UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. GPB CAPITAL HOLDINGS, LLC; ASCENDANT CAPITAL, LLC; ASCENDANT ALTERNATIVE STRATEGIES, LLC; DAVID GENTILE; JEFFRY SCHNEIDER; and JEFFREY LASH, Defendants.	21-cv-00583-MKB-VMS

RECEIVER'S RESPONSE TO DEFENDANTS DAVID GENTILE AND JEFFRY SCHNEIDER'S LIMITED MOTION FOR RECONSIDERATION OF JURISDICTION TO HEAR ADVANCEMENT DISPUTES UNDER MEMORANDUM AND ORDER APPROVING DISTRIBUTION PLAN

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INTRODUCTION

Defendants David Gentile and Jeffry Schneider have filed a motion asking this Court to reconsider its decision approving the Receiver's Distribution Plan (the "Motion to Reconsider" or "Motion"). Because Defendants fail to identify any reason that would warrant this Court revisiting its comprehensive 53-page ruling, the Motion should be denied.

Defendants object to that portion of the Court's decision in which it simply reaffirmed that under the Receivership Order it had "exclusive jurisdiction" over disputes concerning Defendants' advancement claims. However, Defendants never made any jurisdictional arguments in their brief objecting to the Plan. Instead, Defendants assert that this Court erred because it "overlooked" an argument they made in *prior briefs* addressing a *different motion* that Defendants already unsuccessfully appealed to the Second Circuit. In rendering the ruling at issue, this Court had no duty to go back and scour arguments that Defendants made in connection with other motions, and the fact that the Court did not do so certainly does not clear the high bar for reconsideration.

While the Court need not go beyond that, the Motion also fails on the merits. Defendants claim this Court neglected to accord "full faith and credit" to previous Delaware advancement orders. But Defendants' assertions regarding "full faith and credit" are baseless, as they do not even mention the factors that must be established for that doctrine to apply, much less demonstrate that they exist here. What's more, according to caselaw that Defendants themselves cite, it is actually the Delaware court that is now precluded from exercising jurisdiction over advancement disputes based on full faith and credit principles, and not the other way around. That makes sense: This Court, and not the Delaware court, is responsible for overseeing the Receivership and distribution of Receivership assets to the investors who were Defendants' victims and other creditors. The Delaware court, by contrast, has no window into competing claims for GPB assets. While it is unsurprising that Defendants – who have received more than $75 million in

advancement to date – would prefer to have decisions about advancement made in a vacuum, the law does not entitle them to this outcome.

Accordingly, this Court should deny the Motion for Reconsideration.

FACTUAL BACKGROUND

I. The Advancement Orders

In 2021, Defendants filed complaints against GPB Capital and other entities listed in the Receivership Order (collectively "GPB Entities" or "Receivership Entities") in Delaware Chancery Court. In those lawsuits (the "Delaware Actions"), Defendants assert claims for advancement against the GPB Entities.

Schneider and the GBP Entities litigated certain issues on summary judgment relating to advancement not germane here. What is germane is that in both lawsuits Defendants entered into agreed orders with the GPB Entities in April 2022 (the "Advancement Orders") relating to advancement procedures. *See* ECF 259, Exs. A and B (stipulated Order in Gentile litigation signed by all parties and Order in Schneider litigation reflecting that it was a "customary" Order governing advancement jointly submitted by the parties). Among other procedures, the Advancement Orders dictated that Defendants would submit invoices every month, the GPB Entities would have 20 days to raise any objections to such invoices, Defendants would have 10 days to reply to the objections, and that 5 days thereafter the parties would attempt to resolve any remaining disputed amounts.

The Orders provided that if after the foregoing procedures the parties still disagreed about the amount recoverable, then Defendants could file a motion to recover the disputed amounts. Contrary to what Defendants suggest, the Advancement Orders did ***not*** require that such motions be filed only in Delaware Chancery Court. Instead, those Orders stated only that Defendants "***may*** file an application pursuant to Court of Chancery Rule 88" as to disputed amounts. *See* ECF 259,

Ex. A ¶ 9, Ex. B ¶ 7 (emphasis added). Schneider has not filed any such "application" since the Advancement Orders were entered, and Gentile filed only one, in April 2023. *See* Defendants' Motion to Reconsider ("Mot."), ECF 276 at p. 3.

II. The Receivership Order

On July 28, 2023, Magistrate Judge Scanlon issued a Report and Recommendation to convert the Monitorship to a Receivership, to which Defendants filed objections. *See* ECF Nos. 167, 168. In those objections Defendants argued that the proposed Receivership Order would interfere with their advancement rights. On December 7, 2023, this Court rejected those arguments, adopted the Report and Recommendation, and entered the Receivership Order. *See* ECF Nos. 186, 187. In so holding, this Court explained that it "does not understand the terms of the Amended Proposed [Receivership] Order to enjoin the reimbursement procedures pursuant to which Schneider and Gentile submit invoices and requests for reimbursement under their advancement orders" – i.e., the procedures requiring Defendants to submit invoices every month and the process in which the parties attempt to resolve any disputes over the claimed amounts. *See* ECF 186 at p. 35 n.21.

Notably, the Court did ***not*** say that future advancement disputes between the Receiver and Defendants that were not resolved by those "procedures" should be litigated in Delaware. Instead, the Receivership Order stated that this Court has "exclusive jurisdiction and possession of all of the assets of the Receivership Entities" and "over any action filed against the Receiver . . . based upon acts or omissions committed in" his capacity as Receiver. *See* ECF 187 ¶¶ 1, 37. The Receivership Order also enjoined all lawsuits involving the Receiver, the Receivership Estate, the Receivership Entities or any Receivership Assets, including the Delaware Actions. *Id.* ¶ 18, n.1 and Schedule 3.

Defendants filed an appeal of the Receivership Order. On December 3, 2024, the Second Circuit affirmed this Court's entry of the Receivership Order.

III. The Distribution Plan

On January 17, 2025, the Receiver filed a Motion to Approve a Distribution Plan. *See* ECF 228. On February 7, 2025, Defendants filed a brief objecting to the proposed Plan (the "Objections"). *See* ECF 248. On April 8, 2025, this Court rejected the Objections and issued an order approving the Distribution Plan (the "DP Order"). *See* ECF 271. In that decision, this Court reaffirmed that the Receivership Order "clearly stated" that it had "exclusive jurisdiction over any action filed against the Receiver" and accordingly that there was "no dispute that the Court retains jurisdiction to resolve any disputes regarding either Gentile's or Schneider's advancement costs." *Id*. at p. 41 n.25. Defendants now ask the Court to reconsider that statement in the DP Order.

ARGUMENT

The standard for a motion for reconsideration "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Trans., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (citation omitted). Whether to grant such a motion is committed to the discretion of the district court. *Id*. Because Defendants fail to satisfy that "strict" standard, this Court should deny the Motion for Reconsideration.

I. The Motion for Reconsideration Improperly Raises New Arguments

The gravamen of Defendants' Motion is that this Court erred in stating that "no Objector argued that disputes over advancement costs should be litigated in Delaware," which Defendants claim "overlooked" arguments they made to the contrary. *See* Mot. at p. 7. But this Court was correct, because the only specific objections Defendants made to the Plan as to advancement were

that: (1) advancement claims should have "priority" status; and (2) the Plan did not hold "sufficient amounts" in reserve for those claims. *See* ECF 248 at pp. 8-12. Noticeably absent from the Objections was ***any*** discussion of ***where*** advancement disputes should be litigated.

"[A] reconsideration motion is an improper vehicle for raising new claims." *Gala v. Kavanagh*, 2023 WL 2349580, at *1 (E.D.N.Y. 2023) (citing *In re Gentiva Sec. Litig.*, 971 F. Supp. 2d 305, 332 (E.D.N.Y. 2013)). Having failed to raise arguments on jurisdiction in their Objections, Defendants cannot be heard to complain now.

Defendants implicitly concede they made no argument on jurisdiction in their Objections, as they claim only that the Objections "incorporate[d] by reference the arguments" in their ***prior*** objections to Magistrate Judge Scanlon's Report and Recommendation to Convert the Monitorship to a Receivership. *See* Mot. at p. 7. But such incorporation by reference is insufficient to preserve an issue. *See Novoship (UK) Ltd. v. Ruperti*, 567 F. Supp. 2d 501, 503–504 (S.D.N.Y. 2008) (denying motion for reconsideration and stating "incorporation by reference is insufficient to identify" an argument); *Nichols v. Ill. Dep't of Transp.*, 152 F. Supp. 3d 1106, 1129 n.23 (N.D. Ill. 2016) (incorporation "was insufficient to preserve the issues").

That caselaw applies with particular force here, where Defendants incorporated by reference arguments from their objections to Magistrate Judge Scanlon's Report and Recommendation, which this Court rejected when it adopted the Report and entered the Receivership Order – a ruling that was subsequently affirmed by the Second Circuit. *See Novoship*, 567 F. Supp. 2d at 503 ("Reconsideration 'should not be granted where the moving party seeks solely to relitigate an issue already decided'") (citation omitted).

Thus, because Defendants did not raise any jurisdictional issues in their Objections and belatedly raised them only in their Motion for Reconsideration, that Motion should be denied.

II. Defendants "Full Faith and Credit" Arguments Fail

While the Court need not even consider the new arguments raised in Defendants' Motion, even if it did, the Motion still would fail because those arguments are without merit.

Defendants claim that by "retaining jurisdiction over advancement disputes," this Court "failed to properly accord the Advancement Orders full faith and credit," which they (wrongfully) believe continue to allow advancement disputes to be litigated in Delaware. *See* Mot. at p. 8. However, Defendants' discussion of full faith and credit principles is woefully deficient, as they do nothing more than cite caselaw standing for the generic proposition that federal courts must "give to a state-court judgment the same preclusive effect as would be given that judgement under the law of the State in which the judgment is rendered." *Id*. at pp. 8–9. Defendants fail to mention ***any*** of the elements that must be met for the full faith and credit doctrine to apply, or explain how those elements were satisfied here. Nor could they have done so, because those required elements are plainly missing.

Under the Full Faith and Credit Act and Article VI, section 1 of the Constitution, federal courts must determine whether a prior state court judgment has preclusive effect under the doctrines of *res judicata* (claim preclusion) or collateral estoppel (issue preclusion). *Town of Deerfield v. F.C.C.*, 992 F.2d 420, 429 (2d Cir. 1993). In doing so, federal courts apply the preclusion law of the state in which judgment was rendered, here Delaware. *Id*. Although Defendants do not even mention either doctrine, they must be seeking the application of collateral estoppel to preclude litigation of the issue of jurisdiction for advancement disputes, as *res judicata* (which generally bars re-litigation of causes of action asserted in a prior lawsuit) is facially irrelevant. *See generally Betts v. Townsend*, 765 A.2d 531, 534 (Del. 2000).[1]

[1] *Res judicata* also only applies if the prior action resulted in a final adjudication and involved the same claims/issues. *RBC Capital Market, LLC v. Education Loan Trust*, 87 A.3d 632, 643 (Del. 2014). As discussed below, both those elements are missing here

For collateral estoppel to apply, ***all*** of the following elements must exist: "1) the issue previously decided is identical to the one presented in the action in question; 2) the prior action has been finally adjudicated on the merits; 3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication; and 4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *PVP Aston, LLC v. Financial Structures Ltd.*, 2023 WL 2728775, at *8 (Del. Super. 2023) (citing *Betts v. Townsends, Inc.*, 765 A.2d 531, 535 (Del. 2000)).

Defendants cannot satisfy those elements. The Delaware Actions have not yet been "finally adjudicated on the merits," as both lawsuits remain pending, and advancement orders in particular have specifically been deemed as non-final orders under Delaware law. *See Kroenke Sports and Entertainment LLC v. Salomon*, 246 A.3d 1125, 2021 WL 321470 (Del. 2021). Nor was there any actual adjudication on the "merits" on jurisdiction in Delaware, "final" or otherwise, as the terms in the Advancement Orders (including the one saying an application for fees "may" be filed under Chancery Court Rule 88) were simply agreed to by Defendants and GPB Entities – and long before the Receivership Order was issued. That matters because "[c]ollateral estoppel applies when the facts sought to be precluded in a subsequent suit have been 'actually litigated and determined' in the first case," and so is inapplicable to consent orders. *United Parcel Serv. v. Hawkins*, 2024 WL 666726, at *3 (Del. 2024) (citation omitted).

Furthermore, the jurisdictional issue that this Court decided is not "identical" to any issue decided by the Delaware Court, nor did the Receiver (or the GPB Entities) have a "full and fair opportunity to litigate" that issue, as also required for collateral estoppel to apply. The ***actual*** jurisdictional issue this Court addressed in the DP Order was as follows: which court has jurisdiction over disputes between the Receiver and the Defendants relating to Defendants' claims for advancement against the Receivership Estate. *See* ECF 271 at p. 41 n.25. The Delaware Court

never ruled on that issue – and there was no opportunity to litigate that issue at the time of the Advancement Orders – because the Advancement Orders were entered in April 2022, ***20 months before*** this Court issued its Order appointing the Receiver and creating the Receivership Estate.

Nor does the Delaware Court have the authority to address that issue now. The Receivership Order enjoined all actions involving the Receivership Estate, Receivership Entities and the Receiver himself, and specifically identified the Delaware Actions as being enjoined. The Receivership Order also vested this Court with "exclusive jurisdiction" over litigation against the Receiver and over the assets of the Receivership Estate, which would include any funds used for advancement. That litigation injunction and related jurisdictional provisions were in accordance with this Court's authority in receivership proceedings. *SEC v. Byers*, 609 F.3d 87, 92–93 (2d Cir. 1993) ("An anti-litigation injunction is simply one of the tools available to courts to help further the goals of the receivership," including allowing the "district court and receiver" to "maintain maximum control over the assets" of the receivership and to prevent the dissipation of "assets from the receivership estate to the potential detriment of all" creditors.). And the Second Circuit confirmed that was the case when it affirmed the Receivership Order.

In fact, as a result of the Receivership Order, it is the Delaware Court that is precluded from exercising jurisdiction over advancement disputes pursuant to full faith and credit principles, and not this Court. A case that Defendants cite in their brief drives this point home. *SEC v. United Fin. Grp. Inc.*, 576 F.2d 217, 221 (9th Cir. 1978) ("Our analysis begins with the proposition that the California courts were obligated to give full faith and credit to the receivership court's blanket orders barring interference with the administration of the receivership estate . . .").

Consequently, this Court's conclusion that it has exclusive jurisdiction over disputes regarding Defendants' advancement claims was clearly correct, and fully consistent with full faith and credit principles.

III. Defendants' Other Jurisdictional Issues also Fail

Defendants raise various other (belated) objections to this Court retaining jurisdiction. None of them withstands scrutiny.

First, Defendants contend that "[j]urisdiction over matters involving the interpretation of an LLC Agreement, including rights to advancement and indemnification, is specifically imbued in the Delaware Court of Chancery." *See* Mot. at p. 9. However, the statute on which Defendants rely, 6 Del. C. § 18-111, merely provides that actions to interpret an LLC agreement "***may*** be brought in the Court of Chancery." *Id*. (emphasis added). Thus, it does nothing more than create permissive jurisdiction in Delaware Chancery Court. Moreover, while the Receiver does not dispute that the Delaware Chancery Court had jurisdiction when the Delaware Actions were first filed, the relevant question now is whether it can ***still*** exercise jurisdiction. The answer to that question – as demonstrated above – is 'no,' because under the Receivership Order this Court has exclusive jurisdiction over Defendants' advancement claims, and Delaware is required to give full faith and credit to that Order.

Furthermore, in the analogous bankruptcy context Delaware caselaw recognizes that advancement disputes should be litigated in the court presiding over the bankruptcy case. *See Kurz v. EMAK Worldview, Inc*., 464 B.R. 635 (D. Del. 2011) (transferring suit initially filed in Delaware Chancery Court to a California bankruptcy court). The rationale underlying that approach – the "strong public policy favoring centralization of bankruptcy proceedings in a bankruptcy court," *id*. at 640 – applies equally to receivership proceedings. *Gasser v. Infanti Int'l, Inc*., 2004 WL 1243114, at *5 (E.D.N.Y. 2004) (noting the "[s]ound judicial management" that "requires that the equities and priorities among claimants to receivership assets normally be determined in the receivership proceeding.") (citation omitted).

Second, Defendants suggest it is inappropriate for this Court to exercise jurisdiction because it will require it to apply Delaware law. But this is of no consequence, as this Court frequently applies Delaware law. *See In re Forfeiture Order of Tim Leissner*, 2024 WL 4424201 (E.D.N.Y. 2024) (applying Delaware LLC statutes); *S.E.C. v. Platinum Mgmt. (NY) LLC*, 2018 WL 6172404, at *3 (E.D.N.Y. 2018) (applying Delaware law on advancement claims).

Third, Defendants contend that exercising such jurisdiction would be "an extraordinary imposition on this Court's time and resources. . ." *See* Mot. at p. 2. Considering Defendants' tactics to date – including Gentile's violations of this Court's order appointing the Monitor, which led to the lengthy proceedings that resulted in the conversion of the Monitorship to a Receivership – Defendants' professed concerns about imposing "on this Court's time and resources" ring hollow. Moreover, in the three years since the Advancement Orders were entered, Schneider has not filed any motion for advancement costs, and Gentile only filed one in April 2023, eight months before the Receiver was appointed.[2] Thus, Defendants' alleged concerns are both disingenuous and unsupported by the record.

Finally, Defendants argue that if this Court retains jurisdiction it would result in a "manifest injustice." *See* Mot. at p. 10. The obvious implication of that argument – that Defendants believe this Court incapable of rendering a just adjudication on their advancement claims – is plainly wrong. As Defendants concede elsewhere in their Motion, this Court has repeatedly recognized they are entitled to advancement. The Receiver has similarly acknowledged Defendants' advancement rights, subject to the Receiver's right to recoup if Defendants are found not to be entitled to indemnification. In addition, Defendants have already received advancement for over

[2] Gentile recently threatened to file another such motion, which would likely include in significant part a dispute between the parties regarding his (meritless) demand for fees he incurred challenging this Court's Receivership Order.

$75 million in defense costs, including over $50 million since the Receivership Order was entered on December 7, 2023. Against that backdrop, Defendants' "manifest injustice" argument falls flat.

IV. There is No Basis to Stay this Court's Ruling

In the alternative, Defendants ask this Court stay the portion of the DP Order dealing with jurisdiction, pending an appeal they intend to pursue with the Second Circuit. That alternative relief is not warranted either.

To obtain a stay Defendants must (1) make a "strong showing that [they are] likely to succeed on the merits," (2) demonstrate "irreparable injury" in the absence of a stay, (3) show there would not be "substantial injury to the nonmoving party if a stay is issued," and (4) establish that "the public interest" favors them. *New York v. United States Dep't of Homeland Sec.*, 974 F.3d 210, 214 (2d Cir. 2020) (citation omitted). "The first two factors are the most critical," and as movants, Defendants "bear[ ] the burden of showing that the circumstances justify" a stay. *Id.* (citation omitted).

Defendants do not even mention the above factors, and so clearly have not met their burden to justify a stay. Nor could they if they tried. For the reasons set forth above, the first two "critical" factors are not satisfied because: (1) Defendants' Motion to Reconsider is wrong on the merits; and (2) the absence of a stay would not result in any "irreparable injury," because this Court and the Receiver have repeatedly acknowledged Defendants' advancement rights. There also is no possible "public interest" weighing in favor of staying this Court's decision, which addressed jurisdiction for advancement disputes involving just two individuals. Thus, there is no basis for a stay.

CONCLUSION

For all of the foregoing reasons, the Court should deny Defendants' Motion for Reconsideration.

Dated: May 7, 2025
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Respectfully submitted,

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