

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 UNOPPOSED MOTION FOR AUTHORIZATION
TO MAKE A THIRD INTERIM DISTRIBUTION TO JAY PEAK
INVESTORS IN PHASES II-VI AND A SECOND INTERIM DISTRIBUTION TO
BURKE INVESTORS IN PHASE VIII AND SUPPORTING MEMORANDUM OF LAW**

Michael I. Goldberg, the Court-appointed Receiver, files this Unopposed Motion for Authorization to Make a Third Interim Distribution to Jay Peak Investors in Phases II-VI and Burke Investors (Phase VIII) (the "Motion"). In support of this Motion, the Receiver states as follows:

Introduction

1. There are 529 remaining investors in Jay Peak Phases II through VI and there are 121 investors in Burke Phase VIII. Thus, there are a total of 650 remaining investors of which the Jay Peak investors represent approximately 81% and the Burke investors represent approximately 19%. Accordingly, the Receiver's proposed distributions are based on splitting the general and available recovered proceeds by paying 81% to the Jay Peak investors and 19% to the Burke investors. However, recovered proceeds that are easily identifiable as belonging to a specific investor group—such as the sales proceeds from the Jay Peak Resort—the Receiver's proposed distributions contemplate paying 100% of such easily identifiable proceeds to the particular group of investors as set forth below.

2. The Receiver seeks authorization from this Court to make a third interim distribution of approximately \$26,890,137 (the "Jay Peak Investor Third Interim Distribution") on a *pro rata* basis, to all eligible investors in Jay Peak Phases II-VI (as defined in Footnote 5).

3. The \$26,890,137 proposed to be distributed to the Jay Peak investors represents the remaining net sales proceeds of the Jay Peak Resort (\$13,525,137) (the "Jay Peak Resort Sale Proceeds"); 81% of the available proceeds of the sale of the property that was ceased from Quiros (the "Quiros Property") sold to date (\$5,091,863.87); 81% of the available settlement proceeds

from the Receiver's settlement with Mitchell Silberberg & Knupp, LLP (\$7,709,055.17) (the "MSK Settlement Proceeds"), and 81% of the available proceeds of the first settlement payment received from the Receiver's settlement with the State of Vermont (\$2,964,073.50) (the "Vermont Settlement Proceeds").

4. The Receiver anticipates making a small fourth and final distribution to the Jay Peak investors in Phases II through VI, as additional Vermont Settlement Proceeds are received, additional Quiros Property is sold, and other *di minimis* amounts are collected.

5. Additionally, the Receiver seeks authorization to make a second distribution of approximately \$3,135,000 (the "Burke Investor Second Interim Distribution"), on a *pro-rata* basis, to Burke investors in Phase VIII.

6. The \$3,135,000 proposed to be distributed to the Burke investors in Phase VIII represents 19% of the available proceeds of the sale of the Quiros Property sold to date (\$1,194,387.82); 19% of the available MSK Settlement Proceeds (\$1,808,296.89); and 19% of the available Vermont Settlement Proceeds (\$695,276.50).

7. The Receiver anticipates making a significant additional distribution to the Burke investors in Phase VIII after the Burke Mountain Hotel is sold.³ This additional distribution will consist of the sales proceeds of the hotel; the approximate \$10 million in funds held in escrow for the Burke investors in Phase VIII under the Raymond James settlement; a portion of the proceeds of the remaining Quiros Property; and a portion of the remaining Vermont Settlement Proceeds after they are received.

8. If the Court approves both, the Jay Peak Investor Third Interim Distribution and the Burke Investor Second Interim Distribution, it will bring the total amount distributed to defrauded

³ The Receiver is currently negotiating a contract for the sale of the Burke Mountain Hotel which he hopes to finalize this year.

Jay Peak investors in Phases II through IV and Burke investors in Phase VIII, to approximately \$124 million.⁴ The Court previously approved a first interim distribution of approximately \$19.5 million from the MSK Settlement Proceeds on a *pro rata basis* to both, Jay Peak investors in Phase II-VI, and Burke investors in Phase VIII. *See* ECF Nos. 705, 706, and 719. Thereafter, the Court approved a second interim distribution of \$60,000,000 to the investors in Jay Peak Phases II-VI from the Jay Peak Resort Sale Proceeds. *See* ECF Nos. 743 and 744.

9. Accordingly, the Receiver proposes to make both, the Jay Peak Investor Third Interim Distribution and the Burke Investor Second Interim Distribution, on a *pro rata* basis. Courts have generally held that *pro rata* distributions in Receivership actions are the fairest way to compensate similarly situated investors, such as the Jay Peak Phases II-VI investors and Burke Phase VIII investors.

10. The Receiver has conferred with counsel for the SEC, who does not oppose this Motion. Accordingly, the Receiver asks the Court to approve the Motion and authorize the proposed third interim distribution.

Background

11. Michael Goldberg is the Court-appointed receiver over the Receivership

⁴ In addition to the approximate \$124 million, the Receiver already distributed: (i) \$87 million to Phase VII investors; and (ii) approximately \$15 million to trade and contractor creditors earlier in the case.

Defendants,⁵ the Relief Defendants,⁶ and Additional Receivership Defendants⁷ 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. ECF Nos. 60 and 493.

12. 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. Receivership Order at ¶1.

13. 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.

14. In carrying out his duties, the Receiver has agreed to disburse the available funds from the Vermont litigation (the "Vermont Settlement Amount"). The Vermont Settlement Amount stems from approximately thirty-three lawsuits on behalf of sixty-three plaintiffs (collectively the "Vermont Litigation Plaintiffs") against the State of Vermont and others (collectively, the "State of Vermont") stemming from the Jay Peak fraud. After years of litigation

⁵ The "Receivership Defendants" are Jay Peak, Inc. "Jay Peak," Q Resorts, Inc., Jay Peak Hotel Suites L.P. ("Phase I"), Jay Peak Hotel Suites Phase II L.P. ("Phase II"), Jay Peak Management, Inc., Jay Peak Penthouse Suites L.P. ("Phase III"), Jay Peak GP Services, Inc., Jay Peak Golf and Mountain Suites L.P. ("Phase IV"), Jay Peak GP Services Golf, Inc., Jay Peak Lodge and Townhouse L.P. ("Phase V"), Jay Peak GP Services Lodge, Inc., Jay Peak Hotel Suites Stateside L.P. ("Phase VI"), Jay Peak Services Stateside, Inc., Jay Peak Biomedical Research Park L.P. ("Phase VII"), and AnC Bio Vermont GP Services, LLC.

⁶ The "Relief Defendants" are Jay Construction Management, Inc., GSI of Dade County, Inc., North East Contract Services, Inc., and Q Burke Mountain Resort, LLC.

⁷ 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."

including extensive appellate litigation at the Vermont Supreme Court, extensive discovery, and four mediations, a settlement was reached for \$16.5 million, among other things, between the Vermont Litigation Plaintiffs and the State of Vermont (the “Vermont Settlement Agreement”).

15. The Receiver subsequently filed a motion asking the Court to approve the Vermont Settlement Agreement, a copy of which is attached to that motion. [ECF No. 746]. On August 22, 2023, the Court preliminarily approved the Vermont Settlement Agreement [ECF No. 747] and on October 20, 2023, the Court approved of the Vermont Settlement Agreement on a final basis and entered the Bar Order (defined below) [ECF No. 759]. As a result and per the terms of the Vermont Settlement Agreement, on December 26, 2023, the Receiver obtained the first Vermont Settlement Agreement payment in the amount of \$9.5 million.

16. Among other things, the Vermont Settlement Agreement provides (i) funds for the victims of the Jay Peak fraud that did not obtain green cards; (ii) funds for the Vermont Litigation Plaintiffs who helped produce this result; and (iii) funds for all Jay Peak Investors. In exchange for the Settlement Amount, Counsel in the Vermont Litigation has agreed to: (i) provide the Vermont Released Parties with broad releases; and (ii) dismiss their claims against the State of Vermont with prejudice. The Receiver has agreed: (i) to distribute the net settlement proceeds in accordance with the Settlement Agreement and future orders of the Court; (ii) to provide the Vermont Released Parties with broad releases; and (iii) to seek entry of a bar order, as described in the Settlement Agreement (the “Bar Order”). Importantly, as set forth in the Settlement Agreement, the settlement is expressly contingent on the entry of the Bar Order.

The Proposed Interim Distributions to Jay Peak and Burke Investors

17. Under the Jay Peak Investor Third Interim Distribution, the Receiver proposes to distribute the \$26,890,137 on a *pro rata* basis as soon as possible to each of the 529 investors in

Phases II-VI, which amounts to approximately \$50,832.02 per eligible investor. Under the Burke Investor Second Interim Distribution, the Receiver proposes to distribute \$3,135,000 on a *pro rata* basis to each of the 121 Burke investors, which amounts to approximately \$25,909.09 per eligible investor. Because each investor gave an identical \$500,000 to the Jay Peak and Burke entities through the EB-5 program, a *pro rata* distribution is appropriate to identically partially compensate each investor. As required by the MSK settlement terms, the Receiver will treat all investors equally, regardless of whether the U.S. Customs and Immigration Service has approved their I-829 petitions (making their green cards permanent).

18. Although Phase I and Phase VII investors also were defrauded by Jay Peak's former principals, they will not be eligible for distribution of the MSK Settlement Proceeds because the Receiver has already returned their \$500,000 investment or placed them with their approval into another EB-5 investment.

19. Investors in Phases II-VI and Phase VIII that previously received *pro rata* distributions from the MSK Settlement Proceeds were provided with an opportunity to elect (for immigration purposes) for the Receiver to hold these distributions in trust in a non-interest bearing account until such time as the Receiver makes a final distribution. Notice of this continuing election, as well as information on how to elect to receive such funds in the future were provided directly to these investors. These elections were honored in prior distributions, and will continue to be honored in the proposed distributions underlying this Motion.

Memorandum of Law

20. The primary goal of an equity 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). 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). The District Court also has broad equitable power in determining whether to approve a receiver's proposed plan of distribution for assets of the receivership estate. *Duff v. C. Sleep Diagnostics, LLC*, 801 F.3d 833 (7th Cir. 2015).

21. Because the trial court possesses such wide discretion, it has the authority “to classify claims sensibly in receivership proceedings.” *SEC v. Enter. Trust Co.*, 559 F.3d 649, 652 (7th Cir. 2009). In situations such as this one, where the total amount of allowed claims exceeds the funds available for distribution, a trial court must devise an equitable system of distribution with the goal of treating each claimant fairly and as equally as possible. *United States v. Cabe*, 311 F. Supp. 2d 501, 504 (D.S.C. 2003). Under the principals of equity, similarly situated claimants should be treated alike. *SEC v. Credit Bancorp. Ltd.*, 2000 WL 1752979 at *13 (S.D.N.Y. 2000); *SEC v. Drucker*, 318 F. Supp. 2d 1205 (N.D. Ga. 2004); *United States v. Real Property Located at 13328 and 13324 State Highway 75 North*, 89 F.3d 551, 553 (9th Cir. 1996).

22. Receivership courts therefore generally favor a *pro rata* distribution formula. *See, e.g., SEC v. Forex Asset Management, LLC*, 242 F.3d 325, 331 (5th Cir. 2001) (federal district court did not abuse its discretion in approving *pro rata* distribution plan); *United States v. Durham*, 86 F.3d 70, 73 (5th Cir. 1996) (district court was within its discretion to use *pro rata* distribution method even though it could have traced specific funds to specific investors).

23. Under the circumstances in this case, the Receiver recommends that this Court follow this established case law and approve the Receiver’s proposed interim distributions on a *pro rata* basis to each of the eligible 529 Jay Peak investors in Phases II-VI and 121 Burke Phase VIII investors. Each investor made the same \$500,000 EB-5 investment in Jay Peak and Burke; therefore each investor should receive the same *pro rata* percentage of the funds being distributed

under the proposed distributions. There is no more fair or equitable way to distribute the funds to the Jay and Burke Investors.

WHEREFORE, the Receiver seeks entry of an Order authorizing: (i) the proposed Jay Peak Investor Third Interim Distribution to Phase II through VI investors on a *pro-rata* basis of approximately \$26,890,137; (ii) the proposed Burke Investor Second Interim Distribution of approximately \$3,135,000 to the Phase VIII investors on a *pro-rata* basis; (iii) and granting any such other relief as the Court may deem just and proper.

LOCAL RULE 7.1 CERTIFICATION OF COUNSEL

24. Pursuant to Local Rule 7.1(a)(3), undersigned counsel conferred with counsel for the SEC, who does not oppose the Motion or the relief sought herein.

March 25, 2024

Respectfully submitted,

/s/ Michael Goldberg
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 25th day of March 2024 via the Court's notice of electronic filing on all CM/ECF registered users entitled to notice in this case.

By: /s/ Michael I. Goldberg
Michael I. Goldberg, Esq.