

**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 RESPONSE IN OPPOSITION TO TB 3138 COMMODORE
INVESTMENTS, LLC’S AND TB 3120 COMMODORE INVESTMENTS, LLC’S
MOTION FOR STAY RELIEF OR, IN THE ALTERNATIVE,
FOR MODIFICATION OF STAY ORDER**

Bernice C. Lee, as Receiver (“Receiver”) over the Receivership Companies,¹ responds to the Motion for Stay Relief or, in the Alternative, for Modification of Stay Order (“Stay Relief Motion”) (DE#245)² filed by TB 3138 Commodore Investments, LLC and TB 3120 Commodore Investments, LLC (“Ground Lessors”). The Ground Lessors have failed to establish a basis for

¹ The “Receivership Companies” or “Receivership Defendants” include: Location Ventures, LLC, URBIN, LLC, Patriots United, LLC; Location Properties, LLC; Location Development, LLC; Location Capital, LLC; Location Ventures Resources, LLC; Location Equity Holdings, LLC; Location GP Sponsor, LLC; 515 Valencia Sponsor, LLC; LV Montana Sponsor, LLC; URBIN Founders Group, LLC; URBIN CG Sponsor, LLC; 515 Valencia Partners, LLC; LV Montana Phase I, LLC; Stewart Grove 1, LLC; Stewart Grove 2, LLC; Location Zamora Parent, LLC; URBIN Coral Gables Partners, LLC; URBIN Coconut Grove Partners, LLC; URBIN Miami Beach Partners, LLC; and URBIN Miami Beach II Phase 1, LLC.

² While denominated as both a Stay Relief Motion and an “Objection and Response in Opposition” to the Receiver’s Motion to Approve Sale of Commodore Properties Free and Clear of Liens, Encumbrances and Interests (“Commodore Sale Motion”) (DE#238), the Ground Lessors’ filing does not identify any specific objection to the Sale Motion, nor does the relief requested therein oppose any of the relief requested in the Commodore Sale Motion. However, to the extent the Ground Lessors’ filing also constitutes an objection to the Commodore Sale Motion, the Receiver will respond to it separately in her omnibus response.

relief from the Receivership Order. In response, the Receiver states:

FACTUAL BACKGROUND

A. The SEC Complaint and Duties and Powers of the Receiver

On December 27, 2023, the Securities and Exchange Commission (“SEC”) filed a Complaint (unsealed at DE#14) and motion for asset freeze (DE#6) against Rishi Kapoor, Location Ventures, LLC and several subsidiaries and affiliated companies, which asserted and evidenced that Mr. Kapoor used the companies to raise approximately \$93 million from more than 50 investors for investment in real estate projects through a series of material misrepresentations and omissions in violation of securities laws. The motion describes how Mr. Kapoor, among other things: (1) misrepresented his cash investment in Location Ventures LLC and the size of his real estate portfolio, and omitted material information about his prior business; (2) intentionally understated construction and costs and withheld information from investors; and (3) misappropriated at least \$4.3 million of investor funds. It further describes how he regularly commingled investor funds and transferred funds between entities despite representations that each entity and project was a separate and distinct investment, and often used funds for one project for the expenses of another project.

On January 12, 2024, the Court entered an order granting the SEC’s motion to appoint receiver (“Order Appointing Receiver”) (DE#28) and included provisions empowering the Receiver to analyze and investigate assets, and administer assets for the benefit of the receivership estate and harmed investors and creditors. The Court directed and empowered the Receiver, among other things:

To use reasonable efforts to determine the nature, location, and value of all property interests of the Receivership Defendants, including, but not limited to, monies, funds, securities, credits, effects, goods, chattels, lands, premises, leases, claims, rights, and other assets, together with all rents, profits, dividends, interest, or other

income attributable thereto, of whatever kind, which the Receivership Defendants own, possess, have a beneficial interest in, or control directly or indirectly (“Receivership Property” or, collectively, the “Receivership Estates”), *id.* at 7.A;

To manage, control, operate, and maintain the Receivership Estates and hold in her possession, custody, and control all Receivership Property, pending further Order of the Court, *id.* at 7.C;

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, and as approved by the Court.

Id. at ¶ 32. To provide the Receiver with the ability to fulfill her duties without being hindered or obstructed by creditor litigation against the Receivership Property, the Court entered an injunction against interference with the Receiver, and a stay of litigation. *Id.* at ¶¶ 23-28. The injunction protects the Receiver, Receivership Property, the Receivership Defendants and their subsidiaries from actions that would:

Dissipate or otherwise diminish the value of any Receivership Property; such prohibited actions include but are not limited to releasing claims or disposing, transferring, exchanging, assigning, or in any way conveying any Receivership Property, enforcing judgments, assessments, or claims against any Receivership Property or the Receivership Defendants, attempting to modify, cancel, terminate, call, extinguish, revoke, or accelerate (the due date) any lease, loan, mortgage, indebtedness, security agreement, or other agreement executed by the Receivership Defendants or which otherwise affects any Receivership Property; or,

Interfere with or harass the Receiver or interfere in any manner with the exclusive jurisdiction of the Court over the Receivership Estates.

Order Appt. Rec. ¶ 23.C – 23.D. Thus, actions to cancel or terminate leases or other agreements which affect Receivership Property are stayed, in order to afford the Receiver the opportunity to manage and liquidate Receivership Property for the benefit of harmed investors and creditors.

B. The Active Real Estate Projects

This receivership involves twenty-two Receivership Companies, over twenty subsidiaries and related entities, seven active real estate projects, over twenty-five state and federal proceedings pending at the time the Court entered the Order Appointing Receiver, and a massive amount of records and transactions. Since her appointment, the Receiver has been assessing all assets on a project-by-project basis to determine the best path forward for each property and its ability to produce a benefit for the receivership estate. Details of the Receiver's efforts are described in the Receiver's First Interim Report (DE#127) and Second Interim Report (DE#196) and include:

1. The Court-approved \$800,000 sale of a vacant lot on Minorca Avenue in Coral Gables owned by Urbin CG Resi SPE, LLC, a subsidiary of Urbin Coral Gables Partners, LLC;
2. The Court-approved settlement with the secured lender for an office building at 299 Alhambra in Coral Gables owned by CG Office SPE, LLC, another subsidiary of Urbin Coral Gables Partners, LLC, in exchange for a \$100,000 settlement payment;
3. The Court-approved \$17,500,000 sale of a luxury single family home constructed on two parcels in Coconut Grove owned by Stewart Grove 1, LLC and related settlement with the first position secured lender;
4. The Court-approved \$4,010,000 sale of a luxury condominium unit (Unit 1104) at 515 Valencia Avenue in Coral Gables owned by 515 Valencia SPE, LLC, a subsidiary of 515 Valencia Partners, LLC (pending closing after October 29, 2024).

The Receiver has also sought Court approval for the sale of:

1. Two parcels in Miami Beach owned by Urbin Miami Beach Owner, LLC, a subsidiary of Urbin Miami Beach Mezzanine, LLC for \$17,500,000 (DE#220); and
2. The receivership's interest in five parcels located on Commodore Plaza in Coconut Grove comprising the Commodore Properties³ which are the subject of the Commodore Sale Motion.

³ Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the Commodore Sale Motion.

The Receiver remains in the process of liquidating three condominium units at 515 Valencia Avenue, and 12.37 acres in Montana owned by 7240 US Highway 2 SPE, LLC, a subsidiary of LV Montana Phase I, LLC. In addition to seeking to liquidate the real properties, the Receiver and her professionals have been engaged in extensive review and analysis of the transactions of the Receivership Companies and related entities, including those occurring in their bank accounts, third party escrow accounts, and law firm accounts. There are over 40,000 transactions occurring across more than 45 bank accounts.

C. The Commodore Properties

The Commodore Properties are owned by four subsidiaries of Urbin Coconut Grove Partners, LLC. They are a complicated assemblage of fee simple and tenant leasehold interests with various issues presented by the lack of funds, a partially demolished building that still houses Verizon cellular equipment under a lease, gutted residential condominium units for which construction ceased in the summer of 2023, unsafe structure orders from the City of Miami Unsafe Structure Panel, multiple layers of mortgage loans, construction liens, and released purchaser deposits for condominium units. The Commodore Properties comprise:

1. 3138 Property: the partially demolished 3-story “School Property” which is subject to the 99-year ground lease between Urbin Commodore SPE, LLC and TB 3138 Commodore Investments, LLC (the “3138 Ground Lease”);⁴
2. 3120 Property: the gutted 1-story “Restaurant Property” which is subject to the 99-year ground lease between Urbin Commodore Restaurant SPE, LLC and TB 3120 Commodore Investments, LLC (the “3120 Ground Lease,” and with the 3138 Ground Lease, the “Ground Leases”);
3. 3162 Property: the 8 commercial condominium units and 21 residential condominium units owned by Urbin Commodore Residential SPE, LLC located in the building located at 3162 Commodore Plaza (the commercial condominium units include some

⁴ The 3138 Property, notwithstanding the partial demolition, still houses certain Verizon cellular equipment under a lease with Verizon.

which are in average condition and some which are in shell condition; the residential units are gutted shells without wall partitions or interior improvements);

4. 3166 Property: a storefront retail space subject to a 99-year ground lease between Urbin Commodore Residential II SPE, LLC and Dharma Studio Inc., which is also the subject of certain other agreements with Grouper Financial, Inc.; and
5. 3170 Property: a storefront retail space owned by Urbin Commodore Residential II SPE, LLC which is also the subject of certain agreements with Grouper Financial, Inc.

The Commodore Properties are encumbered by mortgages asserted by the Halpern Parties recorded at various times and against various Properties. Based on the recordings, the principal amount asserted against the Commodore Properties is nearly \$27 million, of which the amount asserted to be secured by the 3138 and 3120 Properties is \$21.5 million.

D. The Ground Leases

The 3138 and 3120 Properties are subject to the 99-year Ground Leases executed in 2018 and 2019. According to the Ground Lessors, the monthly payments are \$19,900.87 for the 3138 Ground Lease, and \$10,626.69 for the 3120 Ground Lease. Until August of this year, the Halpern Parties had paid the monthly payments as protective advances under their loans. As a result, the Ground Lessors have received in excess of \$400,000 in payments since August 2023, including more than \$200,000 in payments after the commencement of the receivership. The Ground Lessors assert that payments for September and October have not been made, and the amount owed is approximately \$60,000. The Ground Lessors assert that they obtained a mortgage on their interest in the 3138 Property and anticipated receiving the \$19,900.87 lease payments as a source of payment for the mortgage. They do not state that there is any mortgage on the 3120 Property.

The Ground Lessors assert that the Ground Lessees failed to pay 2023 ad valorem taxes (\$124,524.54 as to 3138, and \$33,400.62 as to 3120), which has resulted in the issuance and sale of tax certificates for the 2023 taxes. Any attempt to conduct a sale to satisfy the tax certificates

would be stayed by the Receivership Order, since the Commodore Properties are Receivership Property. Miami-Dade County’s webpage for Tax Certificate Sales states that a tax certificate holder can submit for a tax deed application 22 months after the year the tax certificate was issued and before seven years from the date the certificate was issued, and “[b]ankruptcy or litigation may extend the life of a certificate and places an automatic hold on the tax deed application process.”⁵

The Ground Lessors assert that the 3138 Property is subject to an unsafe structures order which requires cure and remediation or potential demolition. That order was issued in July of 2023, nearly half a year prior to the commencement of the receivership. They note that the order was precipitated by a fire that occurred at the property – in October 2022, more than a year before the commencement of the receivership. The 3138 Property is a partially demolished structure which will require completion of demolition in any event. The Ground Lessors further assert that the Receiver has failed to provide proof of casualty and liability insurance. The Receiver has provided proof of commercial general liability coverage for March 7, 2024 through March 7, 2025 as to the 3138 Property, and proof of commercial general liability coverage for June 28, 2024 through June 28, 2025 for the 3120 Property, both with a \$1,000,000 limit per occurrence and \$2,000,000 general aggregate limit. The Ground Lessors also assert that the Ground Lessees have failed to pay the Ground Lessor’s attorneys’ fees. The Receiver respectfully submits that any such claim would appropriately be addressed as part of a claims process in the receivership case and does not constitute grounds for stay relief.

The Ground Leases and related agreements contain several provisions which afford the Halpern Parties, as lender to the Ground Lessees, certain rights with respect to any effort to

⁵ See https://www.miamidade.gov/global/service.page?Mduid_service=ser1552661369288950.

terminate the Ground Leases, including those referenced in Paragraphs 4 and 5 of the Agreement Between Fee Owner and Leasehold Mortgagee Regarding Ground Lease attached to the Stay Relief Motion (DE#245, Exhibits 3 and 4 to Exhibit “A”), and those in Section 15.2 of each of the Ground Leases (a copy of which is attached to and incorporated into the foregoing Agreements). There may be no cancellation, surrender, acceptance of surrender, amendment, or modification of the Ground Lease without the lender’s consent; the lender is to receive notice of any default notice served upon the Ground Lessees; the lender is entitled to additional time to remedy or cure any default; the lender is entitled to “nullify” any notice of termination by agreeing to cure the default; the lender has the right to postpone and extend the date for termination by taking certain actions including curing monetary defaults and taking steps to acquire the Ground Lessees’ interest by foreclosure or otherwise (the time period for which is extended during any injunction of such actions); and the lender is entitled to enter into a new lease with Ground Lessors on substantially the same terms in the event of termination of the Ground Leases.

The Ground Lessors assert that the residual value of the leasehold interests in the 3138 and 3120 Properties is \$8.22 million. (DE#245, Ex. “A” ¶ 23). Accordingly, if the Ground Lessors were granted stay relief, and if they were successful in seeking to terminate the Ground Leases, they would effectively take back interests which they assert to be worth more than \$8 million – an amount which is exponentially greater than all amounts which they claim to be due as a result of asserted defaults under the Ground Leases.

E. The Commodore Sale Motion

After obtaining an appraisal for the Commodore Properties and engaging in negotiations with multiple parties, the Receiver negotiated a Sale Contract with Coconut Grove Commodore Development Ventures, LLC (“Buyer”) to buy the Commodore Properties, free and clear of all

liens, claims and encumbrances, for \$28,200,000, plus up to \$150,000 in the event the Closing occurs in or before February 2025. Except with respect to closing costs to be paid by the seller and the reimbursement of \$582,079.62 advanced by the Halpern Parties in protective rental payments to the Ground Lessors, the Commodore Sale Motion does not address the disposition of the net sale proceeds, which is to be addressed and resolved by separate proceedings. Aside from the Ground Lessors' filing, the only filed objections to the Commodore Sale Motion are the objection filed by three investors (DE#265) and a limited objection filed by Grouper Financial, Inc. (DE#270), which will be addressed in the Receiver's omnibus reply. The Halpern Parties do not oppose the sale, and while they assert that "applicable law" should be replaced with "state law" in the proposed order with regard to the lien claim fund, they have not filed an objection.

Under the terms of the Sale Contract, the Buyer's closing deadline is 25 days after the expiration of the Inspection Period, which in turn runs for 45 days from the entry of the Sale Order (subject to a potential 15-day extension in exchange for a fee), assuming there has been no appeal of the Sale Order and the Buyer does not give a Termination Notice during the Inspection Period. Therefore, absent appeal, the closing of the sale will occur (or not) within 70 to 85 days after the entry of the Sale Order.

The Sale Contract and Commodore Sale Motion recognize that the Buyer is acquiring the Seller's interests in the Ground Leases on an "as is, where is" basis, subject to all faults and conditions, that the sale does not absolve, cure or remedy any existing defaults or potential liabilities under the Ground Leases, and that the Buyer acknowledges and agrees that any leasehold defaults or obligations shall remain the responsibility of the Buyer upon acquisition of the leasehold interest in the Ground Leases. (DE#238 at 15). Accordingly, all rights of the Ground

Lessors with respect to any asserted defaults under the Ground Leases are preserved and may be addressed with the Buyer upon the closing of the sale.

The proposed sale of the Commodore Properties provides the Receiver with the opportunity to monetize the Commodore Properties for a substantial amount which will significantly reduce debts and claims, relieve the receivership estate of the ongoing burden of maintaining and preserving the Commodore Properties, potentially realize a recovery for the receivership estate, and by doing the foregoing, provide a better opportunity for recoveries by investors and other creditors of the Receivership Companies, consistent with the Receiver's responsibilities under the Receivership Order. In addition, a closing on the sale of the Commodore Properties would put ownership and control of the Commodore Properties in the hands of a party who is much better positioned than the Receiver to (a) cure any defaults under the Ground Leases; and (b) address and remediate the code violations asserted by the City of Miami, including by addressing the relocation of the Verizon equipment and completing the demolition of the 3138 Property.

DISCUSSION

A. The Ground Lessors Are Not Entitled to Intervene

To the extent that the Ground Lessors seek intervention under Fed. R. Civ. P. 24 to pursue their Stay Relief Motion, the Receiver respectfully submits that such relief is inappropriate. First, Section 21(g) of the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78u(g), provides that "... [N]o action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission." The Receiver is advised that the SEC does not consent to

intervention under Rule 24. And Section 78u(g) has been held to constitute a complete bar on intervention in an SEC case without the SEC's consent.⁶ The *Nadel* court noted that permitting intervention would establish a “dangerous precedent” and “would undermine the efficient administration of this receivership and divert resources and the Receiver's efforts from activities intended to benefit the entire Receivership Estate.” *Nadel*, 2009 WL 3126266, *1. The cases the Ground Lessors cite on intervention fail to address the issue in the context of an SEC receivership, and consequently fail to consider the foregoing authorities.⁷

Moreover, the Receiver would further submit that the interests of the Ground Lessors are adequately protected without the need for intervention. *See, e.g., Sec. & Exch. Comm'n v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992)(noting that “The district court has broad powers and wide discretion to determine relief in an equity receivership” and describing how the government's and parties' interests in judicial efficiency “underlie the use of a single receivership proceeding,” and that a summary proceeding “reduces the time necessary to settle disputes, decreases litigation costs, and prevents further dissipation of receivership assets.”) *Id.* Consistent with *Elliott*, courts have repeatedly and properly held that a claimant is not entitled to intervene in an SEC action where their interests are otherwise protected. *See, e.g., Sec. & Exch. Comm'n v. JCS Enters., Inc.*,

⁶ *Sec. & Exch. Comm'n v. Nadel*, No. 8:09-cv-87-T-26TBM, 2009 WL 3126266 (M.D. Fla. Sep. 24, 2009), citing *Sec. & Exch Comm'n. v. Cogley*, 2001 WL 1842476, *5 (S.D. Ohio 2001) and *Sec. & Exch. Comm'n v. Homa*, 2000 WL 1468726, *2 (N.D. Ill. 2000). *See also Sec. & Exch. Comm'n v. Freedom Env't Servs., Inc.*, No. 6:12-cv-1415, 2013 WL 12155837, *2 (M.D. Fla. Feb. 1, 2013). *Compare Sec. & Exch. Comm'n v. BKCoin Mgmt., LLC*, No. 23-20719, 2023 WL 3250917, *2 (S.D. Fla. May 4, 2023) (noting split of authority on whether Section 21(g) is an absolute bar to intervention in SEC enforcement actions).

⁷ *See Chiles v. Thornburgh*, 865 F.2d 1197 (11th Cir. 1989); *Chen v. Walsh*, 2018 WL 11348600 (S.D. Fla. Dec. 21, 2018); *Abreu v. Pfizer, Inc.*, 2022 WL 2341427 (S.D. Fla. Feb. 3, 2022), adopted Mar. 22, 2022); *Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp.*, 271 F.R.D. 530 (S.D. Fla. 2010); *Beckman Indus. v. Int'l Ins. Co.*, 966 F.2d 470 (9th Cir. 1992).

No. 14-CV-80468, 2015 WL 13950381 (S.D. Fla. Nov. 3, 2015) (denying motion to intervene under Rule 24(a) and (b) by claimant who asserted a claim regarding a particular receivership estate asset). In denying intervention, the *JCS Enterprises* court noted that the receivership was still engaging in “extensive and complex financial reconstructions of dozens of financial accounts” which were required to permit the receiver to “allocate losses according to a Court-approved methodology and fairly evaluate claims during a claims process.” *Id.* at *2. It noted that “A receiver must be given a chance to do the important job of marshaling and untangling a company’s assets without being forced into court by every investor or claimant.” *Id.*, citing *Sec. & Exch. Comm’n v. Universal Fin.*, 760 F.2d 1034, 1038 (9th Cir. 1985). In a similar vein, the court in *Sec. & Exch. Comm’n v. Callahan*, 2 F. Supp. 2d 427 (E.D.N.Y. 2014), denied a lender the right to intervene to foreclose on receivership property where the SEC did not consent, the lender would suffer minimal prejudice, and intervention would interfere with the receiver’s ability to administer the receivership estate and recover assets for investors.

To the extent the Court is willing to entertain the Stay Relief Motion without granting intervention, the Receiver does not oppose the Ground Lessors requesting to be heard by the Court on the Stay Relief Motion, provided that the Receiver reserves the right to contend that the Ground Lessors lack standing as parties to the SEC case or in the event of an appeal of any order on the Stay Relief Motion.

B. The Ground Lessors Are Not Entitled to Stay Relief

The Ground Lessors seek stay relief to “pursue their rights under the Ground Leases,” and to provide the Halpern Parties with their “bargained-for cure right,” asserting that the Ground Lessors have “lost all of the ‘sticks in their bundle of rights.’” (DE#245 at 18). In support of their entitlement to relief, they cite to *U.S. v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 443 (3d Cir. 2005);

S.E.C. v. BKCoin Mgmt., LLC, No. 23-20719, 2024 WL 2990580, at *13-14 (S.D. Fla. Mar. 26, 2024); *S.E.C. v. Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984); and *S.E.C. v. Complete Bus. Sols. Grp., Inc.*, No. 20-CIV-81205, 2022 WL 20703936, at *1 (S.D. Fla. Mar. 3, 2022). These cases consider three factors in determining whether to lift a litigation stay in receivership matters: (1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership when the motion is made; and (3) the merit of the moving party's underlying claim. But both the facts and underlying principles of those cases argue against any stay relief for the Ground Lessors here.

In *Acorn Technology*, the Third Circuit affirmed the denial of a stay relief motion, noting that a district court "should give appropriately substantial weight to the receiver's need to proceed unhindered by litigation, and the very real danger of litigation expenses diminishing the receivership estate." *Acorn Tech.*, 429 F.3d at 443. While the interests of litigants need to be considered, the timing matters: "far into a receivership," a litigant may be permitted to pursue a claim if harm may result from not being able to do so, but "very early in a receivership" even meritorious claims "might fail to justify lifting a stay given the possible disruption of the receiver's duties." *Id.* at 443. The *Acorn* court further noted that the "very purpose of a receiver is to collect and disentangle a receivership estate's assets, including debts owed to it." *Id.* at 449. In *Acorn*, the stay had been in place for ten months when the motion was filed and had remained in effect for nearly three years when the appeal was heard. The Court found no "clear cut-off date," noting that one case had described a two-year old receivership as "fairly youthful," and that another denied stay relief in a four-year old case where financial investigation was ongoing. *Id.* at 450, citing *United States v. ESIC Capital, Inc.*, 685 F.Supp. 483, 485 (D.Md. 1988) and *S.E.C. v. Universal*

Financial, 760 F.2d 1034, 1039 (9th Cir. 1985).

In *BKCoin*, the court adopted a report and recommendation applying the *Wencke* three-factor test to deny stay relief to pursue an indemnification and advancement claim, finding the movant was not entitled to either a lift of the stay, nor an order requiring the Receiver to advance and indemnify the movant. The docket reflects that the motion was filed eight months after the commencement of the receivership, the report and recommendation was issued thirteen months after the receiver's appointment, and the order adopting the report and recommendation was issued nearly sixteen months after the receiver's appointment. (Case No. 23-20719, DE8, DE109, DE136, DE174). The report and recommendation described the one-year time period that the case had then been pending as "a relatively short time for the Receiver to exercise his duties, particularly given the complexities of the case, where Defendants engaged in commingling of assets and the Receiver has had to retain the services of several professionals to assist him in carrying out his duties." *S.E.C. v. BKCoin Mgmt., LLC*, No. 23-20719, 2024 WL 1931524, at *16 (S.D. Fla. Mar. 26, 2024). Similarly in *Complete Business Solutions*, the court denied the request for stay relief, finding that granting it would "infringe upon the work of the Receiver" and "could create an imbalance among the investors with respect to the recovery of their assets." 2022 WL 20703936, at *1. At the time the motion was filed, the case had been pending for 1 ½ years.

In *Wencke*, which is the source for this three-part test, the court noted that the issue "is one of timing," and that "[t]he receivership cannot be protected from suit forever." By comparison, at the time of consideration, the receivership had been open for seven years, had substantially progressed, and the receiver was ready to distribute the estate's assets. Since the receivership "has been in existence for over seven years and no new material facts have been discovered for at least six years," "[s]urely the receiver has had ample opportunity to explore, organize, and understand

the affairs of the entities under his control.” *Wencke*, 742 F.2d at 1232. Accordingly, the appellate court found that the movants had made a showing to support stay relief.

In applying the *Wencke* factors, the Ground Lessors assert that the Receiver’s interests are “relatively minimal” in light of “the financial burden to the estate” as compared to “Movants’ fee and lease interests.” But they have it entirely backwards. The Receiver is attempting to consummate an \$28.2 million sale which would substantially reduce indebtedness and claims, potentially provide a return to the receivership estate, and also provide a path to resolution of the asserted defaults which constitute the basis for the request for stay relief in the first place. By comparison, the Ground Lessors have not received \$30,000 monthly payments for a period of two months, and may have to wait a few more months to give an opportunity for the sale, if approved, to close. Meanwhile, by the Ground Lessors’ own assertions, the leasehold interests which they would take back if they successfully terminated the Ground Leases have a value that exceeds \$8 million – an amount that exceeds, by several multiples, all the amounts claimed to be due as defaults under the Ground Leases.

The timing of the Stay Relief Motion likewise argues against the relief requested. The receivership has only been in existence for approximately nine months; receiverships that have been pending for more than twice that time have been described as “relatively youthful.” During that time, the Receiver has been engaged in the process of disentangling complicated financial transactions across dozens of entities, while also pursuing the sale of a multitude of real properties (both the complex assemblage that comprises the Commodore Properties themselves, as well as the entire portfolio of properties controlled by the Receivership Companies) in a manner that will benefit creditors and investors. Now that the Receiver has filed the Commodore Sale Motion, seeking to consummate a sale of the Commodore Properties that would put them in the hands of a

Buyer better situated to address and resolve the asserted defaults under the Ground Leases, the Ground Lessors have filed a Stay Relief Motion to seek to terminate the Ground Leases – relief that would substantially imperil the proposed transaction. *See also Callahan*, 2 F.Supp. 3d at 440 (denying lender stay relief where receivership case had been pending for 1½ years given the complicated nature of the case, particularly where lender had been receiving payments from other sources).

And while the Ground Lessors claim to have “straightforward” breach claims, the path to a final resolution for the Ground Lessors is far from clear or quick. As noted above, even if there were no stay, the Halpern Parties have a panoply of rights under their agreements with the Ground Lessors and under the Ground Leases which would enable them to cure defaults, nullify notices of termination, postpone and extend termination while seeking to cure, and demand new leases on the same terms from the Ground Lessors.

All of the *Wencke* factors argue against granting stay relief, which would substantially and materially interfere with the Receiver’s ability to pursue the sale of the Commodore Properties consistent with her responsibilities under the Receivership Order, to the detriment of creditors and investors. There are basically three ways in which the issues relating to the Commodore Property will resolve, and in all of them the Ground Lessors’ interests will be protected. Either:

1. The Court will approve, and the Receiver will consummate, the sale with Buyer, in which case the Buyer will be responsible for curing any defaults under the Ground Leases;
2. The Receiver’s sale to the Buyer does not close, in which event – absent a better option – the Receiver would likely consent to the Ground Lessors seeking to issue a default and the Halpern Parties exercising their remedies, in which case the Halpern Parties would have the opportunity to cure any defaults under the Ground Leases; or

3. If the Halpern Parties fail to exercise their remedies, then the Ground Lessors would be entitled to terminate the Ground Leases, and would take back leasehold interests they value at more than \$8 million, a windfall that is more than sufficient to compensate for any rent or other obligations that have not been paid in the interim.

In any of these scenarios, the Ground Lessors' interests are not at any substantial risk. On the other hand, granting their Stay Relief Motion would substantially imperil the \$28.2 million sale of the Commodore Properties proposed in the Commodore Sale Motion – all for the sake of a \$30,000/month claim that will ultimately be satisfied. The Ground Lessors are aware that if the Court grants stay relief that prevents the Receiver from closing as contemplated under the Sale Contract, the Sale Contract will terminate. The Ground Lessors have not “lost any sticks” – the Receivership Order stay merely requires them to wait a few more months to see if the Receiver can successfully consummate a transaction for the Commodore Properties.

C. Equity Does Not Support the Ground Lessors' Stay Relief Motion

Finally, the Ground Lessors argue that equitable principles support their request for relief. They contend that a receiver should be given a reasonable time to elect to assume or reject a contract under the receiver's control but that the receiver is obligated to pay rent during the time the property is under the receiver's control. The only authority they cite are three cases all more than a century old, none of which have been relied upon in any published decision in an SEC equity receivership case to impose an obligation on the receiver to pay rents on a current basis. *See Sunflower Oil v. Wilson*, 142 U.S. 313 (1892); *Dayton Hydraulic Co. v. Felsenthal*, 116 F. 961 (6th Cir. 1902); *Matthews v. Butte Machinery Co.*, 264 F. 801 (9th Cir. 1923).

Moreover, cases citing *Sunflower* make clear that it does not create any absolute entitlement to payment of rents on a current basis, but rather that compelling such payment is an

equitable determination that depends on the facts and circumstances. For instance, in *Irving Trust Co. v. Densmore*, 66 F.2d 21 (9th Cir. 1933), the court reversed an order requiring receivers to pay the rent stipulated in a lease, where (1) the receiver only had “constructive possession” but not “actual possession” of the leased premises; and (2) the order improperly required payment of the rent reserved in the lease, rather than “the reasonable rental value of the premises occupied by the receiver during his occupancy.” *Id.* at 23, citing *Clark on Receivers* (2d Ed.) Volume 1, § 442, pp. 600-01. Here, the Receiver has never taken actual possession of the 3138 Property or 3120 Property. They are currently incapable of actual possession because the 3138 Property is partially demolished, and the 3120 Property is a gutted shell with no improvements. For the same reason, the reasonable rental value of the premises in their current condition is nil.

And in *Empire Distilling Co. v. McNulta*, the court held that it was error to require a receiver to pay current rents “without any regard to funds in his hands, and without allegation that he has the present means to comply with the demands.” 77 F. 700, 704-05 (7th Cir. 1897). Neither the Ground Lessees nor their parent, Urbin Coconut Grove Partners LLC, presently have funds available by which to pay the Ground Lease monthly payments. The *Empire* court went on to note that subsequent proceedings in the underlying case reflected the sale of certain properties by the receiver subject to a condition that the buyer pay the claims against the receivership company, indicating that the landlord “has adequate remedy, not by petition against the receiver, but by petition against the purchaser.” *Id.* at 705. Likewise here, the Ground Lessors have adequate remedy against the Buyer if the sale closes, against the Halpern Parties if not, or failing both, by exercising their termination rights and realizing what by their own description would be an \$8 million windfall.

D. Court Should Not Require Payment of Rent or Tax Certificates

As noted above, there are three possible scenarios as to how the issues relating to the Commodore Properties will resolve, and in each of those scenarios the Ground Lessors are protected by the assumption of their obligations under the Ground Leases by either the Buyer or the Halpern Parties, or by the substantial equity cushion they have in the event they take back the leasehold interests through termination of the Ground Leases. The Ground Lessors claim that requiring payment of the rents and tax certificates is necessary “to ensure they are not ‘left holding the bag.’” (DE#245 at 19). But according to them, that “bag” has more than \$8 million in it, so in the “worst-case” scenario where the asserted defaults are not cured, the Ground Lessors’ successful exercise of their termination rights will more than compensate them for any delay in the lease payments or other obligations. Accordingly, there is no basis for compelling the Receiver to make payments under the Ground Leases on a current basis while she is pursuing consummation of the sale proposed in the Commodore Sale Motion.

If the proposed sale is not approved, or if the sale is approved and does not close in accordance with the Sale Contract, the Receiver would agree that stay relief should be revisited, and at that point would consider whether the Ground Lessors should be entitled to stay relief to issue a notice of default, and whether the Halpern Parties would likewise be entitled to stay relief to exercise their remedies with respect to the Commodore Properties subject to the Ground Leases.

To the extent the Court is inclined to require any payments to the Ground Lessors pending consummation of the Commodore sale, if approved, the Court should consider the absence of any actual possession by the Receiver, the reasonable rental value (if any) of the Ground Lease premises, the substantial protection afforded to the Ground Lessors by their “equity cushion” in the leasehold interests in the event of termination, and the apparent absence of any mortgage

obligation of the Ground Lessors with respect to the 3120 Property. If the Receiver was required to and elected to make any such payments from receivership funds, the Receiver would assert a first priority lien against the 3138 and 3120 Properties for any such payments made to preserve the Ground Lessees' interests in the Properties pending sale. *See Elliott*, 953 F.2d at 1576-77 (court may award receiver fees and costs for maintenance of collateral from property subject to a secured claim); *Gaskill v. Gordon*, 27 F.3d 248, 251 (7th Cir. 1994) (affirming decision to provide receiver with lien with priority over secured creditors when receiver's acts benefited the property).

CONCLUSION

The Receiver needs a relatively brief window of time within which to attempt to consummate the sale contemplated by the Commodore Sale Motion. If the sale does not close, the Receiver would be open to reconsidering the propriety of stay relief in favor of the Ground Lessors, and likely in favor of the Halpern Parties as well. But granting such relief now would substantially imperil a potential \$28.2 million transaction, all for the sake of a relatively small monthly rent obligation which the Ground Lessors are reasonably assured of ultimately recovering. Any weighing of the relative harms leans overwhelmingly in favor of the Receiver. The Court should deny the Ground Lessors' Stay Relief Motion.

Respectfully submitted,

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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