

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 EXPEDITED³ MOTION FOR AUTHORIZATION TO PLEDGE
ASSETS OF THE RECEIVERSHIP ESTATE TO SECURE A LETTER OF CREDIT IN
CONNECTION WITH CREDIT CARD PROCESSING AGREEMENT
AND SUPPORTING MEMORANDUM OF LAW**

Michael I. Goldberg, the court-appointed Receiver (the “Receiver”), by counsel, hereby files this Expedited Motion for Authorization to Pledge Assets of the Receivership Estate to Secure a Letter of Credit in Connection With Credit Card Processing Agreement (the “Motion”). In support of this Motion, the Receiver states as follows:

Preliminary Statement

From the inception of the Receivership, Heartland Payment Systems, LLC (“Heartland”) has provided credit card processing services to the Receivership Defendants⁴, thereby enabling customers to use their credit cards for booking reservations and making purchases at the Jay Peak Resort and the Burke Mountain Hotel (collectively, the “Hotels”). To that end, Heartland has financial exposure to the Hotel’s customers in the highly unlikely event the Hotels cease operating and reservations paid for by credit cards are not ultimately honored. Based on its perceived exposure, Heartland has recently, without notice, unilaterally decided to “hold back” \$3,000,000.00 of the Hotels’ credit card funds to protect it from potential losses. Heartland has stated that this decision is due to a “change in policy” in dealing with entities in receivership.

The Receiver has potential legal grounds to challenge Heartland’s unilateral decision to hold back funds. However, rather than waste time and money fighting with Heartland, the Receiver

³ As required by L.R. 7.1(d)(2), the Receiver asks the Court to enter an Order granting the motion on an expedited basis so that the Receiver may secure the services of First Data and avoid any interruption in the Hotels’ business resulting from an inability to process credit card transactions. Given that there is no objection to the motion, the Receiver believes the motion can be granted on or before January 31, 2020.

⁴ 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.

believes it is in the best interests of all parties that the Hotels replace Heartland with a new payment processor.⁵ The prospective replacement payment processor, First Data Corporation (“First Data”), also requires security. Accordingly, the Receiver and First Data have agreed, subject to the Court's approval, that the Receivership Defendants will provide First Data with a letter of credit in the amount of \$1,500,000.00 in lieu of a holdback in order for First Data to provide credit card processing services for the Hotels.⁶

Replacing the \$3,000,000.00 cash holdback Heartland insists on with a \$1,500,000.00 letter of credit will benefit the Hotels' cash flow by not unnecessarily tying up \$3,000,000.00 of the Hotels' funds that are needed for operations.⁷ Rather, the Receiver will be able to obtain the necessary letter of credit by utilizing funds sitting in its bank accounts which will not affect the Receivership Entities' cash flow. Moreover, using cash in the Receiver's savings account rather than operating cash will enable the Hotels to pay their operating expenses out of operating income without the necessity of having to borrow funds to pay the operating expenses. Therefore, the Receiver seeks authorization from this Court to pledge \$1,500,000.00 of the Receivership Estate's cash currently held in trust by the Receiver with City National Bank (“CNB”) to CNB to secure a letter of credit necessary to retain First Data as the payment processor at the Hotels. CNB is not charging the Receiver any fees for the letter of credit, but rather the \$1,500,000 will be moved to a separate, non-interest bearing account that will be pledged to CNB. The Receiver submits that

⁵ The reality of the situation is that receivership has not placed Heartland at risk. The Jay Peak Resort has been in receivership for nearly four years and is achieving record profits. The recently opened Burke Mountain Hotel's operations are stabilizing and the Receiver is optimistic it will break even this year. All related construction has been completed and any interest defendant Ariel Quiros had in the Hotels has been transferred to the investors. In short, Heartland is in a better position than it was four years ago.

⁶ The amount agreed upon represents \$1,000,000 for the Jay Peak Resort and \$500,000 for the Burke Mountain Hotel.

⁷ Heartland's holdback would come from credit card payments that go directly to the Receiver's operation of the two resorts, whereas the Receiver can obtain the letter of credit from other, non-operational funds.

the foregoing is in the best interest of the Receivership Entities and their creditors because it will enable the Hotels to continue to accept credit cards while at the same time not affecting the Hotels' cash flow.

Background

1. Michael Goldberg is the court-appointed receiver over the Receivership Defendants, the Relief Defendants,⁸ and Additional Receivership Defendants⁹ 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].

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. Q Burke Mountain, LLC owns and operates the Burke Mountain Hotel.

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 at ¶1.

4. 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.

⁸ The "Relief Defendants" are Jay Construction Management, Inc., GSI of Dade County, Inc., North East Contract Services, Inc., and Q Burke Mountain Resort, LLC.

⁹ 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."

Payment Processing

5. 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.

6. 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 Jay Peak Resort "for the benefit of investors subject to further order of this Court." *Id.*

7. As entertainment and lodging destinations that provides both services and goods to the public and allow for advance reservations, it is imperative for the Hotels to permit patrons to purchase these services and goods with debit and credit cards. In order to provide seamless and reliable card payment transactions, it is imperative to utilize reputable payment processing companies.

8. Though the Receivership Defendants currently utilize Heartland for payment processing, Heartland has informed the Receiver – after purporting to have recently learned of the Receivership Defendants' receivership status – that it will now have to hold additional monies in reserve in regard to the Receivership Entities' merchant accounts. The Jay Peak Resort has operated in a stable condition and has experienced record profit years during the receivership. Although the recently opened Burke Mountain Hotel has lost money, its operations have improved

each year it has been open and the Receiver is hopeful it will break even this year. Regardless, there is little chance the Burke Mountain Hotel will cease operations. Accordingly, the Receiver believes additional money reserves are not warranted. Rather than waste time and money arguing with Heartland, the Receiver has determined it is in the Receivership Entities' best interest to replace Heartland with First Data.

9. First Data has indicated its willingness to serve as the Hotels' new payment processing company. To commence the arrangement, First Data and the Receiver have agreed that the Receivership Entities, subject to the Court's approval, will provide First Data with a letter of credit in the amount of \$1,500,000.00 (\$1,000,000 for the Jay Peak Resort and \$500,000 for the Burke Mountain Hotel). This arrangement is more favorable to the Receiver than Heartland holding back twice as much money from funds that go directly to the Receiver's operations. This will enable the Receiver to utilize funds otherwise sitting in the Receiver's accounts to secure the letter of credit without affecting the Hotels' cash flow. Moreover, this will enable the Hotels to pay their operating expenses out of operating cash flow without the necessity of having to borrow cash to pay their operating expenses. Upon sale of the Hotels or the expiration of the letter of credit, the Buyer will make its own credit card processing arrangements and the pledged funds shall be released back to the Receiver.

10. The costs of obtaining the letter of credit is *de minimis* and the only thing the Receivership Entities are giving up is the very low interest accrual on these funds.

11. Through this Motion, the Receiver seeks authority to pledge \$1,500,000.00 in cash held in trust by the Receiver to CNB for the purpose of procuring a \$1,500,000.00 letter of credit to be provided to First Data in connection with payment processing services.

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). It is well-established that courts have power to authorize Receivers to pledge the assets of the trust estate. *See generally Wallace v. Loomis*, 97 U.S. 146, 162 (1877); 16 Fletcher Cyc. Corp. § 7816 (noting that “the power to authorize a receiver to borrow money carries with it the power to authorize the receiver to pledge the assets of the trust estate as collateral for the loan”). Given the long standing and well-established law on the courts’ power to authorize a receiver to pledge assets, this Court should exercise its discretion here. Allowing the Receiver to take all reasonable and necessary steps for operation the Hotels will further the goals of the receivership. Obtaining and providing the letter of credit to First Data will permit the Receivership Defendants to process card payments without the need for holding excessive amounts in reserve thereby improving the Hotels’ cash flow. Based on the foregoing, the Receiver respectfully requests the authority to pledge \$1,500,000.00 in assets held in trust by the Receiver to CNB to obtain a letter of credit.

WHEREFORE, the Receiver respectfully requests the Court to enter an Order in the form attached as “**Exhibit A**”, 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: January 27, 2020

Respectfully submitted,

By: /s/ Naim S. Surgeon

Naim S. Surgeon, Esq.
Florida Bar No. 101682
Email: naim.surgeon@akerman.com
AKERMAN LLP
Three Brickell City Centre
98 SE 7th St., Ste. 1100
Miami, FL 33131
Telephone: (305) 374-5600
Facsimile: (305) 349-4654

Counsel for Receiver

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this January 27, 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:

Robert K. Levenson, Esq.

Senior Trial Counsel
Florida Bar No. 0089771
Direct Dial: (305) 982-6341
Email: levensonr@sec.gov
almonte@sec.gov, gonzalezlm@sec.gov,
jacqmeinv@sec.gov

Christopher E. Martin, Esq.

Senior Trial Counsel
SD Florida Bar No.: A5500747
Direct Dial: (305) 982-6386
Email: martinc@sec.gov
almonte@sec.gov, benitez-perelladaj@sec.gov

**SECURITIES AND EXCHANGE
COMMISSION**

801 Brickell Avenue, Suite 1800
Miami, Florida 33131
Telephone: (305) 982-6300
Facsimile: (305) 536-4154

Attorneys for Plaintiff

Melissa Damian Visconti, Esquire

Email: mdamian@dvllp.com
DAMIAN & VALORI LLP
1000 Brickell Avenue, Suite 1020
Miami, Florida 33131
Telephone: 305-371-3960
Facsimile: 305-371-3965
Co-Counsel for Ariel Quiros

Jeffrey C. Schneider, Esq.

Email: jcs@lklsg.com
**LEVINE KELLOGG LEHMAN
SCHNEIDER + GROSSMAN**
Miami Center, 22nd Floor
201 South Biscayne Blvd.
Miami, Florida 33131
Telephone: (305) 403-8788
Co-Counsel for Receiver

Stanley Howard Wakshlag, Esq.

Email: swkshlag@knpa.com
KENNY NACHWALTER, P.A.
Four Seasons Tower
1441 Brickell Avenue
Suite 1100
Miami, FL 33131-4327
Telephone: (305) 373-1000
*Attorneys for Raymond James & Associates
Inc.*