

**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,

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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RECEIVER'S UNOPPOSED MOTION TO APPROVE SECOND AMENDMENT TO SETTLEMENT AGREEMENT AND RELEASE WITH RAYMOND JAMES & ASSOCIATES, INC.; INCORPORATED MEMORANDUM OF LAW

Michael I. Goldberg, as the court-appointed receiver (the "Receiver") for 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, AnC Bio VT, LLC, Q Burke Mountain Resort, Hotel and Conference Center, L.P., Q Burke Mountain Resort GP Services, LLC, Jay Construction Management, Inc., GSI of Dade County, Inc., North East Contract Services, Inc., and Q Burke Mountain Resort, LLC (collectively, the "Receivership Entities"), in the above-captioned civil enforcement action (the "SEC Action"), files this *Unopposed Motion to Approve Second Amendment to Settlement Agreement and Release with Raymond James & Associates, Inc.; Incorporated Memorandum of Law* (the "Motion").

INTRODUCTION

The Receiver and Class Counsel, with the consent of the SEC, have entered into a second agreement with Raymond James & Associates, Inc. ("Raymond James") to amend the Settlement Agreement and Release between them that was approved by this Court on June 30, 2017 [DE 353]. The precise terms of the Second Amendment to Settlement Agreement and Release ("Second Amendment") are more fully set forth in the Second Amendment, a copy of which is attached as Exhibit A, but in broad terms, the Second Amendment amends Sections 3(d)(vi), 5(d)(iii) and 7 of the original Settlement Agreement and Release by (i) eliminating the \$10 million Phase VIII Escrow requirement; (ii) paying Raymond James \$991,735.54 of the Phase VIII Escrow in exchange for it releasing its rights to the Phase VIII Escrow and its rights to require Phase VIII

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investors who receive a payment from the Phase VIII Escrow to assign their interest in the Burke Mountain Hotel to Raymond James; and (iii) permitting the Receiver to seek the Court's authorization to make a distribution of the remaining Phase VIII Escrow to *all* Phase VIII investors on a *pro-rata* basis. The reason for this Second Amendment is that the basis for the establishment of the Phase VIII Escrow has changed since the Settlement Agreement was signed and approved.

More specifically, when the Settlement Agreement was entered into, it was anticipated that up to 20 Phase VIII investors may be denied their desired immigration status due to a lack of the requisite number of jobs. Therefore, the Receiver insisted that Raymond James place \$10 million in escrow (the "Phase VIII Escrow") to assure that the Receiver would have sufficient funds on hand to return the original \$500,000 investment to those 20 investors. Since that time, however, the United States Citizenship and Immigration Services systematically started denying all investors' immigration petitions based on its position that the requisite number of jobs had not been achieved for all investors due to the fraud perpetrated prior to the receivership. As a result, at this juncture, potentially *all* Phase VIII investors (as opposed to 20 or fewer) may be affected, so the Receiver believes it is more appropriate to make a *pro-rata* distribution to *all* Phase VIII investors rather than having 20 investors receive one hundred percent of the Phase VIII Escrow while the remaining Phase VIII investors receive nothing from the Phase VIII Escrow.

Under the original Settlement Agreement, any investor that received a payment from the Phase VIII Escrow was required to assign their interest in the Burke Mountain Hotel to Raymond James. There are a total of 121 Phase VIII investors. Therefore, if the Receiver paid the Phase VIII Escrow to 20 investors, Raymond James would have owned approximately 16.5% of the Burke Mountain Hotel ($20/121 = 16.5289\%$). To date, the Receiver has received one unsolicited offer for the Burke Mountain Hotel of \$6 million. 16.5289% of \$6 million is \$991,735.54.

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Therefore, to compensate Raymond James for the Receiver's use of the Phase VIII Escrow for all investors, the Receiver and Raymond James have agreed that the Receiver would pay Raymond James \$991,735.54 of the Phase VIII Escrow rather than having each investor assign 15% of their ownership interest in the Burke Mountain Hotel to Raymond James. The net economic effect to Raymond James and the Receivership Estate is the same; the benefit is that it will dispense with an inordinate amount of paperwork while at the same time eliminating Raymond James's contingent rights in the Phase VIII Escrow and Burke partnership.¹ The Receiver plans to seek authorization to make an immediate *pro-rata* distribution of the remaining Phase VIII Escrow to all Phase VIII investors who hold an interest in the Burke Mountain Hotel.

MEMORANDUM OF LAW

“A 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). In such an action, a district court has the power to approve a settlement that is fair, adequate and reasonable, and is the product of good faith after an adequate investigation by the receiver. *See Sterling v. Steward*, 158 F.3d 1199 (11th Cir. 1998). “Determining the fairness of the settlement is left to the sound discretion of the trial court and *we will not overturn the court's decision absent a clear showing of abuse of that discretion.*” *Id.* at 1202 (quoting *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) (emphasis supplied)).

To approve a settlement in an equity receivership, a district court must find the settlement is fair, adequate and reasonable, and is not the product of collusion between the parties. *See Sterling*, 158 F.3d at 1203. To determine whether the settlement is fair, the court should examine

¹ This Second Amendment eliminates all of Raymond James's ties to the Jay Peak case (other than the four recoveries delineated in the First Amendment previously approved by the Court). The Receiver will also pay Raymond James the small amount of interest accrued on the Phase VIII Escrow through the date he makes payment under the Second Amendment.

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the following factors: “(1) the likelihood of success; (2) the range of possible [recovery]; (3) the point on or below the range of [recovery] at which settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.” *Id.* at 1203 n.6 (citing *Bennett*, 737 F.2d at 986).

Upon due consideration of these governing factors, the Second Amendment should be approved. Despite the change in the USCIS position, Raymond James had a contractual right to return of the Phase VIII Escrow or assignment of partnership rights in the Phase VIII partnerships. Before entering into the Second Amendment, the Receiver and his counsel engaged in negotiations with Raymond James to resolve all issues relating to the Escrowed Funds based on USCIS's current position. The Receiver, thus, believes that Second Amendment is in the best interest of the Receivership Estate. It will simplify the process of resolving the distribution of the Escrow Funds and the eventual distribution of the sales proceeds of the Burke Mountain Hotel. It will also save a great deal of time and money documenting the assignment of Phase VIII investor interests in the Burke Mountain Hotel to Raymond James.

The Amendment was executed after extensive, arm's length negotiations conducted between the Parties and their experienced counsel in good faith. It was, of course, not the product of collusion. *See Hemphill v. San Diego Ass'n of Realtors, Inc.*, 225 F.R.D. 616, 621 (S.D. Cal. 2004) (“[T]he courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement[.]”). The proposed Second Amendment marks the culmination of extended negotiation efforts and is clearly not the product of collusion.

Such agreement is undoubtedly well within the range of reasonableness and provides clarity moving forward for the Receiver and Raymond James. The Second Amendment, therefore,

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provides a substantial benefit to the Receivership Entities and the Phase VIII investors. Due to the fact that the Phase VIII Escrow was set up exclusively for the benefit of Phase VIII Investors, no other investor will be affected by the proposed Second Amendment. Accordingly, the Second Amendment is fair, adequate and reasonable, not the product of collusion, and should be approved, and the proposed disbursement authorized.

CONCLUSION

WHEREFORE, the Receiver respectfully requests that the Court grant this Motion and enter the proposed Approval Order attached hereto as **Exhibit B**.

Local Rule 7.1 Certification of Counsel

Pursuant to Local Rule 7.1, undersigned counsel has conferred with counsel for the SEC and the SEC does not object to this Motion or the relief sought herein.

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Dated: June 1, 2021.

LEVINE KELLOGG LEHMAN

SCHNEIDER + GROSSMAN LLP

Co-counsel for the Receiver

201 South Biscayne Boulevard

Citigroup Center, 22nd Floor

Miami, FL 33131

Telephone: (305) 403-8788

Facsimile: (305) 403-8789

By: /s/ Jeffrey C. Schneider

JEFFREY C. SCHNEIDER, P.A.

Florida Bar No. 933244

Primary: jcs@lklsg.com

Secondary: ams@lklsg.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on June 1, 2021 via the Court's notice of electronic filing on all CM/ECF registered users entitled to notice in this case.

By: /s/ Jeffrey C. Schneider

JEFFREY C. SCHNEIDER, P.A.

EXHIBIT A

**Second Amendment to April 13, 2017 Settlement Agreement And Release, Amending
PHASE VIII PROVISIONS**

THIS SECOND AMENDMENT Settlement Agreement and Release , Amending PHASE VIII PROVISIONS (herein called this "Phase VIII Amendment") is made and entered into as of April ___, 2021 ("Amendment Effective Date"), by and between Michael I. Goldberg, in his capacity as receiver (the "Receiver") for the entities identified on Schedule A to the Settlement Agreement and Release (collectively, the "Receivership Entities"), Harley S. Tropin, and Kozyak Tropin & Throckmorton, LLP, as interim class counsel ("Class Counsel") on behalf of the plaintiffs in the Investor Class Action (as defined in the Agreement), and Raymond James & Associates, Inc. ("Raymond James"). The Receiver, Class Counsel, and Raymond James shall each be referred to as a "Party" and shall collectively be referred to as the "Parties." The Settlement Agreement and Release shall be referred to as the "Agreement";

WHEREAS, the Parties executed and entered into the Agreement dated as of April 13, 2017, which was approved on June 30, 2017 by United States District Judge Darrin Gayles in Case No. 16-cv-21301-Gayles pending in the United States District Court for the Southern District of Florida (the "Court"), styled Securities and Exchange Commission v. Ariel Quiros, et al (the "Litigation");

WHEREAS, the parties previously entered into a First Amendment to Settlement Agreement and Release on April 19, 2021, which was approved on April 28, 2021 by the Court in the Litigation;

WHEREAS, at the time the Agreement was entered into, it was anticipated that there could be up to 20 Q Burke Phase VIII Investors who may not become eligible to apply for permanent residency through the United States Citizenship and Immigration Services' EB-5 Immigrant Investor Program for failure of the Q Burke Phase VIII project to create the requisite number of jobs under the federally-created EB-5 visa program United States thereby entitling such Investors to a return of their Five Hundred Thousand Dollar (\$500,000.00) principal investment;

WHEREAS, pursuant to Section 3(d)(vi) of the Agreement, ten million dollars (\$10,000,000)(the "Phase VIII Escrow Funds") of the Settlement Amount was placed in a separate interest-bearing trust account (the "Phase VIII Escrow") and earmarked to pay up to 20 Q Burke Phase VIII Investors whose EB-5 petitions are denied the return of their principal investment;

WHEREAS, as a condition precedent to the receipt of funds pursuant to Sections 3(d)(vi) and 3(d)(vii) of the Agreement, the Q Burke Phase VIII Investors who will be receiving a refund of their Five Hundred Thousand Dollar (\$500,000.00) principal investments must first execute a Phase VII and VIII Investor Release (attached to the Agreement as Exhibit "E") of all claims in favor of the Raymond James Released Parties, the Receiver, and the Receivership Estate, except as provided in this Section 5(d)(iii) of the Agreement;

WHEREAS, as a further condition precedent to the receipt of funds pursuant to Sections 3(d)(vi) and 3(d)(vii) of the Agreement, in addition to executing the Investor Release, pursuant to

Section 7(c) of the Agreement, the Q Burke Phase VIII Investors who receive Phase VIII Escrow Funds must assign to Raymond James, their respective right to receive proceeds from their interests in Q Burke Phase VIII by executing an Assignment of Proceeds in substantially the same form as Exhibit "I" attached to the Agreement;

WHEREAS, if the Receiver paid out the entire Phase VIII Escrow Funds to 20 Q Burke Phase VIII Investors, these 20 Q Burke Phase VIII Investors would be required to assign their interest in the Q Burke Hotel partnership to Raymond James which would result in Raymond James having the right to receive 16.53 percent of the net sales proceeds of the Q Burke Hotel upon its sale.¹

WHEREAS, the Receiver has advised Raymond James that he believes the value of the Q Burke Hotel is approximately \$6 to \$8 million.²

WHEREAS, the Receiver recently advised Raymond James that USCIS has been denying all Q Burke Phase VIII Investors' I-526 and I-829 petitions (and has even started revoking previously granted petitions) based on its assertion that the requisite job creation at Q Burke has not been achieved due to the alleged fraud perpetrated prior to the receivership. As of the date of this Amendment, the Receiver reasonably anticipates that potentially all Q Burke Phase VIII Investors may never obtain citizenship. Accordingly, the Receiver and Raymond James believe that the most equitable way to distribute the Phase VIII Escrow Funds is by distributing each of the Q Burke Phase VIII Investors a *pro-rata* share of the Phase VIII Escrow Funds;

WHEREAS, the Receiver and Raymond James desire to amend those provisions of the Agreement providing or relating to the distribution of the Phase VIII Escrow Funds as set forth below.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. **Defined Terms.** Defined and capitalized terms in the Amendment will have the same meaning as defined and capitalized in the Agreement, unless otherwise indicated in this Amendment.
2. **Recitals.** The recitals set forth above are true and correct and hereby incorporated in their entirety by reference.
3. **Continuing Effect.** Other than as specifically amended below, all other terms in the Agreement remain in effect and unchanged.

¹ 20/121=16.53 percent.

² To date, the Receiver has received one unsolicited offer to date to purchase the Q Burke Hotel for \$6 million. This valuation includes Burke Mountain which is not owned by the Q Burke Phase VIII Investors, but instead was recovered by the United States Securities and Exchange Commission pursuant to its settlement with Ariel Quiros and turned over to the Receiver. Accordingly, the Q Burke Phase VIII Investors limited partnership interests do not technically include ownership rights in Burke Mountain, but rather the Burke Mountain Hotel.

4. Modification of Provisions in Agreement. Sections 3(d)(vi), Section 5(d)(iii), Section 7(c) and Section 8 and all other provisions of the Agreement related to the Phase VIII Escrow are modified as follows:

- a. Within 10 business days of the date the order approving this Phase VIII Amendment becomes final, the Receiver shall distribute \$991,735.54 of the Phase VIII Escrow Funds to Raymond James. This sum represents 16.53 percent of the current estimated value of the Q Burke Hotel.³ Upon payment of this sum by the Receiver to Raymond James, Section 7(c) and Section 8 of the Agreement shall be deemed satisfied and eliminated from the Agreement.
- b. Notwithstanding the terms of this Second Amendment, all interest accrued on this escrow account, if any, through the date of payment pursuant to section 4(a) above shall be for the benefit of Raymond James and shall be paid to Raymond James within ten business days of the payment provided for in section 4(a). When this interest payment has been made, all obligations of the Receiver with respect to section 3(d)(iv) shall be deemed satisfied.
- c. The Receiver, subject to the Court's approval, shall be authorized to distribute the remaining Phase VIII Escrow Funds, on a *pro-rata* basis, to those Q Burke Phase VIII Investors as the Court approves to receive a distribution from those remaining Phase VIII Escrow Funds. This provision modifies Section 3(d)(vi) by removing the 20-person limit and distribution amounts and instead enlarging the potential pool of recipients to any Phase VIII Investor approved by the Court to receive a *pro-rata* distribution.
- d. As a precondition to a Q Burke Phase VIII Investor receiving their pro-rata share of the remaining Phase VIII Escrow Funds, all such Q Burke Phase VIII Investors shall be required to execute and deliver the release contemplated by Section 5(d)(iii) of the Agreement to the Receiver.
- e. If any Investor in Q Burke Phase VIII Investor does not sign the Investor Release or Phase VII I Investor Release (as required) within twenty-four (24) months after the Court approves this Second Amendment, e Bar Order becomes Final, that Investor shall not be entitled to receive payments provided for by this Agreement, and the amounts allocated to be paid to that Investor shall be returned to Raymond James within twenty (20) days thereafter, along with accrued interest, if any.

5. Multiple Counterparts. This Amendment may be executed in a number of identical counterparts. If so executed, each of such counterparts shall be deemed an original for all purposes, and all such counterparts shall, collectively, constitute one Amendment.

³ For purposes of this agreement, the Q Burke Hotel is being valued at \$6 million based on the fact that the Receiver has received one unsolicited offer for the Q Burke Hotel in that amount and such offer expressly required the Receiver to include Burke Mountain as one of the assets being purchased.

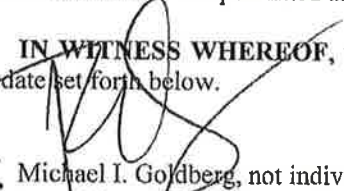
DocuSign Envelope ID: EE2360CD-CC73-4F1F-A144-3C66C7CF2009

6. Facsimile or PDF Signatures. For purposes of this Amendment, signatures delivered by facsimile or as a PDF attached to an e-mail shall be as binding as originals upon the parties so signing.

7. Headings. The use of headings, captions and numbers of the contents of particular sections are inserted only for the convenience of identifying and indexing various provisions in the Amendment and shall not be construed as a part of this Amendment or as a limitation on the scope of any of the terms or provisions of this Amendment.

8. Parties. This Amendment shall be binding upon the parties hereto and their respective successors and permitted assigns.


~~IN WITNESS WHEREOF~~, the Parties hereto have executed this Agreement as of the latest date set forth below.

For:  Michael I. Goldberg, not individually,
but solely in his capacity as Receiver for the Receivership Entities

Dated: May 24th, 2021.
Raymond James & Associates, Inc., a Florida corporation

DocuSigned by:

By: Robert Rudnicki
5D48915E4978488
Its: Robert M. Rudnicki, Assistant General Counsel

Dated: May 24th, 2021.

By: Kozyak Tropin & Throckmorton, LLP in its capacity as Interim Class Counsel

Dated: May, 28, 2021



Certificate Of Completion

Envelope Id: EE2360CDCC734F1FA1443C66C7CF2009	Status: Completed
Subject: Please DocuSign: DM-#634406-v1-Phase_VIII_Jay_Peak_Phase_VIII_Raymond_James_Amendment.pdf	
Source Envelope:	
Document Pages: 4	Signatures: 1
Certificate Pages: 3	Initials: 0
AutoNav: Enabled	Envelope Originator:
Envelopeld Stamping: Enabled	Alanna Searcy
Time Zone: (UTC-08:00) Pacific Time (US & Canada)	880 Carillon Pkwy
	Saint Petersburg, FL 33716
	Alanna.Searcy@RaymondJames.com
	IP Address: 170.12.233.253

Record Tracking

Status: Original	Holder: Alanna Searcy	Location: DocuSign
5/24/2021 4:17:07 AM	Alanna.Searcy@RaymondJames.com	

Signer Events

Robert Rudnicki
 Robert.Rudnicki@Raymondjames.com
 Associate General Counsel - Director of Litigation
 Security Level: Email, Account Authentication (None)

Signature



Signature Adoption: Pre-selected Style
 Using IP Address: 170.12.233.247

Timestamp

Sent: 5/24/2021 4:21:28 AM
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 Signed: 5/24/2021 5:43:58 AM

Electronic Record and Signature Disclosure:
 Accepted: 5/21/2021 10:17:50 AM
 ID: 5671b56e-a610-47a7-8334-f56adae0420a

In Person Signer Events	Signature	Timestamp
Editor Delivery Events	Status	Timestamp
Agent Delivery Events	Status	Timestamp
Intermediary Delivery Events	Status	Timestamp
Certified Delivery Events	Status	Timestamp
Carbon Copy Events	Status	Timestamp
Witness Events	Signature	Timestamp
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Certified Delivered	Security Checked	5/24/2021 5:43:44 AM
Signing Complete	Security Checked	5/24/2021 5:43:58 AM
Completed	Security Checked	5/24/2021 5:43:58 AM
Payment Events	Status	Timestamps
Electronic Record and Signature Disclosure		

EXHIBIT B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 16-cv-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARIEL QUIROS,
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Defendants,

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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

**ORDER APPROVING RECEIVER'S UNOPPOSED MOTION TO APPROVE SECOND
AMENDMENT TO SETTLEMENT AGREEMENT AND RELEASE WITH RAYMOND
JAMES & ASSOCIATES, INC.**

THIS MATTER came before the Court upon the Receiver's Unopposed Motion to

Approve Second Amendment to Settlement Agreement and Release with Raymond James & Associates, Inc. [D.E. ____] (the "Motion").

The Court, having reviewed the Motion and being otherwise fully advised, hereby **ORDERS** and **ADJUDGES** that:

- 1 The Second Amendment to Settlement Agreement and Release is in the best interest of the Receivership Estate.
- 2 The Motion is **GRANTED**.
- 3 The Second Amendment to Settlement Agreement and Release is **APPROVED**.

DONE AND ORDERED in Chambers at Miami, Florida, this ____ day of June, 2021.

DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

Copies furnished to: Counsel of record