UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 1:23-24903-CIV-JB

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

RISHI KAPOOR, et al.

Defendants.
_____/

NON-PARTY, MARTIN HALPERN, AS TRUSTEE OF THE MARTIN L. HALPERN REVOCABLE TRUST AND TRUSTEE OF THE HALPERN FAMILY TRUSTS' RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION OF ORDER GRANTING RECEIVER'S MOTION TO APPROVE SETTLEMENT AGREEMENT WITH THE HALPERN PARTIES

Non-Party Movants, Martin I. Halpern, as Trustee of the Martin I. Halpern Revocable Trust and as Trustee of the Halpern Family Trust ("the Trusts" or "Non-Party Movants") submit their opposition to Defendants, CWL-CH, LLC, ASJAIA, LLC, and Viden Grove Oz, LLC's (the "CG Investors") Motion for Reconsideration of 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 (the "Halpern Settlement Approval Order") (the "Motion" or "Motion for Reconsideration"), (DE 344, 333), and state the following in support:

INTRODUCTION

This Court allowed for the sale of the Commodore Properties in the Halpern Settlement Approval Order (DE 333). In response to the Court's order, the CG Investors filed their Motion for Reconsideration, which fails to meet the CG Investors' burden of coming forward with strong

evidence of new facts or legal arguments to warrant reconsideration of this Court's well-reasoned decision. Instead, the CG Investors make the same arguments as they did in their *unrelated* Motion for Relief from Stay of Ancillary Litigation (the "Motion for Stay") (DE 244) and fail to demonstrate clear error from the Court. In fact, the CG Investors' Motion for Reconsideration attempts to relitigate the same arguments this Court rejected and misrepresents the nature of a lis pendens when making these arguments in hopes of inviting error. Therefore, their Motion should be denied.

RELEVANT FACTUAL BACKGROUND

1. Procedural History

On September 24, 2024, the Receiver filed a Motion to Approve Sale of the Commodore Properties Free and Clear of Liens, Encumbrances and Interests (the "Motion to Approve Sale") (DE 238). In the Motion to Approve Sale, the Receiver sought to approve a sale contract (the "First Sale Contract") with all liens, encumbrances, and interests attaching to the net sale proceeds with the same priority, extent, and validity as they had prior to the receivership, providing that the Receiver will file an appropriate pleading to address disbursement of the net sale proceeds at a later date with notice to be provided to all lien claimants known to the Receiver who may object to the proposed distribution and be heard by the Court. *Id*. at 19. Shortly thereafter, the CG Investors filed their Motion for Stay to prevent the sale of the Commodore Properties and caused five Lis Pendens to be recorded on the properties (DE 244). The Receiver filed a response to the CG Investors' Motion for Stay and the CG Investors filed a reply to the Receiver's Motion to Approve Sale (DE 291). This Court set the Receiver's Motion for hearing (DE 294) on November 27, 2024.

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2. The Halpern Settlement Motion and the Halpern Settlement Order

On December 3, 2024, the Receiver filed the Motion to Approve Settlement Agreement with the Halpern Parties Relating to the Commodore Properties (the "Halpern Settlement Motion") (DE 310). In the Halpern Settlement Motion, the Receiver sought approval for a settlement agreement with the Trusts, which called for a back-up sale of the Commodore Properties, subject and subordinate to the First Sale Contract, and approval of the proposed disbursement of sale proceeds from the First Sale Contract, which is part of the settlement agreement. *Id*. The Receiver opined the settlement agreement is a fair resolution with respect to the administration of the Commodore Properties and is well within the range of reasonableness. *Id*. at 17. Moreover, the Receiver represented the settlement agreement would provide hundreds of thousands of dollars for the benefit of the receivership estate, as well as the interested parties. *Id*. at 18.

The CG Investors filed a response to the Halpern Settlement Motion (DE 315) and the Receiver filed a reply (DE 320). On January 6, this Court heard arguments on the Halpern Settlement Motion, and other matters. DE 323. On January 30, 2025, this Court entered the Halpern Settlement Approval Order. DE 333. In the Halpern Settlement Approval Order, the Court emphasized it previously determined the court's broad powers and wide discretion to determine relief in an equity receivership included the power to authorize the sale of real property free and clear of liens, claims, interests, and encumbrances. *Id*. at 8; DE 185. This Court agreed with the Receiver's claim that the settlement agreement with the Trusts constituted "a fair resolution with respect to the administration of the Commodore Properties and is well within the range of reasonableness." DE 333, at 9. Furthermore, this Court stated it "considered, and overruled, the objection to the Motion filed by the CG Investors, [DE 315]." *Id*. at 10. In overruling the CG

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Investors' objections to the Motion, the Court recognized the CG Investors' objection that the Halpern Settlement Motion would "eliminate the claim process" for the CG Investors, but found the "CG Investors, like all other investors in the Receivership Companies, will have an opportunity to submit a claim and to be heard on any distribution plan proposed by the Receiver in this case." *Id*. Again, the Court relied on the fact that the CG Investors were unsecured lenders and had no rights to the Commodore Properties.

Moreover, the Court rejected the CG Investors' argument that the proposed settlement would violate the Court's interpretation of *S.E.C. v. Wells Fargo Bank, N.A*., 848 F.3d 1339 (11th Cir. 2017). *Id*. Instead, this Court noted that *Wells Fargo* held the Court could not require a secured party to submit a claim and participate in a claim process to preserve a **lien interest**. *Id*. The Court interpreted *Wells Fargo's* holding to mean the Receiver is not estopped from negotiating and seeking approval of a settlement of lien claims against Receivership Property, nor does it preclude the Court from approving such a settlement if it is fair and equitable and within the range of reasonableness. *Id*. at 10-11. This Court acknowledged the CG Investors, as affected persons, had the right to object and be heard, as they did. *Id*. at 11. The Court found the CG Investors objection that a challenged lien cannot support a credit bid disregards the settlement agreement at issue, which would resolve any lien disputes for purposes of distribution of the proceeds of a sale. *Id*. Lastly, and most importantly, the noted the CG Investors, via objection and argument at hearing, have not "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." *Id*.

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ARGUMENT

1. Standards on Motion for Reconsideration

Although the court has discretion, courts have consistently explained that reconsideration of a prior order is "an extraordinary remedy to be used sparingly." *See United States v. Thompson*, No. 24-10469, 2024 WL 4471414, at *3 n.2 (11th Cir. Oct. 11, 2024) (quoting *Burger King Corp. v. Ashland Equities, Inc.,* 181 F. Supp. 2d 1366, 1369-70 (S.D. Fla. 2002)); *see also Galbert v. W. Caribbean Airways*, 715 F.3d 1290, 1294 (11th Cir. 2013). Furthermore, a motion for reconsideration "may not be used to relitigate old matters" or to raise arguments or present evidence that could have been presented prior to the entry of judgment." *See Su v. Local 568, Transp. Workers Union of Am., AFL-CIO*, 699 F. Supp. 3d 1333, 1338 (S.D. Fla. 2023) (quoting *Exxon Shipping Co. v. Baker*, *rvs., LLC*, 805 F. App'x 981, 984 (11th Cir. 2020).

"The burden is upon the movant to establish the extraordinary circumstances supporting reconsideration." *Saint Croix Club of Naples, Inc. v. QBE Ins. Corp*., No. 2:07-cv-00468-JLQ, 2009 WL 10670066, at *1 (M.D. Fla. June 15, 2009) (citing *Taylor Woodrow Constr. Corp. v. Sarasota/Manatee Airport Auth*., 814 F. Supp. 1072, 1073 (M.D. Fla. 1993)). "[T]he movant must do more than simply restate his or her previous arguments, and any arguments the movant failed to raise in the earlier motion will be deemed waived." *Compania de Elaborados de Cafe v. Cardinal Capital Mgmt.,* Inc., 401 F. Supp. 2d 1270, 1283 (S.D. Fla. 2003).

> A motion for reconsideration must do two things. First, it must demonstrate some reason why the court should reconsider its prior decision. Second, it must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. Courts have distilled three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice.

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Cover v. Wal-Mart Stores, Inc., 148 F.R.D. 294, 295 (M.D. Fla. 1993) (citations omitted). "Such problems rarely arise and the motion to reconsider should be equally rare." *Burger King Corp.,*181 F. Supp. 2d at 1369.

Since court opinions "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure," a motion for reconsideration must clearly "set forth facts or law of a strongly convincing nature to demonstrate to the Court the reason to reverse its prior decision." *Am. Ass'n of People With Disabilities v. Hood*, 278 F. Supp. 2d 1337, 1339, 1340 (M.D. Fla. 2003) (citations omitted). Accordingly, a court will not reconsider its prior ruling without a showing of "clear and obvious error where the 'interests of justice' demand correction." *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.,* No. 6:11-cv-1637-Orl-31, 2013 WL 425827, at *1 (M.D. Fla. Feb. 4, 2013) (quoting *Am. Home Assurance Co. v. Glenn Estess & Assoc.*, 763 F.2d 1237, 1239 (11th Cir. 1985)). Thus, a motion for reconsideration should be denied where, as here, a party merely repeats the same arguments, fails to present any strong new evidence or arguments, and fails to demonstrate the need to correct clear error.

2. The Court Correctly Granted the Receiver's Motion to Approve Settlement Agreement with the Halpern Parties.

In responding to the Court's holding that the CG Investors did not provide an explanation regarding as to how its alleged enforceable lien interest exists, because they have no enforceable lien rights, instead, the CG Investors referred the Court to its Motion for Stay as somehow including something overlooked. DE 344 at 6. The CG Investors' Motion for Reconsideration *assumes* the Court made the assessment that it had not yet heard sufficient argument on the matter, but ignores the Court's finding that it "considered, and overruled, the objection to the Motion [for Stay] filed by the CG Investors, [DE 315]." (emphasis added). The CG Investors cannot seek

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reconsideration based on their prior unsuccessful arguments. *See Su*, 699 F. Supp. 3d at 1338; *see Hood*, 278 F. Supp. 2d at 1339-40; *see Cover*, 148 F.R.D. at 295.

Additionally, the CG Investors attempt to raise new arguments that they should have raised before. *Cardinal Capital Mgmt,* 401 F. Supp. 2d at 1283. The CG Investors grasp at straws and attempt to argue the Halpern Settlement Order should be reconsidered because a title insurance company would not issue a clean policy to the Commodore Properties after their sale. DE 344 at 8. This argument clearly ignores this Court's declaration that it could authorize the sale of real property free and clear of liens, claims, interests, and encumbrances. *See* Halpern Settlement Approval Order, DE 333. Additionally, the Court acknowledged a challenged lien cannot support a credit bid disregards the settlement agreement at issue, which resolves any lien disputes for purposes of distribution of the proceeds of a sale. *Id*. In accordance with *Cardinal Capital Management*, these arguments the CG Investors failed to raise in their earlier motion must be deemed waived. 401 F. Supp. 2d at 1283.

The CG Investors also fail to identify any legal error in this Court's analysis of the Halpern Settlement Motion. The Motion alleges the Court made plain error by adjudicating the Halpern Settlement Order before adjudicating the CG Investors' Motion for Stay. *Id*. This ignores the widely known proposition that "courts have broad authority to control their dockets, and decisions related to timing issues are reviewable only for abuse of discretion." *McLaurin v. Terminix Int'l Co., LP*, 13 F.4th 1232, 1237 (11th Cir. 2021). Moreover, the CG Investors point this Court to a state action that was dismissed (without prejudice) and alleges it would be error for this Court to treat a dismissed state action as concluded. *Id*. The state court action, even if it was ongoing, does not provide the CG Investors with any property rights, much less lien rights. Moreover, as

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discussed below, a lis pendens without a pending state action is meaningless. As a result of the CG Investors' failure to identify legal error in the Halpern Settlement Approval Order, their Motion for Reconsideration should be denied. *See Bhogaita,* 2013 WL 425827, at *1.

3. The CG Investors Misconstrue the Effect and Substance of a Lis Pendens.

The CG Investors' incorrectly claim that their lis pendens filed in a lawsuit, they admit was dismissed, provides a "recorded interest" in the Commodore Properties. In doing so, they intentionally misconstrue this Court's ruling which denied their objection because it found that "CG Investors have not… provided any substantive explanation of how…they have a valid, **enforceable lien interest** in the Commodore Properties." DE 333 at 11. The CG Investors misread the holding of *In re Whitehead*, 399 B.R. 570, 573 (Bankr. S.D. Fla. 2009) and argue the CG Investors' lis pendens is an 'enforceable lien' at the end of the litigation. *Id*. at 7. There is no legal basis for this conclusion. To the contrary, a lis pendens does not give right to lien rights, instead, "[t]he purpose of a notice of lis pendens is to alert creditors, prospective purchasers and others to the fact that the title to a particular piece of real property is involved in litigation." *United States v. Rivera*, No. 22-20552-CR, 2023 WL 4363544, at *2 (S.D. Fla. July 6, 2023) (quoting *Sheehan v. Reinhardt ex rel. Est. of Warren,* 988 So. 2d 1289, 1290 (Fla. 2d DCA 2008)). As explained by *Adhin v. First Horizon Home Loans*, "'Lis pendens' literally means a pending lawsuit, and is defined as the jurisdiction, power, or control that courts acquire over property involved in a pending suit." 44 So. 3d 1245, 1251 (Fla. 5th DCA 2010) (citing *See De Pass v. Chitty,* 90 Fla. 77, 105 So. 148, 149 (Fla. 1925)).

The notice of lis pendens is "at common law, intended to warn all persons that a certain piece of property was the subject of litigation, and that any interests acquired during the pendency

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of the suit were subject to its outcome." *Adhin*, 44 So. 3d at 1251. Thus, "notice of lis pendens also operates to protect its proponent by preventing intervening liens that could impair or extinguish claimed property rights." *Id*. (citing *Chiusolo v. Kennedy*, 614 So.2d 491, 492 (Fla.1993) (explaining that a lis pendens exists to give notice of a suit that "could" affect title)); *see also S & T Builders v. Globe Props., Inc.*, 944 So.2d 302, 303 n. 1 (Fla.2006) (a notice of lis pendens protects both the lis pendens proponent and third parties by alerting "creditors, prospective purchasers and others to the fact that the title to a particular piece of real property is involved in litigation." Consequently, a lis pendens provides notice to the world of a pending lawsuit, but it provides no rights on real property. More importantly, without pending litigation there can be no lis pendens. Florida Rule of Civil Procedure 1.420(f) states as much:

> (f) Effect on Lis Pendens. If a notice of lis pendens has been filed in connection with a claim for affirmative relief that is dismissed under this rule, the notice of lis pendens connected with the dismissed claim is automatically dissolved at the same time.

Consequently, once the CG Investors' suit was dismissed, their lis pendens dissolved by operation of law. Accordingly, there are no pending lis pendens and the dissolved lis pendens cannot form the basis of an interest in real property, much less a lien interest as required for them to asserts rights under *Wells Fargo.*

Nevertheless, even if the lis pendens were not dissolved by operation of law, a lis pendens itself provides no lien rights or interest in real property. One cannot foreclose on a lis pendens nor does the recorded document grant any interest in real property such as an easement, mortgage or lien would. Instead, as discussed above, it merely gives notice to subsequent purchasers that an equitable claim is pending. The CG Investors conflate the fact that a lis pendens gives constructive

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notice under the applicable recording statute to subsequent purchasers (and the legal implication of such notice has on priority) with a lis pendens granting lien rights in real property. As evidenced by the case law cited above, the lis pendens only give notice of a lawsuit that, **if successful,** would affect priority as to subsequent purchasers (or liens).

Despite the fact that a lis pendens is simply a tool to give constructive notice, the CG Investors misrepresent the effect and purpose of a lis pendens claiming that it is in essence superior to lien and itself a lien. However, the lis pendens do not grant the CG Investors rights in the Commodore Properties, nor are they liens encumbering the property. *Pilato v. Edge Inv'rs, L.P.*, 609 F. Supp. 2d 1301, 1309 (S.D. Fla. 2009) (explaining that a lis pendens does not give a party actual possession and ownership interest in real property, and does not prevent the property from being bought by a third party); *see also Haisfield v. ACP Florida Holdings, Inc.,* 629 So.2d 963, 965 (Fla. 4th DCA 1993)("a lis pendens technically does not prevent the sale of the property, nor is it a lien on the property"). Therefore, the Court correctly observed the CG Investors have not identified they have valid, enforceable liens against the Commodore Properties. Accordingly, the CG Investors' reliance on their lis pendens should be disregarded, and the Motion for Reconsideration should be denied.

CONCLUSION

Because the CG Investors' Motion impermissibly (1) reargues points previously raised, (2) attempts to make arguments that should have been made prior, (3) has not shown clear error, and (4) improperly relies on their lis pendens, their Motion for Reconsideration should be denied.

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Dated: February 27, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via CM/ECF on February 27, 2025 on the Parties listed within CM/ECF.

/s/ Mark F. Raymond
Mark F. Raymond, Esq.