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

In re: PREMIER KINGS, INC., *et al.*,[1] Debtors.	(Chapter 11) Case No. 23-02871-TOM Jointly Administered
PREMIER HOLDINGS OF GEORGIA, LLC Plaintiff, v. RRG OF JACKSONVILLE, LLC Defendant.	Adversary Proceeding No. 24-00016-TOM

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR RELIEF FROM ORDER ASSUMING AND ASSIGNING CONTRACT

RRG of Jacksonville, LLC ("RRG"), the defendant in this proceeding, submits this memorandum of law in support of its opposition to Plaintiff's Motion for Summary Judgment and in response to Plaintiff's Opposition to Defendant's Motion for Relief from Order Assuming and Assigning Contract. In support of its opposition and for its reply, RRG incorporates by reference as if fully set forth herein, Defendant's Supplemental Memorandum in Support of Motion for Summary Judgment or, in the alternative, Relief from Order Assuming Contract

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification numbers, are: Premier Kings, Inc. (3932); Premier Kings of Georgia, Inc. (9797); and Premier Kings of North Alabama, LLC (9282). The Debtors' address is 7078 Peachtree Industrial Blvd., Suite #800, Peachtree Corners, GA 30071. The Court entered an order for joint administration on October 30, 2023 [Doc. No. 84].

[Adv. Proceeding Docket No. 35] and the supporting affidavits and materials submitted therewith.

Response To Plaintiff's Statement of Undisputed Material Facts

Background of the Lease and the Development Agreement

Paragraphs 1 through 5 of the Plaintiff's statement accurately state the background of the Lease and Development Agreement.

Paragraph 6 of the Plaintiff's statement relies upon a statement in Mr. Pianin's testimony relating to the construction of store locations generally and not the location that is the subject of this action. The referenced testimony is inapposite and is as follow:

Q(By Ms. Jamison) Did you look at the cost to
4 build a store on the ground lease?
5 A Why would I do that?
6 MR. HALEY: Object -- (gesturing).
7 THE WITNESS: No.
8 Q (By Ms. Jamison) Would you assume that a
9 building placed on a ground lease would have cost money
10 to build the building?
11 MR. HALEY: Objection.
12 You can answer.
13 THE WITNESS: Yes.
14 Q (By Ms. Jamison) Do you know how much it
15 would cost to build an outfit of Burger King on a
16 ground lease?
17 A I don't know what it would cost to build it
18 in that location. We are in the process of scraping
19 and rebuilding one of the first 23 restaurants.
20 Q And in that process of scraping and
21 rebuilding, where would -- where are the funds coming
22 from to build that location?
23 A Cash on hand and developing a line of credit.
24 MS. JAMISON: I think that's all I have.

Deposition of Randy Pianin, AP Docket No. 47, Ex. 2 (hereinafter "Pianin Dep."), p. 49.

The Plaintiff's statement of the background information omits the following information:

RRG 1. The Plaintiff Holdings was formed to hold real estate used in the Debtor Premier Kings of Georgia, Inc.'s ("Premier Kings") operation of various fast-food franchises. [Affidavit of Counsel, AP Dkt. No. 37, Ex. A, Deposition of Jaipal Gill (hereinafter "Gill Dep.", p. 9, l. 12-17].

RRG 2. As Plaintiff's sole source of revenue was through the stores managed by Premier Kings, the bank that loaned the money to Plaintiff, First Horizon Bank as successor to Iberia Bank ("First Horizon"), required that Plaintiff create an obligation on behalf of Premier Kings to pay the debt service on the bank loan to Plaintiff, the obligor under the loan. Plaintiff was then was required to assign the Development Agreement to First Horizon. [See, Loan Agreement, Aff. Counsel, AP Dkt No. 37, Ex. B; Assignment of Development Agreement, Aff. Counsel, Ex. C; Gill Dep. p. 19, l. 13-16; p. 29, l. 20-p.30, l. 6.]. The Debtor Premier Kings paid the First Horizon debt service to Plaintiff through, and including during, the conduct of the bankruptcy proceedings. [Gill Dep. p. 41, l. 13-p. 43, l.19].

The Bankruptcy and Sale to RRG

Paragraphs 7 and 8 of the Plaintiff's statement accurately state the background of the Bankruptcy and Sale Process.

Paragraph 9 of the Plaintiff's statement states that the Development Agreement was sited in the Aurora Drop Box, but does not state that the Aurora Drop Box was only a pass-through mechanism and that neither RRG, nor any other prospective buyer, had access to it. [Aff. Counsel, AP Dkt. No. 37, Ex. F, Affidavit of Laura Kendall, ¶¶ 7-10;

> 9. No buyers under the Sale Order, including RRG, accessed the Drop Box.
>
> 10. At no point did Aurora have any contact with RRG regarding Store 26868 or the Development Agreement.

Affidavit of Laura Kendall, ¶¶ 9-10.

Paragraph 10 of the Plaintiff's statement states that Raymond James had access to the Development Agreement in the Aurora drop box, but fails to indicate that the Development Agreement was never uploaded by Raymond James to the Data Room prepared for sellers. See, Affidavit of Randy Pianin, AP Dkt. No. 26, ¶ 10.

Paragraph 11 of the Plaintiff's statement accurately restates the referenced document.

Paragraphs 12 and 13 of the Plaintiff's statement references the rent paid for the Port Wentworth store location as reflected in the information provided by the Debtors as summarized by RRG as being $74,000 per year, but notes that the actual rent paid reflected in the Debtors' records was $120,015. Mr. Pianin testified as follows:

> A Yes, that is 12 months.
> Q Did you question why the rental for these 12 months was more than the rental set forth in the ground lease?
> A No, because the lease that we had showed that what they were paying for September, going back -- and I'd have to look at the monthly schedule that we were provided -- had what they were paying. So we did not ask why they were paying more earlier in the year per the lease that was in the data room, but they were paying towards the back end and what we -- what we believed was the rent was what they were paying, so...
> Q Based on your analysis here, including the $120,015 annual rent payment, was this an acceptable location based on profitability?
> A This would have been acceptable at this level. However, if you see, it's -- it was marked as a

Pianin Dep., p. 29

The schedule prepared by Mr. Pianin, attached to his affidavit as Exhibit C, states on page 3 of Exhibit C following the column identified as "26868" (16 lines up from the bottom of the page), the store number for the Port Wentworth store, that the rent paid by the Debtors at that location was as follows:

Jan 22	13,018
Feb 22	13,018
Mar 22	16,273
Apr 22	9,764
May 22	19,953
June 22	14,103
July 22	14,103
Aug 22	14,103
Sept 22	14,103
Oct 22	14,103
Nov 22	14,103
Dec 22	14,103
Jan 23	20,358
Feb 23	14,193
Mar 23	6,165
Apr 23	6,165
May 23	6,165
June 23	6,165
July 23	6,165
Aug 23	6,165
Sept. 23	6,165

Affidavit of Randy Pianin, AP Dkt. No. 26, Ex. C, page 3.

Paragraphs 14,15,16 and 17 of the Plaintiff's statement provided accurate citations to the record, however, also contain argument (*Paragraph 16: "Therefore, the Development Agreement was listed in the APA as a lease which RRG could choose to assume."; Paragraph 17: "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."*). These statements are unsupported by the record and inaccurate. The Development Agreement speaks for itself. It is not a lease.

6Q And when you say "rent," you're talking about
7 the amounts due under the development agreement, right?
8 A Yes.
9 Q So there was no -- there's no real estate
10 involved with that, correct?
11 A I call it rent, which is the debt service
12 payment.

Gill Dep. , p. 41

Paragraphs 18 through 22 of the Plaintiff's statement accurately reflect the record as stated.

Paragraph 23 of the Plaintiff's statement misstates the record of Mr. Pianin's deposition testimony as to whether he saw the Development Agreement prior to signing:

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Q (By Ms. Jamison) I am reasking if you asked --
A I did not see it prior to signing.
Q And you did sign this document, correct?
A I did, yes.
Q If you turn to the page past your signature, there's a "Landlord Consent to Assignment and Assumption of Lease."
Is this a normal -- strike that.
Did you see this page when you signed --
A I don't recall.
Q -- this document?
A I don't recall.
Q And if you turn to the next page, there's a development -- "Developer Consent to Assignment and Assumption of Lease."
Did you see this page prior to signing?
A I don't believe I did.
Q Do you know whether Premier Kings paid Premier Holdings a cure payment on the development agreement?
A No.
Q Would Premier Kings pay a cure payment on a document that was not being assumed?
A I don't know why you're asking me that

Pianin Dep., p. 38

Paragraph 24 of the Plaintiff's statement accurately states Mr. Gill's testimony.

RRG 3. Both First Horizon Bank and Holdings filed objections to the Sale Motion. [Docket Nos. 293, 312.] First Horizon described the furniture, fixtures and equipment at the Port Wentworth store as "First Horizon's collateral" and described the operation of Plaintiff and its role

in the debt scheme. [Docket No. 312, p. 1; pp. 3-4]. First Horizon asserted that the Debtor could not sell the FFE at the Port Wentworth store, because it did not own the FFE. Id., at pp. 5-6. Plaintiff in its own objections made similar assertions. The Court overruled the First Horizon objection and Plaintiff withdrew its objection in consideration of access to the Disputed Claim Reserve in the amount of $650,000. Sale Order, pp. 14-15. The Sale Order transferred the Port Wentworth store assets to RRG, "free and clear of any and all liens, claims, interests and encumbrances" including "contractual commitments." Sale Order, pp. 11-12.

Post Closing of the Sale to RRG

Paragraphs 25 through 33 of the Plaintiff's statement accurately reflect the record as stated.

RRG 4. Subsequent to the entry of the Sale Order and prior to (or on the same date) as the commencement of this proceeding, the loan to First Horizon Bank referenced in the Development Agreement was paid off. [Gill Dep. 15, l. 11-19.] Presently there is no money owed under the "bank loan" originally referenced in the Development Agreement. Id. The Plaintiff Holdings has no continued interest in the Development Agreement. [Gill Dep. p. 17, l. 17-22; Aff. Counsel Ex. I.]

17 Q And does Holdings have any continued interest
18 in the development agreement?
19 A No.
20 Q And was that true as of the effective date,
21 April 5th, 2024?
22 A That's correct.

Gill Dep. p. 17.

RRG 5. A review of the Development Agreement does not permit any party to determine the amounts due. [Gill Dep. p. 20, l. 22-p. 21, l. 4]

Q (By Mr. Haley) And how much is the development fee currently?
A Currently, it's 11,100 a month.
Q And how is that calculated?
A It was a debt service fee for First Horizon Bank.
Q But there's no fee being paid to First Horizon Bank presently, correct?
A Presently, no.
Q And so is there any amount due under the development agreement presently for the development fee?
A That needs to be calculated.
Q And how would that be calculated?
A Based on the monies spent to pay off the loan and then the cost of the monies.
Q And when you say "the cost of the monies," what do you mean by that?
A The part that's -- as a loan, it has interest, and then the remaining is personal.
Q And how much is the -- that was Mr. --

Gill Dep. p. 21

RRG 6. The Plaintiff is unable to determine or state what is due under the Development Agreement. [citation of record follows on next page]

A Sal Akturk.
Q Sal. And how much is the loan payment Sal?
A 500,000.
Q And how much is the monthly amount?
A It hasn't been set yet.
Q And is there a loan agreement between Coastal and Sal?
A No.
Q Is there a promissory note or any other indicia of the indebtedness?
A Promissory note, yes.
Q And how much is the promissory note for?
A It hasn't been calculated yet as payment.
Q But if there's a promissory note, does the promissory note give an amount that's due?
A No. No. It would be that you pay it in four years and be done with it. There's no calculation as such.
Q But does the promissory note state a principal amount?
A 500,000.
Q Okay. And what's the date of the promissory note?

but March, sometime -- right before we were making the transfer.
Q And do you have a copy of the promissory note?
A Not with me right now.
Q But --
A Yes, I should have it.
Q Okay.
MR. HALEY: So just for the record, I'll ask fora copy of that.
Q (By Mr. Haley) And then with respect to -- and with respect to the interest rate on the 500,000 or the due date, those amounts have not yet been agreed to; is that correct?
A No. I mean that's correct.
Q I'm sorry, that was a bad question.
A Yes.
Q Thank you for clarifying.
The -- and with respect to the -- you also testified that there would be a cost of money for the personal funds that you invested in the payoff. What would that cost be?
A I would say it would be calculated if I were to invest that somewhere, what would be the return, if

that, it can be calculated.
Q And do you know -- have you done that calculation?
A No, I have not.
(Exhibit 5 marked for identification.)
Q (By Mr. Haley) And, Mr. Gill, I show you what's marked as Exhibit 5. Was this the payoff that you testified to earlier on the First Horizon loan?
A Yes.
Q And so it was 344,203 for the equipment loan and 899,679 for the real estate loan?
A That's correct.
Q And with respect to the development agreement, Exhibit 4, do you know if that was ever placed in the data room for the -- this transaction?
A So at that time, I was not part of the sale process. It was -- Aurora, the CRO, was dealing with Raymond James and the data room and everything, yeah.
Q So do you have any personal knowledge as to whether the development was in the data room?
A I have no idea.
Q Okay. And did you ever discuss the development agreement -- prior to the commencement of this action, did you ever discuss the development agreement with anyone at RRG?

A No. I did not talk to anyone at RRG.
Q Okay. And did you ever talk to anyone at STNL or anyone on their behalf?
A No.
Q Okay. And did you ever have any discussions with anyone on behalf of Premier Kings, Inc., the debtors, concerning the development agreement?
A The CRO company knew very well that there is an agreement. That's why we were getting paid our debt service on this agreement.
Q And that was Aurora?
A Yes.
Q And when you say "that's why we were getting paid our debt service," were those payments that took place during the bankruptcy proceedings?
A Before, and then there was a cure payment.
Q And how much was the cure payment?
A It was based on $11,100.
Q And what was the amount of the cure payment?
A It was about 26,000 something. Yeah.
Q So around -- a little over two months' of payments?
A That's correct.
Q And so until the sale -- until two months before the sale, were you getting the debt service

Gill Dep. at pp. 22-25.

The Plaintiff in the conduct of its deposition under Rule 30(b)(6) was able to identify only a promissory note in the amount of $500,000 dated March 27, 2024. [Aff Counsel, Ex. H]. Plaintiff is not a party to that note, which is with Mr. Gill in his personal capacity.

The Assignment of the Development Agreement to JG Coastal

Paragraphs 34 through 38 of the Plaintiff's statement accurately reflect the docket or record as stated, however, also contain argument which RRG denies. The argument includes the statement in Paragraph 37 that RRG has not filed a "motion" for summary judgment. As set forth in RRG's memorandum [Adv. Proceeding Docket No. 35], the Court's procedural and scheduling orders entered in the adversary proceeding made provision to treat RRG's motion for judgment on the pleadings as a motion for summary judgment. (When matters outside the pleadings are presented, the Court may consider the motion as a motion for summary judgment. Fed. R.Civ. P. Rule 12(d).) The Court has afforded the parties time to respond as provided by the Rule. [See Adv. Pro. Docket No. 31]

Plaintiff's Response to RRG's Statement of Facts

Paragraph 45 of the Plaintiff's Statement (Docket No. 48, page 16) states that "[N]ow 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." *citing* Gill Dep., 21:14-24:1. This is not an accurate statement of Mr. Gill's testimony as the Rule 30(b)(6) witness put forth on behalf of the Plaintiff to testify as to "Any and all amounts owed to Premier by the Defendant." [Gill Dep, Ex 1, Notice of Deposition, p. 4, Gill Dep., p. 12]

14 Q And so is there any amount due under the
15 development agreement presently for the development
16 fee?
17 A That needs to be calculated.

Gill Dep. p. 21.

Argument

The Plaintiff Lacks Standing and has no Interest in this Action

In the adversary proceeding, the Plaintiff seeks to recover under two counts, Count I for Declaratory Judgment to establish that "RRG is liable to PHGA under the Development Agreement" [Complaint, p. 6, ¶ 27] and Count 2 for Breach of Contract to hold RRG liable to the Plaintiff for the amounts due under the Development Agreement. Plaintiff in its testimony through its Rule 30(b)(6) deposition acknowledged that it has no stake in this litigation.

Q And does Holdings have any continued interest
18 in the development agreement?
19 A No.
20 Q And was that true as of the effective date,
21 April 5th, 2024?
22 A That's correct.

Gill Dep. 17.

While the Plaintiff is unable to deny that it lacks any interest in this action and, indeed, lacked any interest in the Development Agreement on the day it filed the Complaint, it asks the Court to estop RRG from advancing that argument because RRG opposed its motion to substitute. The motion to substitute referenced, but did not attach, the sale agreement nor did Plaintiff disclose that it never had any interest in this action. There was nothing inconsistent with RRG's opposition to the motion to substitute and its motion to seek dismissal of this action.

At its Rule 30(b)(6) deposition, the Plaintiff stated that on the day it started this action it had no interest in this action and was not owed any money. The Plaintiff's citation to Acme Roofing and Sheet Metal Co., Inc. v. Air Team USA, Inc., No. 12–CV–1056–KOB, 2013 WL 3381372 (N.D. Ala. July 8, 2013) is misplaced. In Acme, the Defendant failed to object to a motion to substitute an intervenor and then in a motion for summary judgment claimed that the intervenor was a stranger to the action. Id at * 3. The Court went on to observe that the pleadings established that a cause of action did exist between the intervening party and the Defendant. Here, the opposite is true. The Plaintiff by its own admission has no interest in the Development Agreement and it is not owed any money. The Court's analysis should end there.

Even if the Court were to consider JG Coastal as a proper party, however, JG Coastal is also not owed any money. In its brief, Plaintiff asserts that "JG Coastal has paid off the Loans, the Development Fee will be equal to at least $11,100 each month." There is no basis for that statement. JG Coastal paid nothing off. The funds that satisfied the First Horizon loan allegedly came from Mr. Gill, but there is no evidence of those payments before the Court and no basis for the statement that "the Development Fee will be equal to at least $11,100 each month." At its deposition in this action in which it seeks to recover the amounts owed under the Development Agreement from RRG, the Plaintiff stated that

14 Q And so is there any amount due under the
15 development agreement presently for the development
16 fee?
17 A That needs to be calculated.

Gill Dep. p. 21. Now, on October 25, 2024, 6 months from when it started this action the Plaintiff in the 36 pages of its memorandum still cannot state what it is allegedly owed under the Development Agreement. It is owed nothing.

The Plaintiff is Relitigating an Issue Already Decided by the Court

The Plaintiff's representative Jaipal Gill, was employed by the Debtors in this action through December 1, 2023 [Gill Dep. p. 6,7.]. Both First Horizon Bank and the Plaintiff filed objections to the Sale Motion. [Docket Nos. 293, 312.] First Horizon described the furniture, fixtures and equipment at the Port Wentworth store as "First Horizon's collateral" and described the operation of the Plaintiff and its role in the debt scheme. [Docket No. 312, p. 1, pp. 3-4]. First Horizon asserted that the Debtor could not sell the FFE at the Port Wentworth store, because it did not own the FFE. Id., at pp. 5-6. The Plaintiff in its own objections made similar assertions. The Court overruled the First Horizon objection and the Plaintiff withdrew its objection in consideration of access to the Disputed Claim Reserve in the amount of $650,000. Sale Order, pp. 14-15.

In his deposition, Mr. Gill states that he purchased certain property related to the Port Wentworth store, the fixtures and improvements. Gill Dep. pp. 14-16. This property, however, was property belonging to the Debtors that RRG purchased from the Debtors under the terms of the asset purchase agreement. The Development Agreement was an insider transaction between related parties that was intended to move money from the Debtors to the Plaintiff affiliate to permit it to service certain debt based on the assumption that the Plaintiff was the owner of the underlying fixtures and equipment. The Plaintiff continues to operate on this assumption, but it is belied by its own objection to the sale asserting that it owned this equipment, that it voluntarily withdrew in consideration of a cash payment.

The Development Agreement is not an Executory Contract

The Court has adopted a definition of executory contracts that eschews the "performance left on both sides" Countryman definition for the more expansive definition embodied by a

functional approach. In re Walter Energy, Inc., 2015 WL 9487718 (Bankr. N.D. Ala. 2015) The Court articulated the test as follows:

> The key, it seems, to deciphering the meaning of [section 365's lease-executory contract provision] is to work backward, proceeding from an examination of the purposes of rejection is expected to accomplish. If those objectives have already been accomplished, or if they can't be accomplished through rejection, the [agreement] is not [a lease or executory contract] within the meaning of the Bankruptcy Act.

Id. at *5 quoting In re General Development Corp., 84 F.3d 1364, 1375 (11th Cir.1996). In this instance, upon entry of the Sale Order, the Development Agreement became a nullity. The obligations it sought to memorialize, the obligation of the Debtor to Plaintiff to facilitate the repayment of Plaintiff's lender First Horizon, were of no consequence at the time the Court determined that the property which secured those obligations was owned not by Plaintiff, but by the Debtor. The Debtor had no obligation to Plaintiff as of December 13, 2023, there was nothing to assume or reject. The Sale Order itself conveyed the assets to RRG free and clear of the claims of the Development Agreement, in consideration of the $15,525,000 in sale consideration it paid to the bankruptcy estate. The Development Agreement was part of a loan transaction invalidated by the Court's determination that the Debtor owned the underlying collateral outright.

The Plaintiff argues that the Development Agreement was executory because "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" Memorandum, Docket No. 48, at p. 24. The Debtors though had no obligation to make any payment under the Development Agreement to facilitate debt service payments on property it owned directly. The rulings made by the Court in the context of the Sale Order as to Plaintiff's interest and the lienholder, First Horizon's interest, in the fixtures and equipment determined the functional meaninglessness of the Development Agreement.

Plaintiff is not an intended beneficiary of the Assignment Agreement.

The Assumption Agreement only purported to assume the Development Agreement to the extent the Lease was subject to the Development Agreement. The Lease exists independent of the Development Agreement and neither contract references the other. Stating that the Lease is subject to the Development Agreement does not result in the Development Agreement becoming part of the Lease, subject to assumption by the Defendant. The Defendant specifically omitted the Development Agreement from the list of Designated Leases on three occasions – in the Amendment to the APA and in each of the two Lease Notices.

The Development Agreement is Not a Lease.

In its efforts to contort the Asset Purchase Agreement into a form in which the Development Agreement is assumed, the Plaintiff ignores the fact the Development Agreement is not a lease. The Development Agreement does not reference the Lease, was executed long after the Lease commenced and does not purport to convey to the Debtor any interest in the land. The Development Agreement is a contract. The Asset Purchase Agreement states quite clearly which contracts RRG was assuming as "None." [Sale Order at p. 183]

The Court Should Afford RRG Relief from Assumption under Rule 9024

Rule 60(b)(1) permits a court to alter or amend a judgment for "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. Rule 60(b)(1). The goal of Rule 60(b)(1) is to correct errors of law or misapprehensions of fact. The decision to alter or amend a judgment is in the sound discretion of the trial judge. Futures Trading Comm'n v. Am. Commodities Group, 753 F.2d 862, 866 (11th Cir.1984). "Mistake" as used within Rule 60 encompasses a broad spectrum of errors consistent with the common dictionary definition of the word. Kemp v. United States, 596 U.S. 598, 142 S. Ct. 1856, 213 L.Ed. 2d 90 (2022).

The Plaintiff's reliance on In re Steel City Pops Holding, LLC, 2020 WL 2569927,(Bankr. N.D. Ala. May 20, 2020) is misplaced as there was not reliance on mistake or excusable neglect asserted as a basis for the Rule 60 motion. Id. at *5. ("[F]or example, there is no showing of mistake, inadvertence, surprise, or excusable neglect necessary to invoke and substantiate a Rule 60(b)(1) challenge.") Similarly, in Coltec Indus., Inc. v. Hobgood, 280 F.3d 262 (3d Cir. 2002), the Court's focus, and the source of the quotation relied upon by Plaintiff, was an analysis of the availability of relief under the catchall provisions of Rule 60(b)(6). Id. at 273. The Court's rulings and analysis in Coltec were all made in the context of Rule 60(b)(6) relief specifically.

The Plaintiff argues that the precedent of In Re UAL Corp., 411 F. 3d 818 (7th Cir. 2005) should be avoided by the Court because, among other things, RRG's argument that the Development Agreement did not permit it to determine what amounts, if any, were actually due under the Development Agreement are misplaced because "debt service payments are a 'sum certain' which can be determined by mathematical calculation." Memorandum, Docket No. 48, at p. 32. (citation omitted) The Plaintiff's representative when called to testify as to what those amounts were, was unable to do so.

14 Q And so is there any amount due under the
15 development agreement presently for the development
16 fee?
17 A That needs to be calculated.

Gill Dep. at p. 21. The Plaintiff remains unable to offer to RRG or the Court the basis for any such mathematical calculation or, the result. The Plaintiff is prosecuting an action to recover amounts due under a written contract and it is unable to state with specificity what those amounts are, yet has the temerity to argue that RRG should have known what those amounts were from a review of the Development Agreement itself. Plaintiff now asks the Court to enter summary judgment in its favor for amounts that remain unstated.

Similar to the facts in In UAL Corp., as viewed through the prism of the scope of this matter, RRG was forced to evaluate a number of geographically disparate lease locations over the span of 60 days and to make its designations accordingly. [Affidavit of Randy Pianin, Docket No. 36, ¶¶ 2-5.] The case was extremely active during the holiday season and placed more than ordinary pressure on the Debtors, the Court and the prospective bidders, including RRG.

There is no unfairness or manifest unjustness in allowing RRG relief from the provisions of the Sale Order that Plaintiff alleges establish the assumption of the Development Agreement. Plaintiff has already released any interest it had in the furniture, fixtures and equipment that were the original subject of the Development Agreement, in consideration of a sum certain, and RRG has paid $15,525,000 in sale consideration for, among other things:

> Equipment. All of Seller's rights, title, and interest in and to, or to the extent leased by Seller, the assignment and assumption of the Equipment located at the Stores on the Effective Date and on the Closing Date. For purposes of this Agreement, "**Equipment**" means all furniture, furnishings, fixtures, signage, security systems, point-of-sale systems, kitchen equipment, computer equipment, small wares, counters, shelving, racks, slat walls, display cases, décor, tables, seating, signs, promotional materials, new and unused uniforms, timers, printers, menu boards, kitchen controllers, cameras, DVRs, other equipment and machinery and replacement or spare parts, in each case, within the four walls of each Store, including such Equipment that is either owned or leased by Seller

Asset Purchase Agreement, § 1.1, Sale Order, Docket No. 355, page 139.

No party is unfairly disadvantaged by this result. The only consequence is the absence of any "windfall" to the Plaintiff. " When an innocent mistake can be rectified without harm to anyone (loss of a windfall is not the kind of harm that a court should endeavor to avert), it should be." In Re UAL Corp. at 824-825.

Conclusion

Wherefore, RRG prays that the Court deny Plaintiff's motion for summary judgment, enter an Order dismissing the Complaint against it, award it costs and attorneys fees and that the Court grant such other and further relief as is just.

RRG of Jacksonville, LLC

by its attorneys,

Peter J. Haley

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Dated: November 15, 2024

Certificate of Service

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Dated: November 15, 2024 */s/ Peter J. Haley*
Peter J. Haley