (D.S.C. 2003). Under the principals of equity, similarly situated claimants should be treated alike. *SEC v. Credit Bancorp. Ltd.*, 2000 WL 1752979 at \*13 (S.D.N.Y. 2000); *SEC v. Drucker*, 318 F. Supp. 2d 1205 (N.D. Ga. 2004); *United States v. Real Property Located at 13328 and 13324 State Highway 75 North*, 89 F.3d 551, 553 (9th Cir. 1996).

18. Receivership courts therefore generally favor a *pro rata* distribution formula. *See, e.g., SEC v. Forex Asset Management, LLC*, 242 F.3d 325, 331 (5th Cir. 2001) (federal district court did not abuse its discretion in approving *pro rata* distribution plan); *United States v. Durham*, 86 F.3d 70, 73 (5th Cir. 1996) (district court was within its discretion to use *pro rata* distribution method even though it could have traced specific funds to specific investors).

19. Under the circumstances in this case, the Receiver recommends that this Court follow this established case law and approve the Receiver's proposed Second Interim Distribution on a *pro rata* basis to each of the eligible 529 Phase II-VI investors. Each investor made the same \$500,000 EB-5 investment in Jay Peak; therefore each investor should receive the same *pro rata* percentage of the \$60 million. There is no more fair or equitable way to distribute the funds from the sale of the resort.

WHEREFORE, the Receiver seeks entry of an Order authorizing the proposed Second Interim Distribution to Phase II through VI investors of \$60 million of the proceeds of the sale of the Jay Peak Resort, approving the Receiver's interim distribution plan, and ordering any such other relief as the Court may deem just and proper.

**LOCAL RULE 7.1 CERTIFICATION OF COUNSEL**

20. Pursuant to Local Rule 7.1(a)(3), undersigned counsel conferred with counsel for the SEC, who does not oppose the Motion or the relief sought herein.

April 27, 2023

Respectfully submitted,

/s/ Catherine Kretschmar

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 27<sup>th</sup> day of April 2023 via the Court's notice of electronic filing on all CM/ECF registered users entitled to notice in this case.

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