

**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 SECOND MOTION FOR AUTHORIZATION TO SELL
22 ACRES A/K/A 00 VICTORY ROAD (FROM THE 71 ACRE
TRACT OF LAND OWNED BY BURKE 2000 LLC)
AND SUPPORTING MEMORANDUM OF LAW**

Michael I. Goldberg (the "Receiver"), the Court-appointed Receiver, through undersigned counsel, hereby files this Second Motion for Authorization to Sell 22 Acres a/k/a 00 Victory Road (From the 71 Acre Tract of Land Owned by Burke 2000 LLC). In support of this motion, the Receiver states as follows:

Preliminary Statement

The Court previously authorized the Receiver to sell a 71-acre parcel of land owned by Burke 2000 LLC, subdivided into four lots. *See* ECF No. 535. The Receiver subsequently learned the nature of the subdivision and/or sale was subject to certain disclosures under Act 250, Vermont's land use and development law. Without the timely dissemination of the Act 250 disclosures, the sale may be rendered unenforceable (at the buyer's option). Indeed, the original buyer of the lot known as 00 Victory Road withdrew from the sale upon learning of the Act's commercial development restrictions. After some time and a significant amount of showings, the Receiver has since procured a new buyer willing to purchase the property notwithstanding the strict confines of Act 250 and the residential development limitations imposed by the terrain of the property. The Receiver thus seeks the Court's approval of the sale on one of the four lots to the new purchaser for \$56,000.

Background

1. Michael Goldberg is the court-appointed receiver over the Receivership Defendants³ the Relief Defendants,⁴ and Additional Receivership Defendants⁵ pursuant to the

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

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. The Receiver is authorized, empowered and directed to, among other things, take immediate possession of all real property of the Receivership Entities, 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.

3. 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. See Receivership Order at ¶17.

4. Additional Receivership Defendant Q Burke Mountain Resort GP Services, LLC, raised money from investors through the sale of limited partnerships in Q Burke Mountain Resort, Hotel and Conference Center, L.P. (“Burke L.P.”) to fund the construction of a hotel on the Burke Mountain on land owned by Burke 2000 LLC. The Burke Mountain ski slopes and mountain bike trails are also located on land owned by Burke 2000 LLC.

5. Relief Defendant Q Burke Mountain Resort, LLC is the 100% owner of Burke 2000 LLC. The Receiver has authority to sell property owned by Burke 2000 LLC – subject to approval of the Court.

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.”

6. As more fully described in the Receiver's interim reports, the Receiver does not plan to market the Burke Mountain hotel and ski area (collectively, the "Burke Resort") for sale at this time because it has yet to create the required jobs for all of the Burke L.P. investors to meet their EB-5 requirements.

7. Burke 2000 LLC owns additional undeveloped land, which the Receiver believes is not necessary for the operation of the Burke Resort. Those tracts of land can be divided and sold separately from the Burke Resort without an impact on the operations of the Burke Resort.

The 71-Acre Tract of Land

8. One section of land owned by Burke 2000 LLC, is a 71-acre parcel to the west of the ski area. Ginn-LA Burski Ltd., LLLP, the prior owner of Burke 2000 LLC purchased the 71-acre parcel in 2005 for \$400,000 with the intention of building condominiums and a golf resort. However, there has been no construction on the 71-acre parcel.

9. The 71-acre parcel currently includes a vacant dwelling, pasture and wooded areas. Vermont Route 114, a busy highway that leads to Canada, runs through the 71-acre parcel. The Receiver has divided the 71-acre parcel into four separate lots and marketed each lot for sale.

10. On February 3, 2019, the Court entered an Order [ECF No. 535] authorizing the Receiver to sell the four parcels, including the sale of 00 Victory Road (the "Property") "As-Is" to Jeffrey Hale and Amy Hale (jointly, the "Hales") for \$70,000. However, the sale fell through due to disclosure issues.

Vermont Act 250

11. Act 250 is Vermont's land use and development law, enacted in 1970 in reaction to the sudden population growth of the preceding decade. See <https://nrb.vermont.gov/act250-program>. The law provides a public, quasi-judicial process for reviewing and managing the

environmental, social and fiscal consequences of major subdivisions and developments in Vermont. *Id.*

12. An Act 250 permit is required for certain kinds of development and subdivision activity — such as commercial projects on more than 10 acres (if the town has permanent zoning and subdivision regulations) or on more than one acre (if it does not) or the subdivision of 10 lots or more in a five year period. *See* <https://nrb.vermont.gov/act250-permitneed-a-permit>. The law also applies to any residential developments that intend to construct ten or more housing units and development above 2,500 feet in elevation. *See* 10 V.S.A. § 6001.

13. Act 250 approval depends on meeting ten criteria that focus on the project’s environmental and economic impact. any proposed project must conform with the local and regional plans. Act 250 discourages scattered development by requiring a project to be contiguous to existing settlements unless the tax revenue generated by the development exceeds the additional cost of public services required by the project. Act 250 also considers a development’s impact on scenic and historic sites. Act 250 has been credited with preserving the natural beauty and rural character of Vermont. However, some detractors decry the lengthy and costly permitting process.

14. Prior to the division or partition of land, the seller or other person dividing or partitioning the land shall prepare an “Act 250 Disclosure Statement.” The seller who is dividing or partitioning land as part of the sale shall provide the buyer with the statement within 10 days of entering into a purchase and sale agreement, and shall file a copy of the statement with the town clerk, who shall record it in the land records. Failure to provide the statement as required shall, at the buyer's option, render the purchase and sales agreement unenforceable. *See* 10 V.S.A. § 6007(a). Here, the realtor did not timely provide the Hales with the Act 250

Disclosure Statement. Upon learning that Act 250 may apply to this property, the Hales declined to purchase the property.

15. The Receiver now seeks to sell the property to Sam Nicholson and Dani Brunelle (jointly, the “Buyer”) “As Is” for \$56,500. A copy of the Purchase and Sale Contract and Rider to Purchase and Sale Contract are attached hereto as **Composite Exhibit “1”**.

16. The Buyer was procured after only a significant amount of showings, none of which generated serious interest.

17. The \$56,000 sale price is lower than the \$70,000 previously offered by the Hales. However, the sale price is similar to more recent sales in the vicinity of the property, when adjusted to account for the development restrictions:

| Victory Road - Comparable Sales | | | |
|--|----------------|--|---|
| <i>Address</i> | <i>Acreage</i> | <i>Date of Sale – Price</i> | <i>Factors which impacted the sale price</i> |
| 00 Sugarhouse Road, Burke, VT 05871 | 32.4 | Listed: 8/12/19 \$69,950 Closed: 3/4/20 \$65,000 | Undeveloped land 15 minutes to Burke Mountain and Kingdom Trails. Diverse terrain, vast trails across edge of land and a brook on the property. Includes power at the road. |
| 0 Burke Hollow Road, Burke, VT 05871 | 20.9 | Listed: 5/31/18 \$75,000 Closed: 1/24/20 \$67,500 | Just outside of East Burke Village and close to Burke Mountain and Kingdom Trails. Approximately 7-acre pond and paved road frontage. Deed restriction requires property to be used for environmental education or single family residential use. |
| 00 Kirby Mountain Road, Kirby VT 05851 | 27 | Listed: 5/8/19 \$67,500 Closed: 5/28/20 \$67,500 | Undeveloped land with power at the road. Approximately 10 acres are open field and the remainder is wooded with a brook that runs through the property. Lot is sub-dividable. Close proximity to Kingdom Trails and Burke Mountain. |

18. The sale price is still within the range of current comparable sales (\$65,000-\$67,500), when adjusted for the development potential of the respective lots at issue. Compared

to the 3 adjacent lots, the terrain and location of 00 Victory Road poses significantly more challenges to residential development. The parcel is comprised of approximately 22 heavily wooded acres with frontage on Smith Hill and Victory Road. The parcel has very little access from Victory Road and not enough depth there for a building. The portion of the parcel available for building is off Smith Hill Road and will require substantial infrastructure of power, driveway and permitting for water. As a result, this parcel has more significantly more challenges accessing a power source. Indeed, the Buyer—a neighbor who owns land adjacent to 00 Victory Road—recognizes these challenges and is not purchasing the property for residential development. Instead, the Buyer plans to utilize the property for private recreational snowmobiling with access to trails granted by his neighboring property.

Memorandum of Law

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). These powers include the authority to approve the sale of property of the Receivership Entities. Clark on Receivers § 482 (3rd ed. 1992) citing *First National Bank v. Shedd*, 121 U.S. 74, 87, 7 S.Ct. 807, 814, 30 L.Ed. 877 (1887) (noting that a court of equity having custody and control of property has power to order a sale of the property in its discretion). The Court should exercise its power and authorize the Receiver to sell the property.

Federal statutes provide procedures for the sale of realty under any order or decree of any court of the United States. *See* 28 U.S.C. § 2001. Generally, realty shall be sold at public sale within the district where the receiver was first appointed. *Id.* However, after notice and hearing, a court may order the sale of realty at a private sale upon terms and conditions approved by the court, if the court finds that the best interests of the estate will be conserved thereby. 28 U.S.C. §

2001(b). *See also Tanzer v. Huffiness*, 412 F.2d 221, 222 (3rd Cir. 1969). Here, the Receiver seeks to sell the property by private sale.

Typically, before confirmation of a private sale, the court shall appoint three disinterested persons to appraise the property to ensure that no private sale shall be confirmed at a price less than two-thirds of the appraised value. 28 U.S.C. § 2001(b). The Receiver does not believe it is necessary for the Court to appoint multiple disinterested persons to appraise the parcel. The property has been exposed to the marketplace, providing evidence of the actual value of the property based on the response of real-world buyers. *See Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 457 (1999) (recognizing that “the best way to determine value is exposure to a market”). Moreover, the Buyer is an independent party; the contract for sale was entered into as an arm’s length transaction, and the Buyer has already partially performed the Contract by paying the required deposit. The Court should exercise its authority to dispense with such procedural requirements and authorize the private sale. *See, e.g., SEC v. Utsick, et al.*, 1:06-cv-20975-PCH, ECF 616 (S.D. Fla. Jan. 4, 2010); *SEC v. Estate of Kenneth Wayne McLeod, et al.*, 1:10-cv-22078-FAM, ECF 62 (S.D. Fla. Feb. 4, 2011) (allowing waiver of formal appraisals for sale of condominiums); *see generally Tanzer v. Huffines*, 412 F.2d 221, 222-23 (3rd Cir. 1969) (upholding sale of property by receiver approved by District Court even though all procedures under 28 U.S.C. 2001 and 2004 were not strictly followed).

The primary goal of a 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). Allowing the Receiver to sell the property owned by Burke 2000 LLC through the proposed private sales will

most expeditiously further the goals of the receivership. The sales will result in additional cash being deposited into the Receiver's account, which is maintained for the purpose of ultimately satisfying claims filed by the investors and creditors. Moreover, the sale will reduce any additional costs to the receivership associated with maintaining this portion of the property. Based on the foregoing, the Receiver respectfully requests the authority to sell the property under the terms set forth herein.

WHEREFORE, the Receiver respectfully requests the Court to enter an Order in the form attached hereto as **Exhibit "2"**, 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, 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.

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 October 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/ Catherine D. Kretzschmar
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SERVICE LIST

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