

**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 MANagements, 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 BIOMEICAL RESEARCH PARK L.P.,
AnC BIO VERMONT GP SERVICES, LLC,

Defendants,

JAY CONSTRUCTION MANAGEMENT, INC.,
GSI OF DADE COUNTY, INC.,
NORTH EAST CONTRACT SERVICES, INC.,
Q BURKE MOUNTAIN RESORT, LLC,

Relief Defendants, and

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

Additional Defendants

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GROUP 7 AD HOC COMMITTEE'S LIMITED OBJECTION TO THE MOTION FOR (I) APPROVAL OF SETTLEMENT BETWEEN RECEIVER AND CITIBANK, N.A.; (II) ENTRY OF A BAR ORDER; (III) MODIFICATION OF FREEZE ORDER; AND (IV) APPROVAL OF FORM, CONTENT AND MANNER OF NOTICE OF SETTLEMENT AND BAR ORDER; INCORPORATED MEMORANDUM OF LAW

The Group 7 Ad Hoc Committee¹ (the “**Ad Hoc Committee**”) objects to the *Motion for (I) Approval of Settlement Between Receiver and Citibank, N.A.; (II) Entry of a Bar Order; (III) Modification of Freeze Order; and (IV) Approval of Form, Content and Manner of Notice of Settlement and Bar Order; Incorporated Memorandum of Law* (the “**Settlement Motion**”) [ECF No. 205], filed by Michael I. Goldberg, the Court Appointed Receiver (“**Receiver**”), and states as follows:

BACKGROUND

1. Jay Peak Biomedical Research Park L.P (“**Biomedical Phase VII**”) was purportedly formed to raise investor funds and construct a biomedical facility in the state of Vermont. Since approximately November 2012, the Biomedical Phase VII raised approximately \$84.5 million from 89 investors (“**Phase VII Investors**”) through an EB-5 offering of limited partnership interests. Biomedical Phase VII was not fully subscribed as it was permitted to have a total of 220 investors and to raise \$110 million.

2. Although Biomedical Phase VII did purchase the real property on which to build the facility, no construction work on the property was completed. Instead, the vast majority of the Biomedical Phase VII funds were diverted to other uses that were not disclosed to the Phase VII Investors and that were not permitted under the partnership agreement.

3. **The Citibank Line of Credit.** On or about March 15, 2015, Citibank, N.A. extended a line of credit to Ariel Quiros (“**Quiros**”) in the amount of \$15,000,000 (the “**Citibank LOC**”).

¹ The Ad Hoc Committee is made up of 36 Phase VII Investors.

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4. As collateral for the Citibank LOC, Quiros pledged \$15,000,000 from a Jay Construction Management, Inc. account and \$2,000,000 from a Q Resorts, Inc. account (the “**Collateral Accounts**”).

5. According to the *Complaint for Injunctive and Other Relief* [ECF No. 1], filed by the Securities and Exchange Commission, a large portion of the funds pledged as collateral for the Citibank LOC are Group VII Investors’ funds.

6. No funds have been withdrawn from the Collateral Accounts and they currently have a balance of \$17,000,000.

7. **The Settlement.** On August 30, 2016, the Receiver filed the Settlement Motion, requesting the entry of an Order approving the proposed settlement between the Receiver and Citibank. The pertinent terms of the proposed settlement are as follows:

- a. Citibank will pay the Receiver \$13,300,000 from the Collateral Accounts;
- b. Citibank retains the remaining \$3,700,000 balance in the Collateral Accounts;
- c. Entry by the Court of a Bar Order enjoining all parties from bringing claims against Citibank for matters arising out of or otherwise connected with this matter; and
- d. Mutual releases between the Receiver and Citibank.

8. Additionally, although a large portion of the Collateral Accounts are made up of Group VII Investors’ funds, the Receiver intends to use the proceeds to operate facilities not owned by Biomedical Phase VII. Specifically, the Receiver intends to use the proceeds as follows:

These funds will provide the Receivership Entities with much-needed liquidity in order to meet off-season operating deficits of the Jay Peak Resort properties and facilities so as to preserve and maximize the value of the assets in the Receivership Entities for the benefit of their investors and other creditors and stakeholders. This liquidity will enable the Receiver to pay payroll for more than 500

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employees, “past due” trade vendors, and make necessary repairs.

The Settlement Motion, p. 7.

9. While the Ad Hoc Committee does not object to the settlement itself, it does object to the use of the proceeds of the settlement and to the bar order with respect to Phase VII Investors.

RELIEF REQUESTED

A. The Order Approving the Settlement Motion Must Require the Receiver to Perform a Full Accounting of the Funds

10. The Ad Hoc Committee objects to the Settlement Motion to the extent the settlement proceeds, or use thereof, does not provide a benefit to Group VII Investors.

11. The Ad Hoc Committee requests that this Court require the Receiver to segregate the settlement proceeds and deliver to Phase VII Investors a full accounting of the settlement funds, every 90 days, identifying the use of the settlement proceeds and any real estate project to which they are related.

B. The Order Approving the Settlement Must Provide a Benefit to Phase VII Investors

12. In the event proceeds are distributed on a pro-rata basis to each investor group, and the settlement proceeds are depleted prior to distributions to investors, the Ad Hoc Committee requests that this Court order the Receiver to perform a true-up on a dollar-for-dollar basis to account for the funds expended.

13. To the extent that Phase VII Investors hold a superior claim or right to the Collateral Funds and funds are not distributed on a pro rata basis, the Ad Hoc Committee requests that this Court order that the settlement proceeds be distributed to Phase VII Investors prior to any pro-rata distribution to the investor groups.

C. The Bar Order is Not Fair and Equitable and Must be Denied

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14. The Receiver's request for entry of the Bar Order must be denied because it is not fair and equitable to Phase VII Investors in that it deprives them of property without just compensation.

15. The Eleventh Circuit has mandated that a bar order may not be approved unless it is "fair and equitable" to the non-settling parties. *Matter of Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996). *See also In re GunnAllen Fin., Inc.*, 443 B.R. 908, 915 (Bankr. M.D. Fla. 2011) ("When a bankruptcy settlement also seeks entry of a bar order, the bankruptcy court must also determine whether the bar order is fair and equitable to the parties whose claims will be enjoined.").

16. In making this assessment, the court examines whether the benefit the enjoined parties will receive from the overall agreement suffices to render the inclusion of a bar order fair to those parties. *See Feld v. Zale (In re Zale Corp.)*, 62 F.3d 746, 754 (5th Cir. 1995) (Ignoring third-party rights and instead "looking only to the fairness of the settlement as between the debtor and other settling claimant contravenes a basic notion of fairness."). Thus in *Munford* the Eleventh Circuit upheld a bar order enjoining certain non-settling defendants from raising future claims, because the settlement containing the bar order provided those defendants with a dollar-for-dollar offset of the claims against them, compensating for their loss of claims for indemnification and contribution against the settling defendants. *See Munford*, 97 F.3d at 455.

17. By contrast, courts will not approve bar orders that fail to provide a fair exchange to the enjoined parties. In *GunnAllen*, for example, the Court rejected a bar order that would have extinguished claims belonging to the enjoined parties in return for no more than 25% of their potential worth. *See GunnAllen*, 443 B.R. at 916. There, the Court explained that under the circumstances such a settlement provided "little value" to the enjoined parties. *Id.* at 917. It thus held that because the settlement failed to provide a meaningful corresponding benefit to the enjoined parties, the bar order was "not fair and equitable" and could not be approved over the objections of those parties. *Id.* Other courts reach the same result. *See, e.g., In re Covington Properties, Inc.*, 255 B.R. 77, 79-80 (Bank. N.D. Fla. 2000) (bar order

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not “fair and equitable” because “it would have the effect of curtailing the [enjoined parties’] state court action against [the settling parties] without conferring any real benefit on them.”).

18. Here, the settlement provides for Citibank to pay \$13.3 million to the Receiver, which the Receiver will use to operate the Jay Peak Resort properties. These properties are not owned by Phase VII Investors, and there is no guaranty that the distribution scheme eventually decided upon by the Receiver will provide any distribution to Phase VII Investors resulting from the sale of those properties. Thus, it is entirely possible that in return for having its rights against Citibank extinguished by the Bar Order, Phase VII Investors will receive nothing in return.

19. Accordingly, this Court must deny approval of the Bar Order.

REQUEST TO APPEAR AT FINAL HEARING ON THE SETTLEMENT MOTION

20. Pursuant to paragraph 4 of the *Order (I) Preliminarily Approving the Settlement Between Receiver and Citibank, N.A.; (II) Approving Form and Content of Notice, and Manner and Method of Service and Publication; (III) Setting Deadline to Object to Approval of Settlement and Entry of Bar Order; and (IV) Scheduling a Hearing* [ECF No. 207], undersigned counsel requests to appear at the final hearing to consider approval of the Settlement Motion.

WHEREFORE, the Ad Hoc Committee respectfully requests that the Court enter an Order: granting the Settlement Motion on the condition that the Order approving the Settlement Motion (a) require the segregation of the settlement proceeds, (b) require the Receiver to deliver an accounting of the settlement proceeds to Phase VII Investors every 90 days, (c) require the settlement proceeds to be distributed evenly on a pro-rata basis to the investor groups, (d) require the Receiver to perform a true-up on a dollar-for-dollar basis to account for any settlement proceeds expended, (e) require, to the extent that Phase VII Investors hold a superior claim or right to the Collateral Funds, that the settlement proceeds be distributed to Phase VII Investors prior to any pro-rata distribution to the other investor groups, and (f) deny the bar order.

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Dated: October 10, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 10th day of October, 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, and via email on Jeffrey C. Schneider, jcs@klsg.com; Mark D. Bloom, BloomM@gtlaw.com; Mark P. Schnapp; SchnappM@gtlaw.com; John R. Dodd, DoddJ@gtlaw.com.

/s/ Linda Worton Jackson
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SERVICE LIST

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