IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	**Chapter 11**
PREMIER KINGS, INC., et al.,	)	
	)	**CASE NO. 23-02871 (TOM11)**
Debtor.	)	**(Jointly Administered)**
	)	
PREMIER HOLDINGS OF GEORGIA, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adv. Proc. No. 24-00016-TOM**
	)	
RRG OF JACKSONVILLE, LLC,	)	
	)	
Defendant.	)	
	)	
	)	

PLAINTIFF PREMIER HOLDINGS OF GEORGIA, LLC'S BRIEF IN SUPPORT OF OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS, DEFENDANT'S PRESUMED MOTION FOR SUMMARY JUDGMENT, DEFENDANT'S MOTION FOR RELIEF FROM ORDER ASSUMING AND ASSIGNING CONTRACT, AND BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, Plaintiff Premier Holdings of Georgia, LLC ("PHGA"), by and through its undersigned counsel, and hereby submits this its response (this "Response") in opposition to RRG of Jacksonville, LLC's ("RRG") *Motion for Judgment on the Pleadings* and *Motion for Relief from Order Assuming and Assigning Contract* [AP Doc. No. 5] ("RRG's Judgment Motion"), in opposition to *Motion for Relief from Order Assuming and Assigning Contract* [Bankr. Doc. No. 643] ("RRG's Relief Motion"), and in opposition to RRG's presumed motion for summary judgment ("RRG's Summary Judgment Motion") as requested in RRG's *Supplemental*

Memorandum in Support of Motion for Summary Judgment or in the Alternative, Relief from Order Assuming Contract [Bankr. Doc. No. 838 and AP Doc. No. 35] (the "Memorandum"). Further, PHGA submits this Response in support of *Plaintiff Premier Holdings of Georgia, LLC's Motion for Summary Judgment* [AP Doc. No. 43] ("PHGA's Summary Judgment Motion"). In support hereof, PHGA relies on *Plaintiff Premier Holdings of Georgia's Evidentiary Submission in Support of Plaintiff Premier Holdings of Georgia, LLC's Motion for Summary Judgment* [Bankr. Doc. 846, AP Doc. No.47] (the "Evid. Subm."), which attaches the following:

1. Exhibit 1 – the Deposition Transcript of Jaipal S. Gill dated September 10, 2024 (the "Gill Dep.");
2. Exhibit 2 – the Deposition Transcript of Randy Pianin dated September 10, 2024 (the "Pianin Dep."), redacted pursuant to AP Doc. 41;
3. Exhibit 3 – the Sale Agreement between Premier Holdings of Georgia, LLC and JG Coastal Properties, Inc. dated April 5, 2024 ("Sale Agr.");
4. Exhibit 4 – the Promissory Note dated March 27, 2024 ("Promissory Note"); and
5. Exhibit 5 – the *Supplemental Interrogatory Responses* dated September 20, 2024 and submitted by RRG of Jacksonville, LLC ("Supp. Int. Responses");

and PHGA further relies on the pleadings in the above-styled bankruptcy case (the "Bankruptcy Case") and the above-styled adversary proceeding (the "Adversary Proceeding"), and states as follows:

I. SUMMARY OF ARGUMENT

RRG argues that it should be relieved of its obligations under the Development Agreement because, among other reasons, it allegedly was not provided information during the sales process to evaluate the Development Agreement and because RRG claims that some "mistake,

inadvertence, surprise, or excusable neglect" occurred that entitles RRG to relief from its assumption and assignment of the Development Agreement.

However, RRG was provided with the Development Agreement via e-mail 11 days prior to the sale closing. The evidence shows that RRG based its decision to take over the Port Wentworth store location based on the financials provided, which financials reference the Development Agreement and show that the amounts being paid for the Port Wentworth location was more than just rent due under the ground lease.

Though RRG claims it is entitled to relief from the assumption of the Development Agreement based on Rule 60(b)(1), this relief cannot be given to a party to relieve it from its own deliberate choices, from its own knowledgeable decisions, or from its own negligence. The evidence shows that RRG itself drafted the assumption and assignment agreement (which states that RRG takes the ground lease subject to the Development Agreement), under which PHGA is considered a counterparty under applicable law, and which contains a signature line for PHGA to sign its approval and consent to the assumption and assignment. RRG's failure to exercise reasonable due diligence is not a basis for the relief requested.

Had PHGA been notified in any way that RRG did not intend to assume the Development Agreement, PHGA would have had the opportunity to object to the assumption and assignment of the ground lease without the Development Agreement. PHGA had no such notice that the Development Agreement may not be assigned and assumed and, to the contrary, the assumption and assignment agreement provided to PHGA for execution indicated otherwise. Additionally, the debtors paid a cure payment to PHGA upon the sale closing, which indicates that the debtors had assumed and assigned the Development Agreement to RRG. Based on the facts of this case and applicable law, RRG should not be permitted to avoid its obligations under the Development

Agreement.

II. STATEMENT OF UNDISPUTED FACTS

A. Background of the Ground Lease and the Development Agreement

1. PHGA was formed by Manraj Sidhu for the purpose of holding real estate in which Premier Kings of Georgia, Inc. ("PKGI") could operate Burger King Restaurants. Gill Dep., 9:12-19.

2. On or around May 8, 2018, PKGI, as tenant, and Port Wentworth Fee Owner, LLC, as landlord, entered into that certain Ground Lease (the "Ground Lease") under which PKGI leased from Port Wentworth Fee Owner, LLC (the "Ground Landlord") approximately 1.05 acres of land (the "Leased Premises"). Gill Dep., Ex. 6.

3. Because PHGA was formed to hold real estate in which PKGI would operate Burger King Restaurants, and because the Ground Lease was only for land and not for an existing Burger King Restaurant, PHGA took out two (2) loans related to that location: (a) a real estate loan and (b) an equipment loan (together, the "Loans"), for the purpose of building and equipping a Burger King Restaurant located on the Leased Premises (the "Port Wentworth Store"). Gill Dep., 9:12-19, 15:5-7, 24:6-12, Ex. 6, Ex. 7.

4. Pursuant to that certain Guaranty Agreement dated May 17, 2019 (the "Guaranty"), Jaipal Gill ("Jay Gill") was a personal guarantor of the Loans. Gill Dep., Ex. 8.

5. On or around May 17, 2019, PHGA and PKGI entered into that certain Development Agreement (the "Development Agreement") under which PKGI agreed to pay to PHGA a development fee (the "Development Fee") in the amount of the debt service payments PHGA owed under "any bank loan," related to the construction and improvements of the Port Wentworth Store, along with a $100 administrative fee. Gill Dep., Ex. 4. Pianin Dep., Ex. 7. The

purpose of the Development Agreement was for PHGA to be able to pay the debt service payments under any loan(s), which PHGA took out to build and equip the Port Wentworth Store. Gill Dep., 19:8-16.

6. When asked about his pre-existing knowledge regarding ground leases generally, Randy Pianin, RRG's corporate representative, stated that he would assume that it would cost money to build and outfit a Burger King restaurant on a ground lease, and that, in the process of scraping and remodeling other Burger King restaurants purchased by RRG as part of the Sale, the funds for said scraping and remodeling come from lines of credit. Pianin Dep., 49:8-23.

B. The Bankruptcy and Sale to RRG

7. PKGI, and other related entities (collectively, the "Debtors"), filed for relief under chapter 11 of the Bankruptcy Code on October 3, 2023 (the "Petition Date"). Gill Dep., Ex. 10. As part of the Bankruptcy, Aurora Management Partners Inc. ("Aurora") served as the Chief Restructuring Officer of the Debtors. Gill Dep., Ex. 10. Before the Petition Date, Aurora had also served in a financial management role with respect to the Debtors.

8. On October 25, 2023, PKGI and RRG entered into that certain Asset Purchase Agreement (the "APA"), pursuant to which PKGI purported to sell, and RRG purported to buy, a portion of PKGI's assets (the "Sale"). Gill Dep., Ex. 16 at 138-207. The APA was amended on December 11, 2023 by that certain First Amendment to Asset Purchase Agreement (the "Amendment to APA"). Gill Dep., Ex. 16 at 208-215.

9. Aurora created and maintained a drop box ("Aurora's Drop Box") which contained documents related to the Debtors and the Debtors' assets. Gill Dep., Ex. 10. The Development Agreement was included in Aurora's Drop Box. Gill Dep., Ex. 10.

10. The Debtors' investment banker, Raymond James & Associates, Inc. ("Raymond

James"), accessed Aurora's Drop Box to prepare the marketing and due diligence materials it compiled into a data room (the "Data Room") it used to facilitate the Sale to RRG and to draft the APA. Gill Dep., Ex. 10.

11. The Data Room included a spreadsheet entitled "Premier King Leases by Location – Burger King," which spreadsheet RRG provided to PHGA, which states in part as follows:

Port Wentworth	7304 Hwy 21	31407	TP	Port Wentworth, GL to Premier Kings of GA. PK-GA pays devel fee to Premier Holdings of GA	GL b/t 3rd party and PKGA; Development agreement b/t PKGA and PHGA for Debt Serv Pmt plus $100;	Premier Kings of Georgia, Inc.	3rd party ($k + CAM) and Related Party (Debt Serv Pmt + $100)

Pianin Dep., Ex. 15.

12. In his deposition, Randy Pianin identified the annual rent owed under the Ground Lease for the Port Wentworth Store as being around $74,000. Pianin Dep., 27:15-17. This would make the percentage of sales for the Port Wentworth Store 6.12%. Pianin Dep., Ex. 25. According to Randy Pianin, RRG was looking only to assume leases with a percentage of sales between eight percent (8%) or nine percent (9%), renegotiating anything over ten percent (10%). Pianin Dep., 20:21-24.

13. Randy Pianin himself prepared a spreadsheet compiling rent from October 2022 to September 2023 (the "Trailing Twelve Months"), which stated that the rent for the Port Wentworth Store for the Trailing Twelve Months was $120,015, not $74,000. Pianin Dep., 28:3-23, Ex. 25. When asked in his deposition about this discrepancy, Randy Pianin stated that he did not question why the rent for the Trailing Twelve Months was different than the rent he understood was owed under the Ground Lease. Pianin Dep., 29:6-16.

14. Exhibit A to the APA listed the Port Wentworth Store on the "List of Store Locations," as depicted below:

26868	Premier Kings of Georgia, Inc.	7306 Hwy 21	Port Wentworth	GA	31407

Gill Dep., Ex. 16 at 170. Notably, this list of store locations did not contain a description of any

ground leases or other contracts which may be applicable to this location.

15. Exhibit B to the APA, entitled "Leased Properties," and which the APA states contains each leasing agreement affecting the restaurants, depicts the Port Wentworth Store as being subject to the following "Existing Lease(s)":

26868	7304 Hwy 21	Port Wentworth	GA	31407	Port Wentworth, (GL to PKGA)PHGA (Del Agrmnt w/PK-GA)	c/o Cape Asset Management 3735 Beam Road, Suite B Charlotte, NC 28217	PKGA	5/8/18 (GL) 5/17/19 Dev Agr	8/3/18 (GL)	3/31/39

Gill Dep., Ex. 16 at 173. Therefore, the Development Agreement was listed in the APA as a lease for the Port Wentworth Store.

16. Section 1.3(a) of the APA lists the "Assignable Leases," from which RRG may elect to assume. Gill Dep., Ex. 16 at 141, § 1.3. For the Port Wentworth Store, both the Ground Lease and Development Agreement are listed as Assignable Leases, depicted as follows:

26868	7304 Hwy 21	Port Wentworth	GA	31407	Port Wentworth, (GL to PKGA)PHGA (Del Agrmnt w/PK-GA)	c/o Cape Asset Management 3735 Beam Road, Suite B Charlotte, NC 28217	PKGA	5/8/18 (GL) 5/17/19 Dev Agr	8/3/18 (GL)	3/31/39

Gill Dep., Ex. 16 at 186, Sched. 1.3(a)-1. Therefore, the Development Agreement was listed in the APA as a lease which RRG could choose to assume.

17. On or before December 26, 2023, RRG was required to designate from the "Assignable Leases" which "Designated Leases" RRG wished to assume in Schedule 1.3(a)-2 of the APA. Gill Dep., Ex. 16 at 141, § 1.3. In the Amendment to APA, RRG listed the Port Wentworth Store as a Designated Lease as follows:

26868	7304 Hwy. 21, Port Wentworth, GA

Gill Dep., Ex 16 at 215, Sched. 1.3(a)-2. Additionally, in two (2) notices to the Debtors, one dated December 4, 2023 and one dated December 26, 2023 (the "Lease Notices"), RRG designated the Port Wentworth Store in the same form as above, i.e. solely by the number and address for the Port Wentworth Store. Pianin Dep., Ex. 12. Therefore, because RRG did not exclude the Development

Agreement from its designation of the Port Wentworth Store as a Designated Lease, RRG must have elected to assume the Development Agreement for the Port Wentworth Store.

18. Under the terms of the Amendment to the APA, RRG had until "two (2) days prior to the Closing" to remove any Designated Leases from Schedule 1.3(a)-2 of the APA, thereby making said leases "Rejected Leases." Gill Dep., Ex. 16 at 209. RRG did not do so.

19. The Court approved the sale of PKGI's assets to RRG under the terms of the APA by that certain Order dated December 21, 2023 (the "Sale Order"). Gill Dep., Ex. 16 at 1-30.

20. Prior to the entry of the Sale Order, there existed certain disputes over the ownership of certain furniture, fixtures, and equipment (the "FF&E") in various Burger King restaurants purported to be sold in the Bankruptcy, including in the Port Wentworth Store. PHGA, among many others, filed objections to the Debtors' *Motion for Order Approving Sale of Debtors' Assets Free and Clear of all Liens, Encumbrances, and Interests* (the "Debtors' Sale Motion"). Gill Dep., Ex. 14, 15. Following a hearing on the Debtors' Sale Motion, the Court found that there "is a bona fide dispute" with respect to the ownership of the FF&E and, rather than prevent the Sale from proceeding, the objecting parties, including PHGA, agreed to reserve their claims against a "Disputed Claims Reserve." Gill Dep., Ex. 16 at 8. The Sale Order confirmed that the Sale would proceed and vest RRG with title "free and clear of all liens, claims, interests, and encumbrances ***other than as set forth in the [APA]***." Gill Dep., Ex. 16 at 10 (emphasis added).

21. The closing (the "Closing") of the Sale to RRG occurred on January 16, 2024. Pianin Dep., 22:22-23:5.

22. On January 16, 2024, RRG executed that certain Assignment and Assumption of Lease Agreement (the "Assumption Agreement") for the Port Wentworth Store, ***which counsel for RRG drafted***. Pianin Dep., 36:20-21, Ex. 34. The Assumption Agreement defines the "Lease"

for the Port Wentworth Store as "that certain Ground Lease, dated as of May 8, 2018, as amended by that certain Amendment to Ground Lease, dated August 3, 2018, and ***as subject to that certain Development Agreement between [PHGA] and [PKGI] dated May 17, 2019***." Pianin Dep., Ex. 34 (emphasis added). Under the Assumption Agreement, RRG assumed the "Lease," the definition of which includes the Development Agreement. Pianin Dep., Ex. 34. PHGA signed a "Developer Consent to Assignment and Assumption of Lease," making PHGA a "Counterparty" to the Assumption Agreement and stating that PHGA agrees to recognize RRG as the new "Owner/Operator" under the Development Agreement "and to thereby establish direct privity of estate and privity of contract with [RRG]." Pianin Dep., Ex. 34, p. 6.

23. When asked about his review of the Assumption Agreement, Randy Pianin stated that he did notice the reference to the Development Agreement in the Assumption Agreement, but chose to sign the Assumption Agreement without reviewing the Development Agreement. Pianin Dep., 37:10-38:5.

24. Prior to the Sale, Aurora (on behalf of PKGI) paid to PHGA the monthly Development Fee pursuant to the terms of the Development Agreement. Gill Dep., 25:8-26:2. Section 1.3(b) of the APA required PKGI to pay "any amounts necessary to cure any default under such Designated Lease" (the "Cure Costs"). Gill Dep., Ex. 16 at 140-41. Following the Closing, PKGI paid to PHGA the Cure Costs due under the Development Agreement, which amounts equaled $26,000.00, or two (2) or so months' payment of the Development Fee of $11,100.00. Gill Dep., 25:13-23.

C. Post-closing of the Sale to RRG and RRG's Defaults under the Development Agreement

25. Following the Closing and payment of the Cure Costs, RRG did not make the expected payments to PHGA under the Development Agreement, and on April 5, 2024, PHGA was forced to initiate the Adversary Proceeding requesting that the Court issue a declaration that RRG assumed the Development Agreement and is liable to PHGA under the same and enter a judgment against RRG for breach of contract. AP Doc. No. 01; Bankr. Doc. No. 584; Pianin Dep., Ex. 39.

26. On May 8, 2024, RRG filed RRG's Judgment Motion requesting that the Court dismiss the Adversary Proceeding. AP Doc. No. 5. Also on May 8, 2024, RRG filed the RRG Relief Motion in the Bankruptcy requesting that, if the Court finds that RRG assume the Development Agreement, the Court enter an order amending the Sale Order to provide for RRG's rejection of the Development Agreement. Bankr. Doc. No. 643.

27. Attached to RRG's Relief Motion is an affidavit executed by Randy Pianin (the "Affidavit"), the Chief Executive Officer of RRG and RRG's corporate representative, stating under oath that RRG never received the Development Agreement at any time prior to the Closing and that the Development Agreement was not included in the Data Room. Bankr. Doc. No. 643-1; Pianin Dep., 41:10-42:9, Ex. 41. RRG asserted the same in both RRG's Judgment Motion and RRG's Relief Motion. AP Doc. No. 5; Bankr. Doc. No. 643.

28. Additionally, in RRG's *Answers to First Set of Interrogatories* propounded by PHGA (the "Interrogatory Responses"), RRG again states that the Development Agreement was not included in the Data Room, that it never received the Development Agreement prior to the

Sale, and that it "was unaware of the existence of the Development Agreement" until after the Closing. Pianin Dep., 14:16-15:11, Ex. 3.

29. In anticipation of signing the Affidavit and the Interrogatory Responses, Randy Pianin stated that he searched his email for the "store number" and "the name" of the Port Wentworth Store (the "Search Terms") to ensure that the statements he made were correct. Pianin Dep., 12:19-23, 15:1-23, 41:11-42:9. According to Randy Pianin, had RRG been aware that the Development Agreement accompanied the Ground Lease, it would have rejected the Ground Lease. Pianin Dep., 36:10-15.

30. PHGA was forced to issue a *Subpoena to Produce Documents, Information, or Object or to Permit Inspection of Premises in a Bankruptcy Case (or Adversary Proceeding)* (the "Subpoena") to Raymond James to determine if the Development Agreement was in the Data Room or sent to RRG. *See* AP Doc. No. 22. After reviewing the documents that Raymond James produced in response to the Subpoena, PHGA discovered from Raymond James that Raymond James sent the Development Agreement to Randy Pianin and various other of RRG's representatives on January 5, 2024 (the "Pre-Sale Email"), for the purpose of facilitating RRG in drafting the Assumption Agreement. Pianin Dep., 15:8-11, 22:9-21, Ex. 33. Also copied on the Pre-Sale Email were Dylan Nugent and Todd Donaghue, who Randy Pianin states he asked to assist with the Interrogatory Responses. Pianin Dep., 11:14-24. Even though RRG had already responded to PHGA's document requests, RRG did not produce the Pre-Sale Email to PHGA until after PHGA informed RRG that it had received the same from Raymond James.

31. As of the date of the Pre-Sale Email, per that that email, RRG did not have copies of any of the "leases" for the Port Wentworth Store, including the Ground Lease and the

Development Agreement, whether in the Data Room or otherwise. Pianin Dep., 43:18-44:4, Ex. 33.

32. Randy Pianin stated that he "either did not find" the Pre-Sale Email, or "did not see it" when responding to PHGA's discovery requests and drafting the Interrogatory Responses, even though the Pre-Sale contains both of the Search Terms that Pianin stated were used to search his emails. Pianin Dep., 15:16-23. Randy Pianin stated that the reason he might not have seen the Pre-Sale Email is because he is "copied on hundreds of emails" and he does not "necessarily read every email" he is copied on. Pianin Dep., 15:16-23. He also stated that he assumed that "whoever the email was directed to would read it." Pianin Dep., 15:16-16:10.

33. On September 20, 2024, RRG provided to PHGA supplemental Interrogatory Responses which state that RRG was not in possession of the Development Agreement prior to January 5, 2024. Supp. Int. Responses, p. 10.

D. The Assignment of the Development Agreement to JG Coastal

34. Because RRG was not paying the Development Fee to PHGA under the Development Agreement and risking potential default under the relevant bank loans, JG Coastal Properties, Inc. ("JG Coastal"), in which Jay Gill has an interest, assumed PHGA's interest in the Development Agreement and purchased the Loans for $1,243.882.32 pursuant to that certain Sale Agreement with PHGA dated April 5, 2024, of which the entire purchase price was used to pay PHGA's debts due and owing the bank. Gill Dep., 14:10-15:21, 16:2-21, Ex. 5. S*ee gen.*, Sale Agreement. To finance JG Coastal's purchase of the Loans, Jay Gill executed a Promissory Note (the "Promissory Note") for $500,000.00. Promissory Note, p. 1. The remaining funds were provided to JG Coastal from Jay Gill's personal funds. Gill Dep., 16:2-7. As part of the sale to

JG Coastal, PHGA's interest in the Development Agreement was assigned to JG Coastal as an affiliate of PHGA. *See gen.*, Promissory Note.

35. On June 3, 2024, as a result of PHGA's assignment of the Development Agreement to JG Coastal, PHGA filed that certain *Motion to Substitute* [AP Doc. No. 17] (the "Motion to Substitute") JG Coastal as the plaintiff in the Adversary Proceeding. On June 14, 2024, RRG objected to the Motion to Substitute. AP Doc. No. 20. Following a hearing on July 10, 2024, the Court denied the Motion to Substitute. AP Doc. No. 29.

36. On September 10, 2024, the parties deposed each of the other parties' respective corporate representatives, which depositions occurred prior to the close of discovery on September 20, 2024. *See* Bankr. Doc. No. 798, AP Doc. No. 31. Additional discovery responses and production were made following those depositions.

37. On October 4, 2024, RRG filed the Memorandum supplementing RRG's Judgment Motion and RRG's Relief Motion. In the Memorandum filed on October 4, 2024, RRG for the first time requests that this Court enter summary judgment against PHGA and in favor of RRG. Bankr. Doc. No. 838; AP Doc. No. 35. Although RRG requests in its Memorandum that this Court enter summary judgment in favor of RRG, RRG has not filed a motion in which RRG requests summary judgment.

38. On Monday, October 21, 2024, PHGA filed the PHGA Summary Judgment Motion within thirty (30) days following the close of discovery (taking into account that the deadline fell on a Sunday). AP Doc. No. 43.

III. RESPONSE TO RRG'S STATEMENT OF FACTS

PHGA disputes the following in RRG's Statement of Facts:

39. RRG implies that, because the Development Agreement was not specifically listed

as a Designated Lease in the Amendment to APA, RRG did not assume the Development Agreement. Bankr. Doc. No. 838, p. 4; AP Doc. No. 35, p. 4. Both the Ground Lease and the Development Agreement were listed as Assignable Leases for the Port Wentworth Store, as depicted above. Gill Dep., Ex. 16 at 208-214. RRG designates all Assignable Leases for the Port Wentworth Store as Designated Leases ***by referring only to the address and store number*** for the Port Wentworth Store in its list of Designated Leases, as depicted above. Gill Dep., Ex 16 at 215; Pianin Dep., Ex. 12. Thus, the Development Agreement, which was listed on an Assignable Lease, must have been included as a Designated Lease for the Port Wentworth Store. Despite RRG's argument that it had to explicitly list the Development Agreement itself as a Designated Lease, ***RRG did not designate any specific leases*** as Designated Leases, including the Ground Lease. Gill Dep., Ex 16 at 215; Pianin Dep., Ex. 12. RRG referred only to each store by its number and address in its list of Designated Leases, which indicates that if the Ground Lease was assumed, then so was the Development Agreement. *Id.* Following the Closing, PKGI paid to PHGA the Cure Costs due under the Development Agreement. Gill Dep., 25:13-23.

40. RRG takes the position that RRG did not assume the Development Agreement because the Development Agreement was not listed as a "Designated Contract." Bankr. Doc. No. 838, p. 4; AP Doc. No. 35, p. 4. The APA lists the "Assignable Contracts" as "None." Gill Dep., Ex. 16 at 182, Sched. 1.2(a)-1. RRG could only choose Designated Contracts from the list of Assignable Contracts. Gill Dep., Ex. 16 at 140, §1.2. Because there were no Assignable Contracts in the APA, there could not be any Designated Contracts. Gill Dep., Ex. 16 at 140, §1.2.

41. Additionally, the APA states that the Assignable Contracts consist of all contracts, "other than Leases" and states that Schedule 1.3(a)-1 contains "all Leases" that RRG could elect to assume. Gill Dep., Ex. 16 at 140, §1.2. However, the APA does not define the term "Leases"

even though the APA defines "Existing Leases," "Assignable Leases," "Rejected Leases," and "Designated Leases." Thus, it is not clear what the capitalized term "Leases" actually means in the APA nor is it clear whether the Development Agreement was defined by the APA as an Assignable Contract or an Assignable Lease because that definition relies on the capitalized term "Leases." Regardless, the APA lists the Development Agreement as both an Existing Lease and as an Assignable Lease, so under the terms of the APA, the Development Agreement would not also be listed as an Assignable Contract. Gill Dep., Ex. 16 at 173, 186, Sched. 1.3(a)-1. Moreover, whether the Development Agreement was an executory contract, a lease, or otherwise included in the correct exhibit to the APA (which it was included), the Development Agreement was expressly listed in the Assumption Agreement.

42. Despite RRG's earlier arguments, RRG was provided the Development Agreement prior to the Closing. Bankr. Doc. No. 838, p. 4; AP Doc. No. 35, p. 4. Even though RRG claims that it was unable to reject the Development Agreement after receiving a copy of it, RRG had until two (2) days prior to the Closing to reject any Designated Leases. Gill Dep., Ex. 16 at 209. Because the Closing occurred on January 16, 2024, RRG had until January 14, 2024 to reject any Designated Leases. Pianin Dep., 22:22-23:5. Even if RRG did not have access to the Development Agreement prior to its receipt of the Pre-Sale Email, RRG still received the Development Agreement eleven (11) days before the Closing and nine (9) days before the deadline to reject any Designated Leases. Pianin Dep., 15:8-11, 22:9-21, Ex. 33. RRG did not take any steps to reject the Development Agreement.

43. RRG makes a blanket statement that the Assumption Agreement does not state that RRG is assuming the Development Agreement. Bankr. Doc. No. 838, p. 5; AP Doc. No. 35, p. 5. Among the other reasons set forth herein, PHGA signed a "Developer Consent to Assignment and

Assumption of Lease," stating that PHGA agrees to recognize RRG as the new "Owner/Operator" under the Development Agreement. Pianin Dep., Ex. 34, p. 6. PHGA would have had no reason to consent had RRG not assumed the Development Agreement. Thus, the Assumption Agreement clearly contemplates that RRG assumed the Development Agreement.

44. RRG also alleges that there is no money owed under the "bank loan" referenced in the Development Agreement, because the Development Agreement identifies the bank loan as "any bank loan," related to the Port Wentworth Store, not the Loans specifically. Bankr. Doc. No. 838, p. 6; AP Doc. No. 35, p. 6; Gill Dep., Ex. 4. Pianin Dep., Ex. 7. The money JG Coastal expended to purchase the Loans became the "bank loan" which RRG is required to pay under the Development Agreement. *See gen.*, Promissory Note. Gill Dep., 21:14-24; Ex. 4. To interpret the Development Agreement otherwise would have entitled PKGI to avoid its obligations under the Development Agreement in the event of a simple refinance.

45. Despite RRG's position that it cannot calculate the Development Fee, the Development Agreement clearly contemplates that the Development Fee is equal to the amount of the debt service payments PHGA owed under "any bank loan," along with a $100 administrative fee. Gill Dep., Ex. 4, p. 1. Pianin Dep., Ex. 7, p. 1. Aurora was able to calculate the Development Fee and paid approximately $11,100.00 monthly to PHGA as the Development Fee on behalf of PKGI. Gill Dep., 21:5-10. Now that JG Coastal has paid off the Loans, the Development Fee will be equal to at least $11,100 each month and, as of October 1, 2024, the past due balance due and owing under the Development Agreement was $105,450. *See* Gill Dep., 21:14-24:1.

IV. LEGAL ARGUMENT

A. Legal Standard

a. Legal Standard for Motions for Judgment on the Pleadings

Federal Rule of Civil Procedure 12(c)[1] provides that, after the pleadings are closed, a party may move for judgment on the pleadings. Fed. R. Civ. P. 12(c). "Judgment on the pleadings is proper when no issues of material fact exist, and the moving party is entitled to judgment as a matter of law based on the substance of the pleadings and any judicially noticed facts." *Cunningham v. District Atty's Office*, 592 F.3d 1237, 1255 (11th Cir. 2010). The same standard applicable to Rule 12(b)(6) motions to dismiss applies to Rule 12(c) motions for judgment on the pleadings. *Batterman v. BR Carroll Glenridge*, LLC, 829 F. App'x 478, 480 (11th Cir. 2020) (internal citations omitted). Thus, for a complaint to survive a motion for judgment on the pleadings, the plaintiff must allege factual allegations raising a right to relief above a speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

b. Legal Standard for Summary Judgment

Summary judgment is proper when "no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1264 (11th Cir. 2010); Fed. R. Civ. P. 56(a).[2] The party seeking summary judgment bears the "'initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the [pleadings, discovery, and other evidence] which it believes demonstrate the absence of genuine issue of material fact.'" *Branch Banking & Trust Co. v. Broaderip*, No. 10-00289-KD-C, 2011 WL 3511774 at *3 (S.D. Ala. Aug. 11, 2011) (*quoting Clark v. Coats & Clark*,

[1] Rule 7012 of the Federal Rules of Bankruptcy Procedure incorporates Rules 12(c) and 12(b)(6) in adversary proceedings. *See* Fed. R. Bankr. P. 7012.
[2] Rule 7056 of the Federal Rules of Bankruptcy Procedure incorporates Rule 56 of the Federal Rules of Civil Procedure in adversary proceedings. *See* Fed. R. Bankr. P. 7056.

Inc., 929 F.2d 604, 608 (11th Cir. 1991)). Once the movant meets this initial burden, "the non-movant must 'demonstrate that there is indeed a material issue of fact that precludes summary judgment.'" *Love v. City of Mobile*, No. 10-0166-CF-C, 2011 U.S. Dist. LEXIS 97443, at *13-14 (S.D. Ala. Aug. 29, 2011) (quoting *Clark*, 929 F.2d at 608). The Court must accept the evidence of the non-moving party as true, resolve all doubts against the moving party, construe all evidence in the light most favorable to the non-moving party, and draw all reasonable inferences in the non-moving party's favor. *Duke v. Atria, Inc.*, 2005 WL 1513158, *1 (M.D. Ala. June 27, 2005).

In the present case, and as fully explained below, RRG is not entitled to judgment on the pleadings, summary judgment, or relief from the Sale Order from its assumption of the Development Agreement. Instead, PHGA is entitled to summary judgment on PHGA's causes of action against RRG.

B. RRG Assumed the Development Agreement.

As explained above, the Development Agreement was listed in the APA as an Existing Lease and as an Assignable Lease. Gill Dep., Ex. 16 at 173, 186, Sched. 1.3(a)-1. RRG was required to designate Designated Leases from the list of Assignable Leases. Gill Dep., Ex. 16 at 141, § 1.3. On three (3) occasions, RRG only listed the store number and address for the Port Wentworth Store in its list of Designated Leases. Gill Dep., Ex 16 at 215; Pianin Dep., Ex. 12. Because RRG only listed the store number and address for the Port Wentworth Store in its list of Designated Leases and did not exclude the Development Agreement, the Development Agreement must have been included as a Designated Lease for the Port Wentworth Store. Gill Dep., Ex 16 at 215. Pianin Dep., Ex. 12.

Even if RRG did not have access to the Development Agreement prior to January 5, 2024, the facts establish that RRG at least received the Development Agreement on January 5, 2024. Pianin Dep., 15:8-11, 22:9-21, Ex. 33. Because RRG had until January 14, 2024 to reject any

Designated Leases, RRG had eleven (11) days before the Closing and nine (9) days before the deadline to reject the Development Agreement, which RRG did not do. Pianin Dep., 15:8-11, 22:9-21, Ex. 33. Thus, RRG received the Development Agreement in sufficient time to reject the same, if RRG had elected to do so.

In conjunction with the Closing, RRG executed the Assumption Agreement for the Port Wentworth Store. Pianin Dep., Ex. 34. In the Assumption Agreement, RRG assumes the "Lease" for the Port Wentworth Store, the definition of which included the Development Agreement. Pianin Dep., Ex. 34. PHGA also signed the "Developer Consent to Assignment and Assumption of Lease," attached to the Assumption Agreement, which established RRG as the new "Owner/Operator" under the Development Agreement. Pianin Dep., Ex. 34, p. 6. Thus, the Assumption Agreement clearly contemplates that RRG assumed the Development Agreement.

Finally, following the Closing, PKGI paid to PHGA the Cure Costs due under the Development Agreement. Gill Dep., 25:13-23. Taken together, the undisputed facts demonstrate that RRG assumed the Development Agreement.

C. PHGA does not Lack Standing and RRG is Estopped from Arguing the Same.

At a fundamental level, in order to have standing, a party must demonstrate: "(1) that they personally have suffered some actual or threatened injury as a result of the alleged conduct of the defendant; (2) that the injury fairly can be traced to the challenged action; and (3) that it is likely to be redressed by a favorable decision." *U.S. Fire Ins. Co. v. Caulkins Indiantown Citrus Co.*, 931 F.2d 744, 747 (11th Cir. 1991) (internal citations omitted).

RRG argues that PHGA has no interest in the Development Agreement and therefore lacks standing in the action, claiming that neither PHGA nor JG Coastal owes money under the Loans. Bankr. Doc. No. 838, p. 7; AP Doc. No. 35, p. 7. However, PHGA is injured because RRG assumed the Development Agreement but did not abide by its obligation to pay the Development

Fee to PHGA, which caused PHGA to further default under the Loans. Gill Dep., 22:10-12; Pianin Dep., Ex. 39. Thus, PHGA has standing to prosecute the Adversary Proceeding to redress the injuries RRG caused to PHGA by not paying the Development Fee.

Even if PHGA lacks standing in this case, RRG is estopped from arguing that JG Coastal, and not PHGA, is the proper plaintiff in the Adversary Proceeding. Judicial estoppel aims to protect the integrity of the judicial system by "preclud[ing] a party from assuming a position in a legal proceeding inconsistent with one previously asserted when inconsistency would allow the party to 'play fast and loose with the courts.'" *Chandler v. Samford Univ.,* 35 F. Supp. 2d 861, 863 (N.D. Ala. 1999) (*quoting Ryan Operations, G.P. v. Santiam–Midwest Lumber Co.*, 81 F.3d 355, 358 (3rd Cir.1996)); *see also In re Sharpe*, 391 B.R. 117, 166 (Bankr. N.D. Ala. 2008) (*quoting Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257, 1261 (11th Cir.1988)) ("Judicial estoppel is a general rule, 'directed at those who would attempt to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings.'"). The application of judicial estoppel necessitates: "(1) the positions asserted are in fact inconsistent, and (2) the inconsistency would allow a party to benefit from deliberate manipulation of the courts." *Chandler*, 35 F. Supp 2d at 863 citing *Ryan*, 81 F.3d at 361.

PHGA filed a Motion to Substitute JG Coastal as the plaintiff in the Adversary Proceeding. AP Doc. No. 17. Subsequently, RRG objected to the Motion to Substitute, and the Motion to Substitute was denied by the Court. AP Doc. No 20; AP Doc. No. 29. RRG now attempts to argue that PHGA lacks standing and that JG Coastal is the correct plaintiff in this Adversary Proceeding, which is contrary to its previous objection to the Motion to Substitute. *See* Bankr. Doc. No. 838, p. 7; AP Doc. No. 35, p. 7. RRG's assuming different positions as convenient to RRG is the exact sort of action that judicial estoppel is designed to prevent.

Consistency must be maintained with respect to varying positions taken by litigants, particularly when these positions involve the substitution of parties. *See Acme Roofing & Sheet Metal Co. v. Air Team USA, Inc.*, No. 12-CV-1056-KOB, 2013 WL 3381372, at *3 (N.D. Ala. July 8, 2013). In *Acme Roofing*, a new plaintiff was substituted in place of an original plaintiff as the true party in interest, as a result of an assignment of the original plaintiff's accounts receivable to the new plaintiff. *Id*. at *1. The court granted this motion to substitute, acknowledging that there were no objections from the defendant. *Id*. The defendant later contended that the new plaintiff was a "stranger" to the relationship and therefore not the proper plaintiff. *Id*. The Northern District of Alabama held that "the court must remain consistent with its previous orders and consider [the new plaintiff] as an involved and interested party in the relationship." *Id*. Consequently, the defendant was estopped from arguing that the new plaintiff was a stranger to the case. *Id*. Like in *Acme Roofing*, RRG is estopped from arguing that JG Coastal, and not PHGA, is the correct plaintiff in the Adversary Proceeding.

As for RRG's additional argument that JG Coastal might also lack standing in this case because there are no longer any funds owed under "any bank loan," this assertion is irrelevant for the above reasons. *See* Bankr. Doc. No. 838, p. 7; AP Doc. No. 35, p. 7. Even if that argument was relevant, it is incorrect. *See id.* RRG's failure to pay the Development Fee led to JG Coastal's purchasing the Loans. Gill Dep., 22:10-12; Pianin Dep., Ex. 39; *see gen.*, Sale Agreement; *see also Poling v. Morgan*, 829 F.2d 885 (9th Cir. 1987) (holding that a guarantor who becomes personally liable under the principal's debt only option to avoid liability is to pay off the debt). For the reasons already outlined in this Response, JG Coastal merely substituted the money JG Coastal expended to pay off the Loans as the "bank loan" under the Development Agreement. Gill Dep., 21:14-24; Ex. 4. *See gen.*, Promissory Note. RRG, as the new Owner/Operator under the

Development Agreement, still owes the Development Fee as payment for the money which PHGA took out to build and equip the Port Wentworth Store as a Burger King restaurant of which RRG now operates and reaps the benefits. Gill Dep., 21:14-24; Ex. 4; Pianin Dep., Ex. 7.

In summary, RRG has not satisfied the requirements for a judgment on the pleadings nor summary judgment.

D. The Development Agreement Remains in Effect.

The purpose of the Development Agreement was to facilitate payments from the "Owner/Operator" under the Development Agreement, originally PKGI, to the "Developer" under the Development Agreement, PHGA, for the purpose of paying off "any bank loan" taken out by the "Developer" to build and equip the Port Wentworth Store. Gill Dep., 19:8-16, Ex. 4. RRG argues that the Sale Order determined that certain furniture, fixtures, and equipment (the "FF&E") in the Port Wentworth Store, which secures one of the Loans, belongs to the Debtors and not to PHGA, and therefore the purpose of the Development Agreement is moot because PHGA no longer owns the FF&E which secured the Loans. Bankr. Doc. No. 838, p. 8; AP Doc. No. 35, p. 8. However, the Court did not state in the Sale Order that the Debtors own the FF&E, but instead stated that there is a "bona fide dispute" as to the ownership of the FF&E, but that the Sale would proceed regardless. Gill Dep., Ex. 16 at 8. Additionally, there were two Loans to PHGA, one for the FF&E in the Port Wentworth Store and one for the Port Wentworth Store itself, i.e. the real estate, which loan is the subject of the Development Agreement. Gill Dep., 9:12-19, 15:5-7, 24:6-12, Ex. 6, Ex. 7. Even if the Sale Order rendered the Development Agreement moot as to the Loan for the FF&E in the Port Wentworth Store, the Sale Order did not render the Development Agreement moot as to the Loan for the Port Wentworth Store itself.

Additionally, RRG argues that the Sale Order transferred the Port Wentworth Store to RRG free and clear of the Development Agreement. Bankr. Doc. No. 838, pp. 8-9; AP Doc. No. 35, pp.

8-9. However, the Sale Order specifically states that it vests RRG with title to the assets RRG purchased in the Sale, "free and clear of all liens, claims, interests, and encumbrances ***other than as set forth in the [APA]***." Gill Dep., Ex. 16 at 10 (emphasis added). The Development Agreement was set forth in the APA as an Existing Lease and as an Assignable Lease, and was designated by RRG as a Designated Lease. Gill Dep., Ex. 16 at 173, 186, 215, Sched. 1.3(a)-1. RRG then assumed the Development Agreement via the Assumption Agreement. Pianin Dep., Ex. 34. Even had the Sale Order had not addressed this specific point, RRG cannot now argue that it does not have to abide by the terms of the Development Agreement because the Port Wentworth Store was sold to RRG "free and clear." *See Folger Adam Sec., Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252, 264 (3d Cir. 2000) (holding that an executory contract cannot be sold free and clear of the associated burdens, because "bankruptcy law generally does not permit a debtor or an estate to assume the benefits of a contract and reject the unfavorable aspects of the same contract."). By this logic, RRG also would not have to abide by the terms of the Ground Lease, or any other asset it assumed from PKGI.

E. The Development Agreement is an Executory Contract.

Regardless of whether the Development Agreement is an executory contract or not, RRG assumed Ground Lease subject to the Development Agreement in the Assumption Agreement. However, under applicable law, the Development Agreement is an executory contract. The Eleventh Circuit has adopted the "functional approach" in determining whether a contract is executory. *In re Gen. Dev. Corp.*, 84 F.3d 1364, 1374 (11th Cir. 1996); *See also In re Walter Energy, Inc.*, No. 15-02741-TOM11, 2015 WL 9487718 (Bankr. N.D. Ala. Dec. 28, 2015). Under the functional approach, "the question of whether a contract is executory is determined by the benefits that assumption or rejection would produce for the estate." *Id.* Therefore, "[e]ven though there may be material obligations outstanding on the part of only one of the parties to the contract,

it may nevertheless be deemed executory under the functional approach if its assumptional rejection would ultimately benefit the estate and its creditors." *Id.* Under the functional approach, a court looks at the purpose of rejecting the contract at issue, and if those purposes have already been accomplished, then the contract is not executory. *Id.*

Regardless of RRG's arguments, the Development Agreement is an executory contract under the functional approach. In *Walter Energy, Inc*, this Court held that under the functional approach, certain agreements were executory because by rejecting them, a debtor would eliminate certain monetary losses it incurs under said agreements, increase operational flexibility, and said objectives were not already accomplished in the bankruptcy. No. 15-02741-TOM11 at *5, Likewise, had the Development Agreement not been assumed by RRG, the Debtors' possible rejection of the Development Agreement would have allowed the Debtors to eliminate the payment of the Development Fee to PHGA, which would have allowed the Debtors to conserve more money in the estate and which purpose was not otherwise accomplished during the Bankruptcy. Thus, again, RRG has not satisfied the requirements for a judgment on the pleadings or summary judgment.

F. PHGA is an Intended Beneficiary of the Assumption Agreement.

RRG states that PHGA cannot enforce its rights under the Assumption Agreement because PHGA is not a party to the Assumption Agreement. Bankr. Doc. No. 838, p. 9; AP Doc. No. 35, p. 9. However, PHGA signed the Assumption Agreement as the "Developer" under the Development Agreement. Pianin Dep., Ex. 34. Black's Law Dictionary defines a "Signatory" to an agreement as "a party that signs a document, personally or through an agent, and thereby becomes a party to an agreement." SIGNATORY, Black's Law Dictionary (12th ed. 2024). Moreover, the Assumption Agreement identifies PHGA as a "Counterparty" to the same. Pianin Dep., Ex. 34. Thus, PHGA is a party to the Assumption Agreement.

RRG cites *Beverly v. Macy*, in which the Eleventh Circuit held that a third party can only sue under a contract if the contract is intended for said party's direct benefit. 702 F.2d 931 (11th Cir. 1983). A third party is an intended beneficiary of a contract:

> "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intentions of the parties; and either: (1) the performance of a promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (2) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

Id.

Thus, because the Assumption Agreement provides for RRG's assumption of the Development Agreement, PHGA is therefore an intended beneficiary of the Assumption Agreement in order to effectuate the intentions of PKGI and RRG. Just as the Ground Landlord signed a Landlord Consent to Assignment and Assumption of Lease attached to the Assumption Agreement agreeing to recognize RRG as the tenant under the Lease, PHGA signed the Developer Consent to Assignment and Assumption of Lease wherein it agreed to recognize RRG as the Owner/Operator under the Development Agreement. Pianin Dep., Ex. 34. To argue that PHGA cannot enforce its rights under the Assumption Agreement because it is not explicitly named as a party to the Assumption Agreement is to argue that the Ground Landlord cannot enforce its rights under the Ground Lease as against RRG because it is not explicitly named as a party to the Assumption Agreement—which would render the Assumption Agreement, the Landlord Consent to Assignment and Assumption of Lease signed by the Ground Landlord, and the Developer Consent to Assignment and Assumption of Lease signed by PHGA, useless.

Finally, PHGA notes RRG's argument that it "specifically omitted" the Development Agreement from the list of "Designated Leases" on three occasions—in the Amendment to APA and in the Lease Notices, all of which were executed in December, 2023. AP Doc. No. 35, p. 9.

However, RRG did not specifically omit the Development Agreement on any of these occasions, nor did it specifically include the Ground Lease on any of these occasions. Gill Dep., Ex. 15 at 215; Pianin Dep., Ex. 12. Rather it included only the store number and address for the Port Wentworth Store in its list of Designated Leases, implying that it intended to assume all Assignable for the Port Wentworth Store, of which the Development Agreement was one. Gill Dep., Ex. 15 at 215; Pianin Dep., Ex. 12. To the extent that RRG attempts to argue that because it did not specifically list the Development Agreement as a Designated Lease it did not assume the same, then RRG did not assume any leases, including the Ground Lease, as RRG refers only to the Designated Leases for each store by the store's store number and address. Gill Dep., Ex. 15 at 215; Pianin Dep., Ex. 12.

Moreover, Randy Pianin stated and implied on multiple occasions, including in the Interrogatory Responses, that RRG was not aware of the Development Agreement until after the Closing, on January 16, 2024, or weeks after RRG supposedly "specifically omitted" the Development Agreement on three occasions in December, 2023. Pianin Dep., 14:16-15:11, 36:10-15, Ex. 3. While RRG has supplemented its Interrogatory Responses to state that RRG was not aware of the terms of the Development Agreement until January 5, 2024, this is still weeks and days after RRG supposedly "specifically omitted" the Development Agreement on three occasions. Supp. Int. Responses, p. 10. It is not possible for RRG to have "specifically omitted" the Development Agreement in December 2023 if RRG did not know it existed until January 5, 2024.

G. Whether or not the Development Agreement is a lease, it was listed in the APA as an "Assignable Lease."

Regardless of whether the Development Agreement is an executory contract or a lease, RRG assumed the Ground Lease subject to the Development Agreement in the Assumption

Agreement. PHGA disputes RRG's assertion that, because the Development Agreement is a contract and the APA listed RRG's Designated Contracts as "None," RRG did not assume the Development Agreement. Bankr. Doc. No. 838, pp. 89-10; AP Doc No. 35, pp. 9-10. Again, Schedule 1.2(a)-1 to the Sale Order also lists the Assignable Contracts as "None." Gill Dep., Ex. 16 at 182. Section 1.2 of the Sale Order is clear that RRG could only choose Designated Contracts from the list of Assignable Contracts. Gill Dep., Ex. 16 at 140, §1.2. Because there were no Assignable Contracts listed in the Sale Order, there could not be any Designated Contracts. Gill Dep., Ex. 16 at 140, §1.2.

The Development Agreement is listed in the APA as an Existing Lease and as an Assignable Lease for the Port Wentworth Store. Gill Dep., Ex. 16 at 173, 184-186. Gill Dep., Ex. 16 at 140, §1.2. RRG proceeded to designate all leases for the Port Wentworth Store as Designated Leases. Gill Dep., Ex 16 at 173, 186, 215, Sched. 1.3(a)-1. RRG then must have assumed the Development Agreement in the Assumption Agreement. Pianin Dep., Ex. 34. Finally, following the Closing, PKGI paid to PHGA the Cure Costs due under the Development Agreement. Gill Dep., 25:13-22.

H. Even if the Intent of the Parties is Considered, the Facts Indicate that the Parties Intended to Assume the Development Agreement.

RRG alleges that the Court should look to the intent of the parties, and that, because the Development Agreement provides no value to RRG, it would never have intended to assume the same [Bankr. Doc. No. 838, p. 10; AP Doc. No. 35, p. 10]. Initially, RRG cites *Garber v. Nationwide Mut. Ins. Co.*, 2021 WL 5811733, at *9 (N.D. Ala. Dec. 7, 2021) in support of the idea that, when interpreting a contract, a court looks to the intent of the parties. However, the procedure laid out in *Garber* as to the principle of contract law, is that a court will not look to the intent of the parties to determine the meaning of a contract unless the contract is ambiguous. *Id*. If a court

determines that a contract is ambiguous, it will then determine whether established rules of contract construct resolve said ambiguity, and only if the rules of contract construction do not resolve the ambiguity, will the court look to factual issues like the intent of the parties. *Id*. at *7 citing *Ohio Cas. Ins. Co. v. Holcim (US),* 744 F. Supp. 2d 1251, 1259-60 (S.D. Ala. 2010) ("[T]he proper analytical sequence under Alabama law is as follows: (a) determination of whether the contract is ambiguous; (b) if so, application of rules of construction to resolve the ambiguity; and (c) if the rules of construction do not resolve the ambiguity, then look to factual issues, which are generally for the jury."). A contract is ambiguous, "only if, when given the context, the term can reasonably be open to different interpretations by people of ordinary intelligence." *Id*. at *5 (internal citations omitted).

Neither the Assumption Agreement nor the APA are ambiguous as to the Development Agreement under this standard, nor has RRG attempted to argue the same. Even if this Court determines that the Assumption Agreement and/or APA are ambiguous, the next determination is whether the ambiguity can be resolved by contract construction principles, and only if the ambiguity could not be resolved by contract construction principles, then would the intent of the parties be considered. *Id*. at *7. Moreover, PKGI was a party to the Assumption Agreement and it was clearly PKGI's intent for RRG to assume the Development Agreement, as PKGI paid Cure Costs to PHGA representing amounts due under the Development Agreement. Gill Dep., 25:13-23. Pianin Dep., Ex. 34.

RRG also states that the Development Agreement was provided to RRG after it determined which leases it would assume. Bankr. Doc. No. 838, p. 10; AP Doc. No. 35, p. 10. Even if RRG did not have access to the Development Agreement prior to its receipt of the Pre-Sale Email, or in time to create the list of leases it wished to assume, RRG received the Development Agreement

on January 5, 2024, eleven (11) days before the Closing and nine (9) days before the deadline to reject any Designated Leases. Pianin Dep., 15:8-11, 22:9-21, Ex. 33. If RRG had truly intended to reject the Development Agreement, it had ample time to do so.

Moreover, as of the date of the Pre-Sale Email, RRG apparently also did not have access the Ground Lease for the Port Wentworth Store. Pianin Dep., 43:18-44:4, Ex. 33. Thus, RRG appears to have made the decision to assume leases for the Port Wentworth Store based solely on its review of various spreadsheets in the Data Room and not on a review of the Ground Lease and the Development Agreement themselves.

If RRG based its decision to assume the Development Agreement based solely on the spreadsheets in the Data Room, the spreadsheets in the Data Room evidence the existence and terms of the Development Agreement. Bankr. Doc. No. 838, p. 10; AP Doc. No. 35, p. 10. For example, Data Room included a spreadsheet entitled "Premier King Leases by Location – Burger King," which spreadsheet was in RRG's possession, which stated that, for the Port Wentworth Store, "PKGA pays devel fee to Premier Holdings of GA" along with further identifying the existence of the Development Agreement. Pianin Dep., Ex. 15. RRG's corporate representative Randy Pianin himself prepared a spreadsheet which showed that the Trailing Twelve Months of rent for the Port Wentworth Store was significantly higher than the $74,000.00 he understood rent to be under the Ground Lease. Pianin Dep., 21:8-17, 28:3-23; Ex. 25. Regardless, he did not question why the rent for the Trailing Twelve Months was different than the rent he understood was owed under the Ground Lease. Pianin Dep., 29:6-16. Thus, the Data Room contained documents which should have put RRG on notice that the payments for the Port Wentworth Store included the Development Fee.

I. RRG Should Not Be Afforded Relief from RRG's Assumption of the

Development Agreement under Rule 9024 Nor under any other Rule or Theory of Law.

Federal Rule of Civil Procedure 60(b)[3] permits a court to alter or amend a judgment under certain circumstances. However, "relief under Rule 60(b) requires extraordinary circumstances that should be employed judiciously as a scalpel and not as a bludgeon." *In re Steel City Pops Holding, LLC*, 2020 WL 2569927, at *5 (Bankr. N.D. Ala. May 20, 2020). Extraordinary circumstances "rarely exist when a party seeks relief from a judgment that resulted from the party's deliberate choices." *Coltec Industries, Inc. v. Hobgood*, 280 F.3d 262, 273 (3d Cir. 2002). Consequently, a court will not look favorably upon "parties trying to escape the consequences of their own counseled and knowledgeable decisions." *Id.* Moreover, "neglect or lack of diligence" is not enough to force a court to remedy a judgment under Federal Rule of Civil Procedure 60(b). *Lehman v. United States*, 154 F.3d 1010, 1017 (9th Cir. 1998).

RRG has not established that extraordinary circumstances exist to relieve RRG of its assumption of the Development Agreement. Rather, wRRG's assumption of the Development Agreement, to the extent it was not intentional, is a direct result of a lack of due diligence. The APA includes the Development Agreement as an Existing Lease and an Assignable Lease for the Port Wentworth Store. Despite this, RRG has provided no evidence that it ever asked the Debtors about the Development Agreement and its terms. Moreover, at least one spreadsheet in the Data Room that was in RRG's possession stated that, for the Port Wentworth Store, "PKGA pays devel fee to Premier Holdings of GA." Pianin Dep., Ex. 15.

As explained above, RRG's corporate representative, Randy Pianin, prepared a spreadsheet which showed that the Trailing Twelve Months of rent for the Port Wentworth Store was significantly higher than the $74,000.00 he understood rent to be under the Ground Lease, and he

[3] Rule 9024 of the Federal Rules of Bankruptcy Procedure incorporates Rule 60 of the Federal Rules of Civil Procedure in adversary proceedings. *See* Fed. R. Bankr. P. 9024.

still did not question why this was the case. Pianin Dep., 21:8-17, 28:3-23, 29:6-16, Ex. 25. As of the date of the Pre-Sale Email, RRG did not have access to the Ground Lease for the Port Wentworth Store, thus RRG did not take any action to confirm the obligations under the Development Agreement or even under the Ground Lease. *See* Pianin Dep., 43:18-44:4, Ex. 33.

RRG received the Development Agreement in the Pre-Sale Email for the purpose of drafting the Assumption Agreement. RRG included the Development Agreement in the Assumption Agreement ***that RRG itself drafted*** as part of the Lease being assumed by RRG, and also included the Developer Consent to Assignment and Assumption of Lease which stated that RRG was becoming the "Owner/Operator" under the Development Agreement. Pianin Dep., 36:20-21, 37:10-38:5, Ex. 34. When asked about his review of the Assumption Agreement, RRG's corporate representative, Randy Pianin, stated that he did notice the reference to the Development Agreement in the Assumption Agreement, but chose to sign the Assumption Agreement ***without reviewing the Development Agreement***. Pianin Dep., 37:10-38:5.

Finally, rent for the Port Wentworth Store is $74,000 annually. This is a percentage of sales of 6.12%. Pianin Dep., Ex. 25. Despite this low percentage of sales and despite knowing that it costs money, typically under a loan, to build a brand new Burger King restaurant on a Ground Lease, RRG has not provided any evidence that it ever questioned this low percentage of sales. Pianin Dep., 20:21-24, 49:8-23. Thus, it is clear that RRG's assumption of the Development Agreement, to the extent it was not intentional, is the result of RRG's lack of diligence and therefore does not meet the extraordinary circumstances necessary for this Court to afford RRG relief from its assumption of the Development Agreement under Rule 60(b).

RRG cites *In re UAL Corp.*, in which the Seventh Circuit held that a debtor could be released of its assumption of certain airplane leases under Federal Rule of Civil Procedure 60(b)

because the debtor's assumption of the same was a case of excusable neglect, due to the complex nature of airplane leases, and because the harm in the debtors assuming said leases would be borne by the innocent creditors. 411 F.3d 818 (7th Cir. 2005). Unlike *In re UAL Corp.*, the leases at issue in the Bankruptcy were standard real property leases, not complex airplane leases. Moreover, innocent creditors will not bear the burden of RRG's decision to assume the Development Agreement. As RRG cites, "loss of windfall is not the kind of harm that a court should endeavor to avert." *Id*. at 823-34. Finally, the Seventh Circuit also explicitly stated that it was not granting the debtor relief under Federal Rule of Civil Procedure 60(b) because of the "number and complexity" of the airplane leases compounded by the "60-day deadline for sorting through them and figuring out which to abandon and which to keep." *Id*. at 823. To the extent RRG attempts to argue the same in its Memorandum, this Court should not give effect to such arguments.

RRG further argues that it could not possibly know what payment obligations exist under the Development Agreement. Bankr. Doc. 838, p. 10; AP Doc. No. 35, p. 10. However, debt service payments are a "sum certain" which can be determined by mathematical calculation of the amounts due and owing under the terms of a note. *See In re University of Wisconsin Oshkosh Foundation, Inc.*, 592 B.R. 216 (Bankr. E.D. Wisc. 2018) ("The State's obligation to cover the debt service also is a 'sum certain.' The debt service liability is fixed by the terms of the note. The balance due can be readily determined by mathematical calculation . . . ."). Prior to the Closing and as Cure Costs, Aurora authorized payment of approximately $11,100.00 monthly to PHGA as the Development Fee, which amount constituted the debt service payment for the Loans and a $100 administrative fee. Gill Dep., 21:5-10. The Development Fee is now equal to at least $11,100 per month. *See* Gill Dep., 21:14-24:1. While RRG may not have known a specific dollar amount that was owed under the Development Agreement, RRG could have determined how much was

owed under the Development Agreement had it inquired as to those amounts. PKGI, and later Aurora, were able to calculate the amount due and owing and could have provided this information. In conclusion, RRG has not demonstrated that it is entitled to relief from its assumption of the Development Agreement under Federal Rule of Civil Procedure 60(b) due to RRG's own neglect, lack of due diligence, and deliberate choices.

J. Summary Judgment is Due to be Entered in Favor of PHGA on PHGA's Causes of Action against RRG.

Summary judgment is due to be entered in favor of PHGA because, by refusing to abide by the terms of the Development Agreement RRG assumed: (1) PHGA is entitled to a declaratory judgment that RRG assumed the Development Agreement and is liable under the same; (2) PHGA is entitled to damages for RRG's breach of the Development Agreement; and (3) PHGA is entitled to a judgment for its attorney's fees and expenses incurred in unnecessary discovery efforts caused by RRG's failure to conduct a diligent inquiry before it alleged it had not received the Development Agreement prior to the Closing.

a. PHGA is entitled to Summary Judgment on its claim for a Declaratory Judgment that RRG assumed the Development Agreement and is liable under the same.

A declaratory judgment is proper when a justiciable controversy exists. *Atlanta Gas Light Co. v. Aetna Cas. & Sur. Co.*, 68 F.3d 409, 414 (11th Cir. 1995) (internal citations omitted). In order to prove that a justiciable controversy exists, the party who invokes a federal court's authority must show, at an "irreducible minimum," that at the time the complaint was filed, he has suffered some actual or threatened injury resulting from the defendant's conduct, that the injury fairly can be traced to the challenged action, and that the injury is likely to be redressed by favorable court disposition." *Id.*

In the case at hand, there exists a "justiciable controversy" regarding whether RRG assumed the Development Agreement and is therefore liable under the same. As a direct result of

RRG's assertion that it has not assumed the Development Agreement, PHGA has incurred damages in the form of the unpaid Development Fee owed under the Development Agreement. PHGA will continue to incur damages unless this Court declares that RRG assumed the Development Agreement and is liable to PHGA thereunder. Because a justiciable controversy exists as to whether RRG assumed the Development Agreement, and because the facts as set forth in this Response demonstrate that RRG did assume the Development Agreement, a declaratory judgment is proper declaring that RRG assumed the Development Agreement and that RRG is liable to PHGA under the terms of the Development Agreement, thereby obligating RRG to perform its responsibilities as specified.

b. PHGA is entitled to Summary Judgment on its claim against RRG for Breach of Contract.

A party can recover under a cause of action for breach of contract when said party demonstrates: "(1) the existence of a valid contract binding upon the parties in the action, (2) the plaintiff's own performance; (3) the defendant's nonperformance, or breach, and (4) damage." *In re Jewell*, No. AP 11-70032-CMS, 2012 WL 5467764, at *9 (Bankr. N.D. Ala. Nov. 9, 2012). For all the reasons enumerated herein, including because the Development Agreement was listed as an Assignable Lease in the APA, RRG designated the Development Agreement as a Designated Lease in the Amendment to APA, RRG assumed the Development Agreement in the Assumption Agreement, and Aurora paid Cure Costs for the Development Agreement, the Development Agreement is a valid and binding contract between PHGA and RRG. Gill Dep., 25:13-23, Ex. 16 at 186, 215, Sched. 1.3(a)-2. Pianin Dep., Ex. 34. PHGA abided by its obligations under the Development Agreement by taking out the Loans and building and equipping the Port Wentworth Store as a Burger King restaurant. Gill Dep., 9:12-19, 15:5-7, 24:6-12, Ex. 6, Ex. 7. RRG has not abided by its obligation under the Development Agreement to pay the Development Fee to PHGA.

Pianin Dep., Ex. 4. PHGA has been damaged by RRG's breach of the Development Agreement because PHGA was unable to pay the amounts due and owing under the Loans. Gill Dep., 16:2-21. *See gen.*, Promissory Note.

Because: (1) the Development Agreement is a valid and binding contract; (2) PHGA has performed under the Development Agreement; (3) RRG has not performed under the Development Agreement; (4) and PHGA has suffered damages as a result of RRG's breach of the Development Agreement, the undisputed facts demonstrate that PHGA is entitled to summary judgment against RRG.

c. PHGA requests an award of attorney's fees for its fees and expenses incurred in discovery of the Pre-Sale Email.

Additionally, PHGA requests that this Court enter an order that PHGA is entitled to attorney's fees incurred in discovery efforts that resulted in the production of the Pre-Sale Email, which had been in RRG's possession and should have been located upon diligent inquiry. Had RRG exercised a diligent inquiry to locate the Pre-Sale Email, RRG would not have asserted complete lack of knowledge of the Development Agreement as a defense and PHGA would not have incurred attorney's fees in its discovery related to that issue.

V. CONCLUSION

For all the foregoing reasons, PHGA requests that this Court deny RRG's Judgment Motion, deny RRG's Relief Motion, and deny RRG's Summary Judgment Motion. Additionally, PHGA requests that this Court grant PHGA's Summary Judgment Motion by entering judgment in favor of PHGA which (1) declares that the RRG has taken assignment of the Development Agreement; (2) enters judgment against RRG and in favor of PHGA for the amounts which RRG has failed to pay under the Development Agreement, (3) and orders RRG to reimburse PHGA for the costs of discovering the Pre-Sale Email, including attorneys' fees, with leave of Court to PHGA

to establish such fees at a future hearing, and grant such other and further relief as this Court deems appropriate.

/s/ Heather A. Jamison
Heather A. Jamison (ASB-8673-H49L)
Chloe E. Champion (ASB-5104-Q54H)

Counsel for Plaintiff, Premier Holdings of Georgia, LLC

OF COUNSEL:
BURR & FORMAN LLP
420 North 20th Street, Suite 3400
Birmingham, Alabama 35203
Telephone: (205) 251-3000
Facsimile: (205) 458-5100
Email: hjamison@burr.com
cchampion@burr.com

CERTIFICATE OF SERVICE

Service of the foregoing shall be made via ECF to all parties entitled to notice thereunder, and to the following via e-mail, and if e-mail is not available via U.S. mail, on this the 25th day of October, 2024:

Peter J. Haley
Nelson Mullins Riley & Scarborough LLP
One Financial Center, 35th Floor
Boston, Massachusetts 02111
Email: peter.haley@nelsonmullins.com

Gregory M. Taube
Nelson Mullins Riley & Scarborough LLP
201 17th Street, NW, Suite 1700
Atlanta, Georgia 30363
Email: greg.taube@nelsonmullins.com

/s/ Heather A. Jamison
OF COUNSEL