

§UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 23-24903-CIV-JB

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

RISHI KAPOOR, et al.,

Defendants.

**RECEIVER’S OMNIBUS¹ REPLY TO OBJECTIONS TO MOTION TO
APPROVE SALE OF COMMODORE PROPERTIES FREE AND
CLEAR OF LIENS, ENCUMBRANCES AND INTERESTS**

Bernice C. Lee, as Receiver (“Receiver”) over the Receivership Companies,² submits this omnibus reply to the objections to the Commodore Sale Motion (DE#238), specifically, the Objection by Members of Urbin Coconut Grove Partners, LLC (DE#265) (“CG Members Objection”) filed by CWL-CH, LLC, ASJAIA, LLC and Vieden Grove Oz, LLC (“CG Members”); the Limited Response to Receiver’s Motion (DE#270) (“Grouper Limited Response”) filed by Grouper Financial, Inc. (“Grouper”); and, to the extent construed as an objection to the Commodore Sale Motion, the Objection and Response in Opposition (“Ground Lessors’ Response”) filed by TB 3138 Commodore Investments, LLC and TB 3120 Commodore Investments, LLC (“Ground Lessors”) (collectively the “Responses”). In reply to the Responses, and in support of the Commodore Sale Motion, the Receiver states:

¹ For the Court’s convenience, the Receiver has filed this omnibus reply to all filed objections to the Commodore Sale Motion. The Receiver requests the Court permit the Receiver to go one page over the Local Rule reply page limit for this Omnibus Reply to the three filed objections.

² Capitalized terms not otherwise defined have the meanings ascribed to them in the Commodore Sale Motion.

A. Notice of the Commodore Sale Motion

On September 24, 2024, the Receiver filed the Commodore Sale Motion, seeking approval of the sale of the five parcels that comprise the Commodore Properties to the Buyer for \$28.2 million. As recited in paragraph 24 of the Commodore Sale Motion, to the best of the Receiver's knowledge all interested parties have received notice of the Motion. On October 9, 2024, the Receiver provided notice by email, where available, and U.S Mail to all the same interested parties of the Court's paperless order (DE#250) resetting the deadline to respond to the Commodore Sale Motion to October 15, 2022. The Receiver also posted the Commodore Sale Motion on the Receiver's website on September 25, 2024. Multiple media outlets reported on the proposed sale, including the South Florida Business Journal on September 26, 2024;³ the Real Deal on October 1, 2024;⁴ and Miami Commercial Real Estate News, published by Hawkins Commercial Realty, on October 2, 2024.⁵ The Responses were the only objections filed to the Commodore Sale Motion. A potential objection by the City of Miami has been resolved as described below.

B. The CG Members' Objections:

1. The Wells Fargo Decision

The CG Members assert that the Eleventh Circuit Court of Appeals' decision in *Sec. & Exch. Comm'n v. Wells Fargo Bank, N.A.*, 848 F.3d 1339 (11th Cir. 2017), precludes the Court's approval of the Commodore Sale Motion because the proceeds will not be sufficient to fully pay

³ <https://www.bizjournals.com/southflorida/news/2024/09/26/coconut-grove-commadore-plaza-receivership-sale.html>

⁴ <https://therealdeal.com/miami/2024/10/01/andrew-korge-offering-28m-for-location-ventures-dev-site/>

⁵ <https://www.hawkinscre.com/miami-commercial-real-estate-news-october-2-2024-shops-at-midtown-miami-sells-for-84m-pair-of-doral-office-buildings-for-71m-miami-top-destination-for-those-with-100m-more/>

all pre-existing liens, asserting that the sale would “effectively extinguish some state security interests.” They recognize that the *Wells Fargo* decision has already been addressed in this case, *Sec. & Exch. Comm’n v. Kapoor*, No. 23-cv-24903-JB, 2024 WL 3026490 (S.D. Fla. Jun. 17, 2024) (“Stewart Sale Order”) (DE#185), but appear to have not carefully read the Court’s decision.

In the Stewart Sale Order, the Receiver sought to sell a luxury single family home subject to multiple liens. The Receiver proposed to pay amounts agreed to with the first lender, and establish a lien claim fund for the remaining proceeds to which any other liens would attach with the same priority, extent and validity as they had prior to the receivership. The Halpern Trusts made the exact same argument that the CG Members make here – that such a sale would improperly “extinguish” their liens. The Court, after requesting the parties address the *Wells Fargo* decision, rejected the Halpern Trusts’ argument and held that the proposed sale was not inconsistent with *Wells Fargo*:

The proposed sale does not violate these principles. As mentioned, the Halpern Trusts’ junior security interest is not extinguished or invalidated, but rather, attaches to the funds in the Lien Claim Fund. ...

Given the preservation of the Halpern Trusts’ security interest, its argument that the proposed sale violates the Takings Clause of the Fifth Amendment by “extinguishing non-parties lien rights without just compensation” is without merit.

Kapoor, 2024 WL 3026490, at *4.

The CG Members’ Objection fails to address the Court’s ruling specifically rejecting the argument they now raise, and instead cites to the portion of the Court’s Order that addressed the Halpern Trusts’ waiver of 28 U.S.C. § 2001 requirements, claiming the Court “reached a different conclusion on procedural grounds.” (DE#265 at 6). The CG Members misconstrue the Stewart Sale Order: the § 2001 waiver issue was separate from the Court’s substantive ruling rejecting the objection that the sale improperly “extinguished” liens, even though such liens would attach to the

proceeds. The CG Members fail to even argue, much less establish, any basis for revisiting the Court's prior ruling.

The CG Members are not prejudiced in any way. The Commodore Sale Motion does not address the disposition of proceeds other than the seller's closing costs to be paid under the Sale Contract, and the reimbursement to the Halpern Parties of their advances to pay ground lease rents. Whatever lien claims are asserted against the Commodore Properties may be asserted against the net proceeds, just as in the Stewart Sale Order.

2. Florida and Federal Law Allow Require "Formal Notice"

Next, the CG Members assert that they are entitled to "formal notice" of the proposed sale. In support, they argue that the Receiver's proposed sale is governed by Florida Statutes § 714.16(2). Once again, the CG Members are entirely off the mark. Chapter 714 is the Florida Uniform Commercial Real Estate Receivership Act. But the Receiver is not a state court property receiver appointed under that Act. She is a federal equity receiver appointed by this Court in an SEC enforcement action. Chapter 714 by its express terms applies only "to a receivership initiated in a court of this state for an interest in real property," and likewise by its express terms "does not apply to ... actions authorized by or commenced under federal law." Fla. Stat. § 714.04(1), (2)(b).

The Receivership Order itself expressly provides the Receiver authority to sell real property:

[T]he Receiver is authorized to locate, list for sale or lease, engage a broker for sale or lease, cause the sale or lease, and take all necessary and reasonable actions to cause the sale or lease of all real property in the Receivership Estate, either at public or private sale, on terms and in the manner the Receiver deems most beneficial to the Receivership Estate, and with due regard to the realization of the true and proper value of such real property.

Upon further Order of the Court, pursuant to such procedures as may be required by the Court and additional authority such as 28 U.S.C. sections 2001 and 2004, the Receiver is authorized to sell, and transfer clear title to, all real property in the

Receivership Estate.

DE#28 ¶ 32-33. The legal basis for that authority and the appropriate exercise of it here are already set forth in the Commodore Sale Motion. (DE#238 pp. 20-24).

Moreover, while investors “may have some due process rights” in an SEC receivership, there “are no specific standards or rules setting forth precisely what rights such investors would have to participate in such a proceeding,” and “the use of summary proceedings is permissible ... so long as those affected are afforded adequate notice and an opportunity to be heard.” *Sec. & Exch. Comm’n v. EB5 Asset Mgr., LLC*, No. 15-62323, 2016 WL 11486857, *3 (S.D. Fla. Dec. 8, 2016); *see also Sec. & Exch. Comm’n v. Elliott*, 953 F.2d 1560 (11th Cir. 1992) (affirming use of summary proceedings in receivership proceedings). The CG Members indisputably received notice of the Commodore Sale Motion and have the opportunity to object (as they have done). They make no reasoned argument as to why they are entitled to “formal notice” beyond that which has already been provided, or how they are in any way prejudiced.

3. “Formal Notice” Required to Waive Section 2001

The CG Members similarly argue that “formal notice” is required to waive the provisions of 28 U.S.C. § 2001. As this Court noted in the Stewart Sale Order, the parties in this action – the SEC, the Receiver, and Mr. Kapoor – filed a stipulation waiving the requirements of Section 2001(b) in connection with the sale of any real property sought by the Receiver. (DE#48) On January 24, 2024, the Court entered an Order approving the stipulation and expressly stated that “[t]he Receiver is excused from compliance with 28 U.S.C. section 2001 in connection with the sale of real property in this case.” (DE#51). The CG Members are not parties to the SEC case, and have not been granted permission to intervene, and accordingly their stipulation or waiver is not required, nor is “formal notice” to them of the stipulation required. The CG Members have not

pointed to any authority suggesting otherwise.

In the Stewart Sale Order, aside from noting the Halpern Trusts' failure to timely challenge the stipulation, the Court further held that the Halpern Trusts had not shown that the § 2001(b) waiver prejudiced them:

The statute requires that a hearing with notice to all interested parties take place before a court can approve a private sale of receivership property. 28 U.S.C. § 2001(b). That occurred here, as the Halpern Trusts received notice of the Motion and an opportunity to be heard at a hearing prior to court approval of the proposed sale. Similarly, the statute allows an interested party to make a bona fide offer that it is at least ten percent higher than the private sale amount. *Id.* The Halpern Trusts have been on notice of the private sale amount and could have, but did not, make a higher offer.

The Halpern Trusts are correct that the statute also requires that three disinterested persons appraise the property, and the private sale price must be more than two-thirds of the appraised value. *Id.* The Halpern Trusts have not offered any appraisals of the Property, or other evidence to show that the current sale price is less than two-thirds of the appraised value. ... In short, the Halpern Trusts have failed to demonstrate that the proposed private sale amount runs afoul of Section 2001(b).

Kapoor, 2024 WL 3026490, at *6. Similarly here, the CG Members fail to make any showing of prejudice by the stipulated waiver: they have been given the opportunity to object and be heard; they have not made any assertion that the proposed \$28.2 million sale price is less than two-thirds of the appraised value of the Commodore Properties; and they have not made any assertion that there is someone prepared to make a 10% higher offer. It is well established that arguments not made in an initial pleading are deemed waived. *See, e.g., MacSouth Forest Products, LLC v. Current Builders, Inc.*, No. 0:24-CV-60013, 2024 WL 3650456, *4, fn. 2 (S.D. Fla. Jul. 26, 2024), *report and recommendation adopted*, 2024 WL 4024736 (S.D. Fla. Sep. 3, 2024), citing *Amargos v. Verified Nutrition, LLC*, 666 F.Supp. 3d 1249, 1250 (S.D. Fla. 2022). In fact, as represented in the Commodore Sale Motion, the purchase price *exceeds* the appraised value obtained by the Receiver by several million dollars.

4. Compliance with Section 2001

Finally, the CG Members assert that they object to any sale “that does not conform to all the requirements” set forth in 28 U.S.C. § 2001(b). In support, they cite to *Sec. & Exch. Comm’n v. EB5 Asset Mgr., LLC*, No. 15-62323, 2016 WL 7508252 (S.D. Fla. Mar. 25, 2016) for the proposition that some of the § 2001(b) requirements “are mandatory and cannot be waived.” (DE#265 at 10). Yet they fail to note that the case goes on to say that “While the Court may not waive the mandatory requirements of § 2001(b), the parties may.” *Id.* at *2. And in fact, that is exactly what happened in the *EB5 Asset* case: the SEC, the receiver and the defendant filed a Stipulation of Waiver (Case No. 15-62323 DE#81), and the Court then entered an Order granting a renewed motion to sell, without requiring § 2001(b) compliance. (Case No. 15-62323 DE#86). The circumstances here are identical, with the additional fact that this Court has entered an Order expressly approving the stipulation.

Moreover, multiple courts have held that strict compliance with all the provisions of § 2001(b) is not required for the Court to approve a sale, particularly where there has been substantial compliance and no demonstration of prejudice. For instance, in *Sec. & Exch. Comm’n v. Platinum Mgmt. (NY) LLC*, the court declined to require strict adherence to all of the § 2001(b) requirements where the docketing of an application to employ a professional in connection with a sale and the sale motion itself, as well as the advertising of the sale motion on the receiver’s website, constituted “public” notice of the sale and an opportunity to be heard, and the notice and marketing process ensured that “the purpose of a public sale was largely satisfied”. No. 16-CV-6848, 2018 WL 9801132, at *3-4 (E.D.N.Y. Sept. 12, 2018). Even if considered a “private” sale, the *Platinum* court held that the requirements of § 2001(b) were “sufficiently observed” where the Receiver was entrusted with the responsibility for selling the property in the best interest of the receivership,

retained professionals to assist in the process, the highest bid was made public by virtue of the sale motion, and individuals opposed to the sale were able to be heard before it was approved. *Id.* at *4. The court further noted that “requiring the Receiver to follow § 2001 at this point would be a waste of Receivership assets and would likely result in the exact same outcome.” *Id.* “The Court does not understand how denying the sale motion, and making the Receivership undergo a second sale process that is similar to the one it just conducted, to sell the exact same asset, would result in any greater recovery for the Receivership or its investors. The past eight months would have been for naught, and the Court will not require the Receiver to start again from the beginning.” *Id.*

In *Sec. & Exch. Comm’n v. Harbor City Capital Corp.*, the court noted that “Courts in the Middle District and elsewhere have exercised their discretion in relieving receivers from the judicial sale requirements of 28 U.S.C. §§ 2001, 2004,” No. 6:21-CV-694-CEM-DCI, 2022 WL 22881912, at *1-2 (M.D. Fla. Oct. 7, 2022), *report and recommendation adopted*, 2022 WL 22881911 (M.D. Fla. Oct. 25, 2022), *opinion clarified*, 2023 WL 3995297 (M.D. Fla. Apr. 26, 2023), citing *Sec. & Exch. Comm’n v. Nadel*, No. 8:09-cv-87-T-26TBM, Dkt. 1050 (M.D. Fla. Aug. 13, 2013) (waiving multiple appraisal and publication requirements); *Sec. & Exch. Comm’n v. Kirkland*, No. 6:06-cv-183-Orl-28KRS, 2008 WL 4264532, at *3 (M.D. Fla. Sept. 12, 2008) (permitting sale based on highest of six offers received); and *Sec. & Exch. Comm’n v. Billion Coupons, Inc.*, No. CIV. 09-00068 JMS-LEK, 2009 WL 2143531, at *4 (D. Haw. July 13, 2009) (recommending receiver be given discretion to sell items at best price without court confirmation) *report and recommendation adopted*, 2009 WL 2365696 (D. Haw. July 29, 2009).

In *Sec. & Exch. Comm’n v. Kirkland*, the court waived compliance with the multiple appraisal provision on the receiver’s advice that it was difficult to find an appraiser due to the unique nature of the property, and that no purpose would be served by the multiple appraisals

because the appraised value was less than the purchase price. No. 6:06-CV-183ORL28KRS, 2009 WL 1439087, at *2-3 (M.D. Fla. May 22, 2009). The court agreed, only requiring publication of the terms of sale after approval and ten days before confirmation of the private sale. *Id.* And in *Sec. & Exch. Comm'n v. Yin Nan Wang*, where, as here, there was a stipulated waiver, the court held that the receiver need not comply with the publication and appraisal requirements of § 2001(b), and it could approve sales “if the Receiver reasonably exercised his business judgment and the proposed sales are in the best interests of the Receivership Entities.” No. CV 13-7553 JAK (SS), 2015 WL 12656907, at *4 (C.D. Cal. Aug. 25, 2015).

Once again, the Receiver notes that the CG Members make no argument that the proposed sale price is not at least two-thirds of the appraised value of the Commodore Properties, or that there is any purchaser willing to pay at least 10% more on the same terms, and thus there is no showing that strict compliance with all requirements of § 2001(b) would serve any purpose, or that they are in any way prejudiced. The sale process here, including the notice provided to interested parties through the filing of the motion and publication to the Receiver’s website, as well as the fact that the purchase price substantially exceeds the appraised value obtained by the Receiver, all support the conclusion that there has been substantial compliance with the purposes of § 2001(b), and that strict adherence would serve no purpose.

The CG Members claim that the sale “would effectively prevent them protecting the claims that they raised in the State Case.” (DE#265 at 11). But it does no such thing, since the approval of the sale has been separated from the approval of any disposition of the proceeds, and the CG Members may still assert whatever claim they may have to the net proceeds. They also assert that a “sale conducted under the cloud of the challenged mortgages necessarily depresses the realizable value of the Commodore Properties.” *Id.* But the mortgages have no effect on the “realizable

value,” precisely because the sale is being done free and clear of liens. The Buyer need not be concerned with the mortgages or the disposition of proceeds, which will be dealt with separately from the approval of the sale itself. If the CG Members are right, and they can make the lender’s claims disappear, or step ahead of them in priority, then their claims would be fully satisfied by the sale proceeds.

The CG Members have not asserted any proper grounds for opposing the Commodore Sale Motion, and their objections should be overruled.

C. The Grouper Limited Response

Grouper asserts certain non-monetary rights in the properties located at 3166 Commodore Avenue and 3170 Commodore Avenue by virtue of certain agreements. The Receiver, with the approval of the Buyer, has agreed to include the following language in the Sale Order to be entered on the Commodore Sale Motion, and which Grouper has acknowledged is acceptable to resolve the issues raised in its Limited Response:

Any interest of Grouper Financial, Inc. in the real property located at 3170 Commodore Plaza under the Memorandum of Agreement dated January 31, 2022, recorded February 3, 2022 in Book 32999, at Page 4889 of the Public Records of Miami-Dade County, Florida which runs with the land remains pending and 3170 Commodore Plaza is not being sold free and clear of such interest.

The Receiver will include an updated proposed sale order with her report a week before the next status conference.

D. The Ground Lessors’ Response

Although the Ground Lessors styled their filing as both a motion for stay relief and an objection to the Commodore Sale Motion, there is nothing in their filing that specifically objects to any of the relief requested in the Commodore Sale Motion, nor is any of the relief requested in their filing directed to the sale itself. Accordingly, any objection of the Ground Lessors to the

Commodore Sale Motion should be deemed waived. *MacSouth*, 2024 WL 3650456, *4.

E. City of Miami

As noted in the Commodore Sale Motion, there are pending unsafe structure orders directed to certain of the Commodore Properties. The City of Miami has requested clarifications be made with regard to the preservation of its ability to assert liens for certain costs related thereto. The Receiver, with the approval of the Buyer, has agreed to include the following language in the Sale Order which the Receiver requests be entered on the Commodore Sale Motion, and which the City of Miami has acknowledged is acceptable to it:

The City of Miami's Notice of Unsafe Structure Violation recorded in Book 33659, Page 769 of the Public Records of Miami-Dade County, Florida and Notice of Unsafe Structure Violation recorded in Book 33775, Page 3743 of the Public Records of Miami-Dade County, Florida, and any liens that may arise thereunder for costs incurred and/or in the event the City of Miami incurs further costs, including to demolish the structures to remedy the violations, remain pending and the Commodore Properties are not being sold free and clear of such liens.

The Receiver will include an updated proposed sale order with her report a week before the next status conference.

CONCLUSION

The Receiver respectfully submits that any objections to the Commodore Sale Motion should be overruled and that the Court should enter an order approving the Commodore Sale Motion, incorporating the two additions described herein.

Respectfully submitted,

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By: /s/ David L. Rosendorf
David L. Rosendorf
Florida Bar No. 996823

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via CM/ECF upon all counsel of record this 22nd day of October, 2024.

By: /s/ David L. Rosendorf
David L. Rosendorf