

**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].

**MOTION FOR AUTHORIZATION TO ENTER INTO AND FOR APPROVAL OF
AMENDMENT TO MANAGEMENT AGREEMENT EFFECTIVE
AS OF NOVEMBER 7, 2021 AND SUPPORTING MEMORANDUM OF LAW**

Michael I. Goldberg the Court-appointed Receiver (the “Receiver”), by and through undersigned counsel, hereby files this *Motion for Authorization to Enter Into and for Approval of Amendment to Management Agreement Effective as of November 7, 2021 and supporting Memorandum of Law* (the “Motion”). In support of this Motion, the Receiver states as follows:

Preliminary Statement

1. Through this Motion, the Receiver seeks the authority to enter into an Amendment to the Management Agreement with resort management company, Leisure Hotels & Resorts. The Receiver believes the proposed modifications to the Management Agreement—an increase of the amount of Leisure Hotels’ accounting fee from \$9,000 per fiscal period to \$10,000 per fiscal period effective February 1, 2022, and the employment of Burke Mountain Resort employees by Leisure Hotels (on behalf of the Receivership) for payroll reporting and administrative purposes— to be in the best interests of the receivership estate, for the reasons set forth herein.

Background

2. 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 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.”

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.

3. The Receivership Order authorizes, empowers and directs the Receiver to, among other things, continue to operate the Receivership Entities, and manage and administer the business affairs of the Receivership Entities for the benefit of its investors and subject to order of this Court. Receivership Order, ¶ 4. To that end, the Receivership Order thus authorizes the Receiver to appoint a management company necessary to the continued operation of the Jay Peak and Burke Mountain Resorts. *Id.*

The Management Agreement

4. Immediately upon his appointment, the Receiver contacted Leisure Hotels & Resorts ("Leisure Hotels"), an established resort management company, and commenced negotiating a management agreement (the "Management Agreement")⁶ to ensure the continued operation of the Jay Peak and Burke Mountain Resorts. The Receiver then sought and obtained Court approval of the form of the Management Agreement and Court authority to enter into the Management Agreement. *See* ECF Nos. 176 and 186.

5. The Management Agreement provided, among other things, that Leisure Hotels would be responsible for: (i) maintaining and repairing the subject properties; (ii) obtaining and maintaining in full force and effect required licenses and permits; (iii) procuring and arranging for goods and services; (iv) making or installing repairs; (v) making recommendations with respect to all major policy matters affecting the subject property; (vi) arranging for and complying with all terms of all insurance policies; (vii) collecting and accounting for and remitting to governmental

⁶ A true and correct copy of the Management Agreement is on file with the Court. *See* ECF No. 176.

authorities applicable taxes; and (viii) participating in and cooperating with the Receiver in connection with any investigation related to the subject properties.

The Amendment to the Management Agreement

6. The Management Agreement was effective as of April 20, 2016. As of the filing of this Motion (more than six years later) Leisure Hotels continues to diligently perform its obligations under the terms of the Management Agreement.

7. In light of the length of the receivership case as well as recent developments, including the marketing and possible sale of the Jay Peak Resort, the Receiver and Leisure Hotels revisited the terms of the Management Agreement, with resulting negotiations culminating in the Amendment to Management Agreement, attached hereto and incorporated herein as **Exhibit A**.

8. Specifically, the Receiver and Leisure Hotels have negotiated the following, as memorialized in the Amendment:

(a) Accounting Fees. Section 10.2 of the Management Agreement shall be amended to change the amount of the accounting fee from \$9,000 per fiscal period to \$10,000 per fiscal period effective February 1, 2022.

(b) Personnel. Section 5.2 shall be amended (effective November 1, 2021) to read as follows in its entirety:

All personnel employed at the Properties may either be employees of the Owner or employed by Manager, at the cost of Owner, or in any configuration thereof, provided that Manager will consult with Owner prior to transferring the employment of personnel primarily performing services at Jay Peak (all of such employees are collectively referred to as "Properties Personnel"). Subject to the Approved Operating Budget, Manager will supervise the hiring and direct the work of, discharge, and determine the compensation and other benefits of all personnel necessary for the operation of the Properties. Notwithstanding the previous sentence, the individuals hired by Manager as member of the executive team, as well as the terms of employment, and any relocation benefits, if applicable, and any employment contract must be approved in writing by Receiver. The "Executive Team" is comprised of any general managers, chief executive officer (if applicable), chief financial officer, director of revenue management, director of engineering, director of sales and marketing and other positions of similar rank. The members of the Executive Team shall be comprised of personnel to be agreed

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upon in writing by Manager and Receiver. Manager shall not relocate any member of the Executive Team to other of its managed properties or its corporate office. In no event shall Manager participate in discussions or other activities related to union organizing activities, collective bargaining agreements, neutrality agreements, or the like without the express written approval of Receiver, or as directed by Receiver, and in any event with such participation by Receiver as Receiver may require. The cost of Properties Personnel, which includes but is not limited to wages, benefits, assessments related to regulatory agency requirements, personnel, administrative cost, employment related tax and assessments by whatever source derived, employment related tax compliance, and other employment-related costs including Paychex processing fees and expenses, (or other such third-party administration fees and expenses) shall be an operating expense and shall be charged to Owner each Fiscal Period. It is expressly understood and agreed that all Properties Personnel shall be employed at Owner's cost. Additionally, should any final employer shared responsibility payment be assessed with respect to any of the Properties Personnel on a Form CP220J Notice from the IRS, such amount shall be paid by the Owner to the Manager, along with any additional taxes or penalties that the Manager must pay based on Manager's payment of such final employer shared responsibility payment with respect to the Properties Personnel. Manager shall evaluate and administer all employee benefit plans previously adopted with respect to employees of the Properties, whether by the Owner or by Manager ("the "Employee Benefit Plans"). Employer contributions to such Employee Benefit Plans for Properties Personnel for the period of such employee's performance of services at the Properties shall be deemed payroll costs hereunder and shall be the responsibility of, and at the sole cost and expense of Owner. As applicable, the administrative expenses of any joint plans will be equitably apportioned by Manager among properties covered by such plans. Except as may be required under any applicable law, Manager shall not make any material changes to any of the Employee Benefit Plans of Owner without Receiver's written approval. It is expressly understood and agreed that all Properties Personnel shall be employed entirely at Owner's cost.

Relief Requested

9. Through this Motion the Receiver requests the Court enter an order (i) approving the form of the Amendment to Management Agreement; and (ii) authorizing the Receiver to enter into the Amendment to Management Agreement effective as of November 7, 2022.

Memorandum of Law

10. 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). The Court, through its

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Receivership Order, authorized, empowered and directed the Receiver continue to operate the Receivership Entities, and manage and administer the business affairs of the Receivership Entities for the benefit of its investors. Receivership Order, ¶ 4. The Receivership Order likewise explicitly authorized the Receiver to appoint a management company necessary to the continued operation of the Jay Peak and Burke Mountain Resorts. *Id.*

11. A court-appointed receiver has no implied power to contract or authority to enter into contracts or maintain existing contracts unless such authority is specifically approved by the appointing court. *American Automatic Co. v. Harbour Towers Development Corp.*, 227 So. 2d 94 (Fla. 3d DCA 1969). The Receiver thus sought and obtained Court approval of the form of the Management Agreement negotiated by and between the Receiver and Leisure Hotels, as well as Court authority to enter into the Management Agreement. *See* ECF Nos. 176 and 186.

12. The Management Agreement has been in effect since 2016. Recently, Leisure Hotels requested its first ever increase in accounting fees, seeking a monthly accounting fee pegged to the Consumer Price Index. The Receiver instead negotiated the requested amount down to an additional \$1,000 per fiscal period, effective as of February 2022, as reflected in the Amendment to the Management Agreement. The Receiver believes the requested increase in accounting fees to be usual and customary given the duration, quality, and extent of services provided by Leisure Hotels to the Receivership Entities. An appointing court may authorize its receiver to make contracts, which are usual and customary in particular operation. *In re Chira*, 343 B.R. 361 (Bankr. S.D. Fla. 2006), *aff'd*, 367 B.R. 888 (S.D. Fla. 2007).

13. The Amendment to Management Agreement also makes changes necessary to the Receivership's employment structure, so that the Receiver might more successfully effectuate a sale of the Jay Peak Resort. New Section 5.2 provides that, while Jay Peak Resort employees will

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continue to be employed by the Receivership, Burke Mountain Resort employees will be employed by Leisure Hotels on behalf of the Receivership for payroll reporting and administrative purposes. This separation of employees provides an avenue by which the Jay Peak Resort may be sold without the encumbrance of the Burke Mountain Resort personnel administrative burden. This revised structure also provides the Receivership with significant cost savings, as the Receiver would otherwise have needed to source new welfare benefit plans, 401(k) plan and separate employee insurance for all Burke Mountain Resort employees, which would have undoubtedly been costly for the Receivership.

14. The Court should authorize the Receiver to enter the Amendment to Management Agreement effective as of November 7, 2022 and should approve the Amendment to Management Agreement. Leisure Hotels has been critical to the operation and preservation of the Receivership Entities' assets. The Receiver believes the requested increase in accounting fees (an additional \$1,000 per fiscal period) to be usual and customary given the duration and extent of services provided by Leisure Hotels to the Receivership Entities. The Receiver likewise believes, in an exercise of his business judgment, the employment of Burke Mountain Resort personnel by Leisure Hotels on behalf of the Receivership to be in the best interests of the receivership estate. This structure allows the sale of Jay Peak Resort to proceed, continues the Burke Mountain Resort employees benefits, and provides significant cost savings to the Receivership Entities.

WHEREFORE, the Receiver requests the Court enter an order (i) approving the form of the Amendment to Management Agreement; (ii) authorizing the Receiver to enter into the Amendment to Management Agreement effective as of November 7, 2022; and (iii) granting such further relief as is just and equitable.

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LOCAL RULE 7.1 CERTIFICATION OF COUNSEL

Pursuant to Local Rule 7.1, undersigned counsel hereby certifies that the Receiver has conferred with to the Securities and Exchange Commission. Counsel for the Securities and Exchange Commission has indicated that it does not object to the relief requested in this Motion.

Dated: May 12, 2022

Respectfully submitted,

AKERMAN LLP
201 E. Las Olas Boulevard
Suite 1800
Fort Lauderdale, FL 33301
Phone: (954) 463-2700
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/s/ Catherine D. Kretzschmar
Catherine D. Kretzschmar, Esq.
Florida Bar Number: 85843
Email: catherine.kretzschmar@akerman.com
Counsel for Receiver

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this Thursday, May 12, 2022 via the Court's notice of electronic filing on all CM/ECF registered users entitled to notice in this case.

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

EXHIBIT “A”

AMENDMENT TO MANAGEMENT AGREEMENT

PROPERTIES:

Jay Peak Resort and Q Burke Resort

This Amended Agreement (“Amendment”), is dated as of November 7, 2021 (“Effective Date”), by and between Michael I. Goldberg, Court Appointed Receiver under the United States District Court, Southern District of Florida (“Receiver”), for Jay Peak, 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., Q Resorts, Inc., Q Burke Mountain Resort, LLC, Burke Mountain Operating Company, Burke Mountain Water Company, Mountain Road Management Company, Buke 2000, LLC, and applicable affiliates of each of the foregoing (all Vermont legal entities and collectively referred to as “Owner”) with its primary offices located at 830 Jay Peak Road, Jay, VT 05859; and Leisure Hotels, L.L.C., a Kansas limited liability company organized and existing under the laws of the State of Kansas, with its principal office at 14275 Golf Course Dr, Baxter, MN 56425 (hereinafter referred to as “Manager”).

WHEREAS, Receiver and Manager entered into a management agreement (“Agreement”) effective the 20th day of April, 2016 for the management of the Properties as defined within the Agreement; and

WHEREAS, Receiver and Manager hereby desire to amend certain provisions of the Agreement as stated herein;

NOW, THEREFORE, the following amendments to the Agreement are hereby made as follows:

1. Section 10.2 of the Agreement shall be amended to change the amount of the accounting fee from Nine Thousand and no/100 (\$9,000) per Fiscal Period to the amount of Ten Thousand and no/100 (\$10,000) per Fiscal Period effective February 1, 2022 and thereafter.
2. Section 5.2 shall be amended effective November 1, 2021 to read as follows in its entirety:

“Personnel. All personnel employed at the Properties may either be employees of the Owner or employed by Manager, at the cost of Owner, or in any configuration thereof, provided that Manager will consult with Owner prior to transferring the employment of personnel primarily performing services at Jay Peak (all of such employees are collectively referred to as “Properties Personnel”). Subject to the Approved Operating Budget, Manager will supervise the hiring and direct the work of, discharge, and determine the compensation and other benefits of all personnel necessary for the operation of the Properties. Notwithstanding the previous sentence, the individuals hired by Manager as member of the executive team, as well as the terms of employment, and any relocation benefits, if applicable, and any employment contract must be approved in writing by Receiver. The “Executive Team” is comprised of any general managers, chief executive officer (if applicable),

chief financial officer, director of revenue management, director of engineering, director of sales and marketing and other positions of similar rank. The members of the Executive Team shall be comprised of personnel to be agreed upon in writing by Manager and Receiver. Manager shall not relocate any member of the Executive Team to other of its managed properties or its corporate office. In no event shall Manager participate in discussions or other activities related to union organizing activities, collective bargaining agreements, neutrality agreements, or the like without the express written approval of Receiver, or as directed by Receiver, and in any event with such participation by Receiver as Receiver may require. The cost of Properties Personnel, which includes but is not limited to wages, benefits, assessments related to regulatory agency requirements, personnel, administrative cost, employment related tax and assessments by whatever source derived, employment related tax compliance, and other employment-related costs including Paychex processing fees and expenses, (or other such third-party administration fees and expenses) shall be an operating expense and shall be charged to Owner each Fiscal Period. It is expressly understood and agreed that all Properties Personnel shall be employed at Owner's cost. Additionally, should any final employer shared responsibility payment be assessed with respect to any of the Properties Personnel on a Form CP220J Notice from the IRS, such amount shall be paid by the Owner to the Manager, along with any additional taxes or penalties that the Manager must pay based on Manager's payment of such final employer shared responsibility payment with respect to the Properties Personnel. Manager shall evaluate and administer all employee benefit plans previously adopted with respect to employees of the Properties, whether by the Owner or by Manager ("the "Employee Benefit Plans"). Employer contributions to such Employee Benefit Plans for Properties Personnel for the period of such employee's performance of services at the Properties shall be deemed payroll costs hereunder and shall be the responsibility of, and at the sole cost and expense of Owner. As applicable, the administrative expenses of any joint plans will be equitably apportioned by Manager among properties covered by such plans. Except as may be required under any applicable law, Manager shall not make any material changes to any of the Employee Benefit Plans of Owner without Receiver's written approval. It is expressly understood and agreed that all Properties Personnel shall be employed entirely at Owner's cost."

3. All other provisions contained within the Agreement shall remain in effect in its original form.

IN WITNESS WHEREOF, the parties hereto have duly executed and delivered this Amendment as of the day and year first above written.

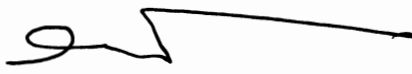
RECEIVER:

By: _____
Michael I. Goldberg

OWNER:

By: _____
Michael I. Goldberg, as Receiver

MANAGER:

By: 

Gary S. Endicott, Authorized Agent