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 TO CG INVESTORS' MOTION FOR RECONSIDERATION OF ORDER APPROVING SETTLEMENT AGREEMENT WITH HALPERN PARTIES RELATING TO COMMODORE PROPERTIES

Bernice C. Lee, as Receiver over the Receivership Companies,[1] submits this response in opposition to the Motion for Reconsideration (ECF No. 344) filed by CWL-CH, LLC, ASJAIA LLC and Vieden Grove Oz, LLC ("CG Investors"). The CG Investors have failed to demonstrate any basis for reconsideration of the 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 (ECF No. 333) ("Halpern Commodore Settlement Order").

In the Halpern Commodore Settlement Order, the Court found and concluded that the proposed settlement between the Receiver and the Halpern Parties constituted a fair resolution with respect to the administration of the Commodore Properties and was well within the range of reasonableness. *Id.* at 8-9. In so doing, the Court noted that the proposed settlement contemplated

[1] Capitalized terms not otherwise defined shall have the meanings given in the Receiver's Motion to Settlement Agreement with Halpern Parties Relating to the Commodore Properties and Distribution of Sale Proceeds and Back-Up Sale Contract (ECF No. 310) ("Halpern Commodore Settlement Motion").

the Halpern Parties accepting an amount that was at least $1.5 million less than the asserted principal balance of their mortgage loans in full satisfaction of their claims against the Commodore Properties, while providing a $600,000 cash carve-out to the receivership estate from the First Sale Contract, if it closes, and an $800,000 cash carve-out to the receivership estate from the Halpern Back-Up Sale Contract if the First Sale Contract does not close, while also providing for the Halpern Parties to pay the rent obligations to the 3138/3120 Ground Lessors pending closing. *Id.* at 9.

With regard to the CG Investors' objection to the Halpern Commodore Settlement Motion, the Court found and concluded that (1) their objection that the motion "eliminated" the claim process for the CG Investors was unfounded because they would still be able to submit a claim and be heard on any distribution plan proposed by the Receiver in the case; (2) their objection that the factual background in support of the motion was incomplete because it did not refer to the matters they had asserted in their own filings was unsupported because those matters were all of record in the case; (3) their objection that the proposed sale by credit bid to the Halpern Parties did not comply with 28 U.S.C. § 2001 was premature because the Receiver would be filing a further motion to seek approval of the Halpern Back-Up Sale Contract; (4) their objection that the settlement did not comply with *S.E.C. v. Wells Fargo Bank, N.A.*, 848 F.3d 1339 (11th Cir. 2017) was legally incorrect, because nothing in *Wells Fargo* precludes a receiver from negotiating and seeking approval of a settlement of lien claims against receivership property, nor preclude the court from approving such a settlement if fair and equitable and within the range of reasonableness, with affected persons having the right to object and be heard; and (5) their objection that a challenged lien cannot support a credit bid disregarded that the motion encompassed a resolution of any lien dispute. The Court further noted that the CG Investors had failed – either in their objection or in

their argument to the Court – to provide any substantive explanation for how they, as equity investors in the parent of the borrower entities which owned the Commodore Properties, had a valid, enforceable lien interest in the Commodore Properties. *Id.* at 10-11.

In their Motion for Reconsideration, the CG Investors do not directly address any of the five matters ruled upon in the Halpern Commodore Settlement Order. Instead, they attempt to (re)argue that the Court's statement that they had failed to provide a substantive explanation for their purported lien interest in the Commodore Properties was "plain error." ECF No. 344 at 6.

1. Standard of Review.

The CG Investors assert that the standard applicable to their Motion for Reconsideration is that they must set forth "facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Id.* at 4-5, citing *Horowitch v. Diamond Aircraft Indus. Inc.*, No. 606-CV-1703-PCF-KRS, 2009 WL 1537896 (M.D. Fla. Jun. 2, 2009). *Horowitch* does say that; but importantly it says more that is directly relevant to the Motion for Reconsideration. In the next two sentences immediately following that which the CG Investors quoted, *Horowitch* further states that "A motion for reconsideration should not be used to set forth new theories of law or to reiterate arguments already made," and that "Reconsideration of a previous order is an extraordinary remedy to be employed sparingly." *Id.* at *3, citing *Mays v. U.S. Postal Serv.*, 122 F.3d 43, 46 (11th Cir. 1997) and *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002).

Several other cases apply the same standard. *See, e.g., Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to entry of order); *Global Network Mgmt., Ltd. v. Cirion Techs., LLC*, No. 20-cv-2023-JB, 2024 WL 5372673, *2

(S.D. Fla. Dec. 28, 2024) (reconsideration is an "extraordinary remedy to be employed sparingly," "should not be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made," and is appropriate only where "the Court has patently misunderstood a party, or has made a decision outside of the adversarial issues presented to the Court by the parties, or has made an error not of reasoning, but of apprehension").

The Motion for Reconsideration is predicated on the entirely unsupported assumption that this Court entered the Halpern Commodore Settlement Order without having read or considered the CG Investors' Stay Relief Motion filed on October 4, 2024. The Motion for Reconsideration states: "This observation overlooks all the briefing on the CG Members' Stay Relief Motion, which has remained unresolved for several months.". ECF No. 344 at 6. While such an assumption would be inappropriate in most circumstances, it is particularly inappropriate here, where (1) the Court had initially set the Stay Relief Motion for hearing on November 21, 2024 (ECF No. 294), more than a week before the Halpern Commodore Settlement Motion was filed on December 3, 2024 (ECF No. 310); and (2) in response to the CG Investors' objection that the factual recitations in support of the motion were incomplete because they did not recite the matters contained in the CG Investors' court filings, the Halpern Commodore Settlement Order itself specifically notes that those filings were already of record in the case.

Similarly, the CG Investors' argument that "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," ECF No. 344 at 6, simply disregards or reargues the Court's recognition that the Commodore Halpern Settlement Motion comprises a *settlement* of any lien dispute, subject to approval if fair and equitable and within the range of reasonableness. ECF No. 333 at 11. The pendency of the Stay Relief Motion has no impact on the Court's determination that the settlement

embodied in the Halpern Commodore Settlement Motion is a fair and equitable resolution within the range of reasonableness. The CG Investors' "exclusive jurisdiction" argument, citing to *U.S. Bank Nat'l Ass'n v. Quadomain Condo. Ass'n*, 103 So. 3d 977 (Fla. 4th DCA 2012), on the other hand, represents an argument that the CG Investors failed to raise in response to the Halpern Commodore Settlement Motion (though they did assert it in the briefing on their Stay Relief Motion). ECF No. 344 at 8-9.[2]

The Motion for Reconsideration simply reargues matters already presented to the Court and does not identify any patent misunderstanding by the Court, any decision outside the adversarial issues presented by the parties, or any error of apprehension. On this basis alone, it can and should be denied.

2. A Notice of Lis Pendens is Not a Substantive Lien Right.

To the extent the Court nonetheless invites reconsideration of the Halpern Commodore Settlement Order, the Motion for Reconsideration is still deficient. In an effort to address the Court's comment that the CG Investors failed to provide a substantive explanation for how they, as minority equity investors in the parent company to the entities that own the Commodore

[2] In any event, the argument runs directly contrary to the very first paragraph of the decretal portion of the Receivership Order, which states that "The Court takes exclusive jurisdiction and possession of the assets of whatever kind and wherever situated, of the Company Defendants," ECF No. 28 at 3, consistent with the Court's "broad powers and wide discretion to determine relief in an equity receivership," *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992), as well as the statutory authority vesting complete jurisdiction and control over all receivership property in the appointing court and receiver, *see* 28 U.S.C. § 754; Wright & Miller, Federal Practice and Procedure § 2985 (3d ed.(("Section 754 … give the appointing court and the receiver exclusive jurisdiction over all of defendant's property[.]"). While the CG Investors assert that at least one decision by this court has cited approvingly to *Quadomain*, it did not do so for the "exclusive jurisdiction" proposition relied on by the CG Investors, but only for the proposition that a recorded lis pendens can bind subsequent purchasers. *See Dorsten v. SLF Series G, LLC (In re Hunter Hosp'y LLC)*, No. 15-CIV-61235, 2015 WL 5542590, *8 (S.D. Fla. Sep. 21, 2015)

Properties, have valid, enforceable lien interests in the Commodore Properties, the CG Investors refer to the case of *In re Whitehead*, 399 B.R. 570 (Bankr. S.D. Fla. 2009). But *Whitehead* actually confirms that the filing of a notice of lis pendens does not itself create any substantive lien right, but rather only serves to put other persons on notice of an asserted interest. In *Whitehead*, former Bankruptcy Judge Olson quotes former Bankruptcy Judge Weaver's holding that "the filing and recording of a lis pendens in the instant case did not create a lien right in favor of the defendant," and goes on to note that "Judge Weaver was right in concluding that the mere filing of a notice of lis pendens does not create a lien …". *Id.* at 573, citing *In re Sierra*, 79 B.R. 89, 91 (Bankr. S.D. Fla. 1987).[3] Nothing in *Whitehead* supports or explains any substantive ownership or lien right of the CG Investors in the Commodore Properties themselves.

Even if the CG Investors were to successfully challenge the Halpern Parties' mortgages in state court, or prevail on claims that the manager of the entity they invested in breached the Operating Agreement or committed other breaches of duty, that still does not establish that the CG Investors themselves have valid enforceable lien interests in the Commodore Properties owned by the subsidiaries of the entity in which they made an equity investment. They cite to *Weiss v. Bi 27, LLC*, 388 So. 3d 189 (Fla. 3d DCA 2023) for the proposition that "'the proponent of a claim maintains a lis pendens as a matter of right' where the action is 'founded upon a duly recorded instrument,'" and argue that because their (now dismissed) state court lawsuit challenged the Halpern Parties' liens, it was "founded upon a duly recorded instrument." First, their reading of

[3] The *Whitehead* court went on to conclude that while recording a notice of lis pendens does not itself create any substantive lien right, it does confer an interest in property by providing notice to subsequent third party purchasers in the event the party ultimately prevails on their underlying claim against the property. In the *Whitehead* case, that claim arose from an unrecorded mortgage deed executed by the debtor in favor of the claimant with respect to seven of the debtor's properties, and the debtor's breach of the mortgage.

the *Weiss* case is off target: the *Weiss* court actually expressly declined to decide whether the provisions of Fla. Stat. § 48.23(1)(b) regarding notices of lis pendens based on a duly recorded instrument applied: "[W]e find it unnecessary to decide this issue because other factors are dispositive." *Weiss*, 388 So. 3d at 193.

But more importantly, the CG Investors' misapplication of *Weiss* – that because they are seeking to challenge a duly recorded instrument (the Halpern Parties' mortgages), their own claim is itself founded upon a duly recorded instrument – is directly foreclosed by Florida Supreme Court precedent. In *Am. Legion Cmty. Club v. Diamond*, 561 So.2d 268 (Fla. 1990), the Florida Supreme Court held that a suit to set aside a conveyance of real property is not an action "founded on a duly recorded instrument" within the meaning of Fla. Stat. § 48.23. In so doing, it distinguished between claims which are "founded on the terms and provisions of the deed" versus claims that are based on "circumstances surrounding the execution of the deed." *Id.* at 271-72. As to the latter, such as claims to rescind, cancel or set aside a conveyance, those claims do not come within the "founded on a duly recorded instrument" provisions of § 48.23. *Id. See also Bode v. Wilmington Sav. Fund Society, FSB*, 356 So. 3d 907 (Fla. 3d DCA 2023) (citing *American Legion* in a per curiam affirmance of an order discharging a lis pendens); *Suarez v. KMD Const., Inc.*, 965 So. 2d 184, 187 (Fla. 5th DCA 2007) ("founded on a duly recorded instrument" provision "imposes a strict requirement that the lawsuit must be based on the terms contained in the recorded document itself"). The CG Investors' claim is not "founded on a duly recorded instrument" simply because they hope to challenge the Halpern Parties' duly recorded mortgages.

Absent a claim founded on a "duly recorded instrument," a claimant seeking to preserve a lis pendens under Florida law must demonstrate that their underlying claim has a "fair nexus" to the real property. A fair nexus between the litigation and the at-issue property requires the

proponent to show a good faith, viable claim concerning the legal or equitable ownership of the at-issue property. *See Nu-Vision, LLC v. Corp. Convenience, Inc.*, 965 So. 2d 232 (Fla. 5th DCA 2007). "In the absence of a duly recorded instrument, where there is no 'direct claim cognizable under the law against or upon the . . . property burdened by the lis pendens,' 'no lis pendens may be asserted under any conditions against the realty . . .'" *Ness Racquet Club, LLC v. Renzi Holdings, Inc.*, 959 So. 2d 758, 761 (Fla. 3d DCA 2007)(citing *Sunrise Point v. Foss*, 373 So.2d 438, 439 (Fla. 3d DCA 1979)).

The CG Investors' status as minority investors in CG Partners, and their assertion of breaches of the CG Partners' Operating Agreement, do not constitute such a "fair nexus" to the Commodore Properties owned by CG Partners' subsidiaries. The case of *Blue Star Palms, LLC v. LED Trust, LLC*, 128 So. 3d 36 (Fla. 3d DCA 2012) parallels the facts of this case. In *Blue Star*, the plaintiffs negotiated to become investors in Blue Star and Blue Star's parent company. *Id.* at 37. The Blue Star entities were formed to purchase 289 unsold condominiums. *Id.* Pursuant to the written contract, legal title to the condo properties was held by Blue Star, with any ownership interest in the properties two levels removed, in the form of membership interests in Blue Star's parent company. *Id.* at 39. Thereafter the defendants allegedly reneged on the deal and fraudulently failed to file the appropriate membership information with the state. *Id.*

The *Blue Star* court ruled that the lis pendens must be dissolved because the plaintiff's failed to show that the allegations of the complaint were connected to the title of the condominium units. *Id.* Claims for constructive trust and equitable lien were against the subsidiary companies rather than the specific condominium units. *Id.* Therefore, the plaintiffs failed to "establish a fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit. *Id.* (citing C*hiusolo v. Kennedy*, 614 So.2d 491, 492 (Fla.1993)); *see also Powerline*

Development Corp. v. Assor, 458 So.2d 305, 306 (Fla. 3d DCA 1984) (plaintiff's allegations of fraudulent transactions involving interest in a corporation did not directly affect the realty itself and could not support a lis pendens.). Similarly, an asserted interest in the profits to be derived from the marketing and sale of a real estate property (as distinguished from an interest in the property itself) cannot support a lis pendens. *See MCZ/Centrum Flamingo I, LLC v. AIMCO/Bethesda Holdings, Inc.*, 988 So. 2d 89, 89 (Fla. 3d DCA 2008); *Ness*, 959 So. 2d at 758–761.

Filing a notice of lis pendens does not create any substantive property interest. The Commodore Halpern Settlement Order correctly noted that the CG Investors had failed to provide any substantive explanation for how they, as minority equity investors in CG Partners, had an ownership or lien interest in the Commodore Properties owned by CG Partners' subsidiaries. And in any event, the Motion for Reconsideration fails to even challenge any of the Court's substantive rulings that the settlement is fair and equitable and within the range of reasonableness, and that the CG Investors' objections were unfounded. The CG Investors have failed to demonstrate any basis for reconsideration.

3. The Stewart Appeal is Irrelevant to the Court's Jurisdiction over the Halpern Commodore Settlement Motion.

Finally, the CG Investors argue that the pendency of the Halpern Parties' appeal of the Court's Order Granting in Part Receiver's Motion to Approve Sale Free and Clear and Related Settlement Agreement and Claims Process (the "Stewart Grove Sale Order") [ECF No. 185] divests this Court of jurisdiction to enter the Halpern Commodore Sale Order. This argument is of no moment because (1) the Stewart Grove Sale Order addresses an entirely different property than the Commodore Properties; (2) the Court has already noted in the Commodore Halpern Sale Order that the 28 U.S.C. § 2001(b) issue is premature with regard to a sale of the Commodore Properties

under the Halpern Back-Up Sale Contract; and (3) the Receiver and Halpern Parties have entered into a settlement with regard to the Stewart Grove sale which, if approved by the Court, will result in the dismissal of the appeal. *See* ECF No. 348.

WHEREFORE, the Receiver respectfully requests that the Court deny the Motion for Reconsideration and grant the Receiver such additional relief as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served this 3rd day of March, 2025 via CM/ECF upon all counsel of record.

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