

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

SECURITIES AND EXCHANGE
COMMISSION, CASE NO. 1:23-cv-24903

Plaintiff,

v.

RISHI KAPOOR, et al.,

Defendants.

**CWL-CH, LLC, ASJAIA, LLC, AND VIEDEN GROVE OZ, LLC'S
MOTION FOR RECONSIDERATION OF ORDER
GRANTING RECEIVER'S MOTION TO APPROVE SETTLEMENT AGREEMENT
WITH THE HALPERN PARTIES RELATING TO THE
COMMODORE PROPERTIES, ETC.**

CWL-CH, LLC, ASJAIA, LLC, and VIEDEN GROVE OZ, LLC (jointly and severally referred to hereafter as the "CG Members"), by and through their undersigned counsel¹, pursuant to Rules 54(b), 59(e) and 60(b), Federal Rules of Civil Procedure and Rule 7.1, Southern District of Florida Local Rules, file their Motion for Reconsideration of this Court's Order Granting Receiver's Motion To Approve Settlement Agreement with the Halpern Parties Relating to the Commodore Properties and Distribution of Sale Proceeds and Back-Up Sale Contract [D.E. 333, hereafter, the "Halpern Settlement Approval Order"], and state:

BRIEF SUMMARY OF PROCEDURAL HISTORY:

¹ The CG Members and the undersigned counsel have appeared for the limited purpose of seeking relief from this Court's stay and to object to the sale of the Commodore Properties. The CG Members do not concede that this Court has jurisdiction over the liens that they have asserted in the Commodore Properties.



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A. State Court Proceedings.

1. For brevity, the CG Members incorporate herein their recitation of the procedural history of the State Court Proceedings as set forth in their pending Expedited Motion for Relief from Stay of Ancillary Litigation, etc. *See* D.E. 244 (hereafter, the “CG Members’ Stay Relief Motion”), pages 2 - 4. Briefly, that history reflects that before the Complaint was filed in the present case, the CG Members had sued defendants Kapoor and Urbin Coconut Grove Partners, LLC (“UCGPLLC”). *See CWL-CH LLC, et al. vs. Kapoor, et al.*, Miami-Dade Circuit Court Case No. 2022-024051-CA-01 (hereafter, the “State Court Case”). In the State Court Case, the CG Members caused five Notices of Lis Pendens to be recorded as to the Commodore Properties (the “Commodore NLPs”). *See* D.E. 244-1, D.E. 244-2, D.E. 244-3, D.E. 244-4, and D.E. 244-5. The Commodore NLPs remain liens of record as to the Commodore Properties.

2. In the State Court Case, the CG Members had challenged the validity of certain mortgage interests in the Commodore Properties. Those mortgages had been granted *ultra vires* by certain defendants and recorded by entities that were affiliated with Marty Halpern. Those mortgage interests also represent the consideration that the Receiver proposes to accept as a “credit bid,” as described in the Receiver's Motion to Approve Settlement Agreement with the Halpern Parties Relating to the Commodore Properties. *See* D.E. 310, which is discussed below.

B. Proceedings in the Present Case

3. On December 27, 2023, Plaintiff Securities & Exchanges Commission filed the Complaint in the present action.

4. On January 12, 2024, this Court entered the Receivership Order [D.E. 28]. Section VIII of that order (the “Stay Provision”) includes a broadly worded stay provision. *See* ¶ 26. That section includes the following (arguably one-sided) paragraph:



28. All Ancillary Proceedings are stayed in their entirety, and all courts having any jurisdiction thereof are enjoined from taking or permitting any action until further order of this Court. Further, as to a cause of action accrued or accruing *in favor of the Receivership Defendants against a third person or party*, any applicable statute of limitations is tolled during the period in which this injunction against commencement of legal proceedings is in effect as to that cause of action.

(Emphasis added.)

5. On August 12, 2024, the Halpern Parties filed their Notice of Appeal. *See* D.E. ____, citing the Order Granting in Part Receiver’s Motion to Approve Sale Free and Clear and Related Settlement Agreement and Claims Process [D.E. 185]. That Appeal was assigned Eleventh Circuit Court of Appeals Case No. 24-12635, which remains pending.

6. On September 24, 2024, the Receiver filed her Motion to Approve Sale of Commodore Properties Free and Clear of Liens, Encumbrances and Interests [D.E. 238, hereafter the “Receiver’s Commodore Sale Motion”]. In paragraphs 17.p. and 17.ff of her Commodore Sale Motion, the Receiver describes two of the Commodore NLPs, and characterized them as “liens or *lis pendens* recorded by claimants ...”. *See* D.E. 238, pages 9 – 12.

7. On October 4, 2024, the CG Members filed their Stay Relief Motion. *See* D.E. 244.

8. On October 15, 2024, after the deadline for doing so had been extended, the CG Members filed their Objection to the Receiver’s Commodore Sale Motion. *See* D.E. 265.

9. After the Receiver filed a response to D.E. 244, on October 31, 2024, the CG Members filed their Reply in Support of Motion for Relief from Stay of Ancillary Litigation. *See* D.E. 291.

10. On November 7, 2024, the Court set the Receiver’s Commodore Sale Motion [D.E. 238] and the CG Members’ Stay Relief Motion to be heard on November 27, 2024. *See* D.E. 294.



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11. On December 3, 2024, the Receiver filed her Motion to Approve Settlement Agreement with the Halpern Parties Relating to the Commodore Properties. *See* D.E. 310 (hereafter, the “Halpern Settlement Motion”).

12. On December 17, 2024, the CG Members filed their Response to the Receiver’s Halpern Settlement Motion. *See* D.E. 315. Therein, at page 11, the CG Members requested that this Court take judicial notice of the docket entries in the State Court Case. Those docket entries include the Commodore NLP’s.

13. On December 31, 2024, the Receiver filed her Reply to the CG Members’ Response to the Halpern Settlement Motion. *See* D.E. 320.

14. On January 6, 2025, this Court heard argument on several pending matters related to this case, including D.E. 244 and D.E. 310. *See* Minute Entry, D.E. 323.

15. On January 30, 2025, this Court entered the Halpern Settlement Approval Order. *See* D.E. 333.

16. On February 5, 2025, this Court entered its Order setting the CG Members Stay Relief Motion for Hearing. *See* D.E. 342. That hearing is presently set for March 5, 2025.

DISCUSSION OF POINTS AND AUTHORITIES:

A. Standard of Review.

The decision to grant a motion for reconsideration of a non-final order is committed to the sound discretion of the Court. *See Horowitch v. Diamond Aircraft Indus. Inc.*, No. 606-CV-1703-PCF-KRS, 2009 U.S. Dist. LEXIS 46440, 2009 WL 1537896, at *2 (M.D. Fla. June 2, 2009). This is the same standard applied to reconsideration of final orders pursuant to Rules 59(e) or 60(b), but the time limits under those Rules are not applicable to the reconsideration of a non-final order. *See id.* In support of its request for reconsideration, "the moving party must set forth facts or law of a



strongly convincing nature to induce the court to reverse its prior decision." *Id.* (citation omitted); see also *Winn-Dixie Stores, Inc. v. Se. Milk, Inc.*, No. 3:15-CV-1143-BJD-JBT, 2019 U.S. Dist. LEXIS 229578, 2019 WL 8273604, at *1 (M.D. Fla. Dec. 19, 2019).

Although Rule 54(b) does not set forth the specific factors a court may consider when deciding a motion for reconsideration, the Eleventh Circuit has suggested that Rule 54(b) mirrors those factors considered under Rule 60(b). See *Herman v. Hartford Life & Acc. Ins. Co.*, 508 F. App'x 923, 927 n.1 (11th Cir. 2013) ("Although Rule 54(b) does not delineate the parameters of a district court's discretion to reconsider interlocutory orders, we have at least indicated that Rule 54(b) takes after Rule 60(b)."); *Maldonado v. Snead*, 168 F. App'x 373, 386-87 (11th Cir. 2006) ("Although the district court reviewed Maldonado's motion under Rule 54(b) as a motion for reconsideration of a non-final order rather than under Rule 60(b) as a motion for relief from judgment, we see no reason to apply a different standard when the party seeks reconsideration of a non-final order than when the party seeks reconsideration of a final judgment.") (internal quotation marks and citation omitted); *Onita-Olojo v. Veolette Sellers*, No. 12-CIV-62064, 2016 U.S. Dist. LEXIS 198198, 2016 WL 11600719, at *1 (S.D. Fla. June 27, 2016) ("Motions for reconsideration, whether considered under Rule 54(b), Rule 59(b), or Rule 60(b) (like this one), are generally all evaluated under the same standard.").

B. The Pendency of the CG Members' Motion for Relief from Stay Warrants Reconsideration of the Halpern Settlement Order.

In the Halpern Settlement Approval Order, the Court stated as follows:

The Court further notes that the CG Investors have not – either in their objection or in their argument to the Court at hearing – provided any substantive explanation of how, as equity investors in the parent of the borrower entities, they have a valid, enforceable lien interest in the Commodore Properties.



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D.E. 333 at page 11. This observation overlooks all the briefing on the CG Members' Stay Relief Motion, which has remained unresolved for several months. For that reason, this Court has set that motion for hearing on March 5th. The setting appears to reflect this Court's assessment that it has not yet heard sufficient argument, or seen sufficient evidence, to render a decision on the CG Members' Stay Relief Motion.

When the Court reviews the briefing on the CG Members' Stay Relief Motion, the Court will see that the quote on page 11 of D.E. 333 reflects plain error. Contrary to the Court's observation, the CG Members have provided a substantive explanation of how they have a valid interest in the Commodore Properties. Because of this error, the Court has assumed that the Halpern Parties have valid mortgage interests that can serve as the consideration to support the settlement. That assumption is also plain error; before this Court can give credit to the mortgage interests that the Halpern Parties claim, it must adjudicate the CG Member's Stay Relief Motion. It must also receive evidence as to the validity or lack of validity of the Halpern Parties' claimed mortgage interests.

Again, in the due course of the State Court Action, the CG Members caused their Notices of Lis Pendens to be recorded as to each of the Commodore Properties. *See* D.E. 244-1 through D.E. 244-5. Thus, the question of whether the CG Members have a recorded interest to support their claims is squarely before the Court. In that regard, the question of whether a notice of lis pendens created a lien right was considered in *In re Whitehead*, 399 B.R. 570, 573 (Bankr. S.D. Fla. 2009). In that case, the bankruptcy court observed that:

although [the claimant] did not obtain a lien on the disputed property by virtue of his recording of notices of lis pendens outside the preference period, but that by putting the world on notice of his equitable claim to the properties, he acquired an interest superior to that of a hypothetical future bona fide purchaser.



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The *Whitehead* court further clarified its understanding of the effect of a lis pendens under Florida law, and ruled:

The Florida lis pendens statute provides, "[T]he filing for record of such notice of lis pendens shall constitute a bar to the enforcement against the property described ... of all interests and liens ... unrecorded at the time of filing for record such notice of lis pendens...." Fla. State. § 48.23(1)(b). Not only does this language seem to make clear that the interest acquired by Nemeroff by virtue of his recording the Notices of Lis Pendens was superior to that of a hypothetical future bona fide purchaser, but the policy rationale behind this logic is equally evident. Indeed, if the recordation of such a notice did not create a priority over all future parties (to the extent of the ultimate judgment), then the very nature of Florida's statute would be peculiar at best. Putting other parties on notice of pending litigation involving particular property, including Nemeroff's equitable claims here, is a consequential action: Under Florida substantive law, a party taking an interest in the affected property subsequent to the recording of the notice of lis pendens takes subject to the interests of the party filing the notice, as ultimately vindicated in the litigation as to which notice has been given. This is an entirely sensible result.

Ibid. The *Whitehead* ruling is especially pertinent in this case because the Commodore NLP's give notice to everyone, including this Court and the Receiver, that the CG Members have challenged the validity of the Halpern Mortgages. Thus, the Commodore NLPs advises everyone that the CG Members' interests can ripen into a valid and enforceable lien interest at the conclusion of the litigation that is shown on the notice. And, that litigation has not yet concluded; on March 5th, this Court will consider whether the State Court Action can proceed.

At this point, this Court has not yet determined whether the CG Members will be granted relief from the Stay. As such, there is a real possibility that this Court or the Eleventh Circuit will allow the CG Members to proceed with the litigation that is the subject of the Commodore NLP's. Aside from the Stay that is the subject of the CG Members' motion, no party in this action has stated a plausible basis upon which any court could find that the Commodore NLP's are invalid or unenforceable.

Indeed, the Commodore NLP's exist to provide notice that there is a substantial question as to whether the Halpern Mortgages are enforceable. Thus, because the existence or enforceability



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of the Commodore NLP's has not yet been decided by a court, the question of the enforceability of the Halpern Mortgages also remains unresolved. As the Florida Supreme Court observed in *Med. Facilities Dev. v. Little Arch Creek Props.*, 675 So. 2d 915, 917 (Fla. 1996):

While the term "lis pendens" literally implies a pending suit, it is defined as the jurisdiction, power, or control which courts acquire over property involved in a pending suit. *See DePass v. Chitty*, 90 Fla. 77, 105 So. 148 (1925). A notice of lis pendens or actual notice filed on the public records, *see* § 48.23(1)(a), Fla. Stat. (1995), protects both the lis-pendens proponent and third parties. **The notice protects the lis-pendens proponent's interest both from extinguishment and from any impairment from intervening liens.** *See Chiusolo*, 614 So. 2d at 492. The notice also protects future purchasers or encumbrancers of the property by informing them that there is a current suit involving the property's title. *Id.* It is this protection afforded to third parties which distinguishes a lis pendens from a typical injunction. *Id.*

(Emphasis added.) This ruling clearly shows that the Commodore NLP's protect the CG Members' claims from extinguishment. Thus, until the underlying question as to the enforceability of the Halpern Parties' claimed mortgages is resolved, it is highly unlikely that any title insurance company will be able to issue a clean policy covering the post-sale title to those properties.

Further, the Court will note that the State Court Action was dismissed without prejudice. Thus, it would be error for this Court or any subsequent title insurer to treat the State Court Action as if it has been concluded. Indeed, the CG Members continue to rely upon the decision in *United States Bank Nat Ass'n v. Quadomain Condominium Ass'n*, 103 So. 3d 977, 979-80 (Fla. 4th DCA 2012) ("the court presiding over the action which created the lis pendens has exclusive jurisdiction to adjudicate any encumbrance or interest in the subject property from the date the lis pendens is recorded to the date it enters final judgment."). At least one opinion in this Court has cited *Quadomain* approvingly. *See Dorsten v. SLF Series G, Ltd. Liab. Co. (In re Hunter Hosp'y Ltd. Liab. Co.)*, No. 15-CIV-61235, 2015 U.S. Dist. LEXIS 126060, at *24-25 (S.D. Fla. Sep. 21, 2015). Therefore, both title insurance companies and this Court should consider whether the



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doctrine of “prior exclusive jurisdiction” would render inoperative the Stay and the Halpern Settlement Approval Order.

The Court will note that the Commodore NLP’s rest upon the mortgages that were recorded by the Halpern Parties against the Commodore Properties. Even though those mortgage documents are of questionable validity, the recording of these questioned mortgages puts this case squarely within the holding in *Weiss v. Bi 27, LLC*, 388 So.3d 189, 193 (Fla DCA 3rd 2023) (“the proponent of a claim maintains a lis pendens as a matter of right” where the action is “founded upon a duly recorded instrument”). In *Weiss*, as in the present case, the plaintiff challenged the validity of certain mortgage interests that were founded upon a recorded mortgage. For that reason, the Third DCA ruled that the limitations in Fla. Stat. §§ 48.23(1)(b)(1) and (b)(2) did not apply and that the claimant maintained the lis pendens as a matter of right. Moreover, because the CG Members’ claims are founded on the albeit dubious recorded mortgages, they are arguably not subject to the one-year limitation stated in Fla. Stat. § 48.23(2).

Finally, the Court will also note that the Halpern Parties have filed a Notice of Appeal that raises significant issues regarding this Court’s authority to proceed with judicial sales under 28 U.S.C. §§ 2001 *et seq.* in this case. Even though the Receiver and the Halpern Parties have entered their settlement, the Halpern Parties’ appeal remains pending. The Eleventh Circuit has not returned a Mandate as to that appeal. Accordingly, it is highly questionable whether this Court has jurisdiction to proceed on any issue that is the subject of the pending appeal, including whether it can approve or confirm a sale under 28 U.S.C. §2001(b) that would allow a Receivership Property to be sold free and clear of the CG Members’ NLP’s. See *SEC v. Nadel*, No. 8:09-cv-87-T-26TBM, 2013 U.S. Dist. LEXIS 144309, at *6-8 (M.D. Fla. Sep. 27, 2013) (“Generally, the ‘filing of a notice of appeal divests the district court of jurisdiction over the aspects of the case involved in



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the appeal.”). If the Court proceeds with such a sale and allows the Halpern Parties to enjoy the fruits of the Halpern Settlement Approval Order on the basis of the Halpern Parties’ questioned mortgage interests, at the appropriate time, the CG Members expect to file a Notice of Appeal that parrots the Halpern Appeal’s arguments, at least in part.

WHEREFORE, CWL-CH, LLC, ASJAIA, LLC, and VIEDEN GROVE OZ, LLC, respectfully request that the Court enter an order retracting this Court’s Order Granting Receiver’s Motion To Approve Settlement Agreement with the Halpern Parties Relating to the Commodore Properties and Distribution of Sale Proceeds and Back-Up Sale Contract [D.E. 333], and for any further relief this Court deems just and proper.

Rule 7.1(a)(3) Certificate of Pre-Filing Conference

Undersigned counsel certifies that he has not been able to communicate with counsel for Plaintiff S.E.C., the Receiver, or the Halpern Parties to determine their position. However, each of these counsels has previously filed documents in this case that make it abundantly clear that they would oppose the relief sought herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 13th, 2025, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, and that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

By: /s/ Brian Barakat

BRIAN BARAKAT



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