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,	)	
	)	**Adv. Proc. No. 24-00016-TOM**
v.	)	
	)	
RRG OF JACKSONVILLE, LLC,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF PREMIER HOLDINGS OF GEORGIA, LLC'S BRIEF IN REPLY TO DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO 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 reply (this "Reply") to Defendant RRG of Jacksonville, LLC's ("RRG") *Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment* [AP Doc. No. 55; Bankr. Doc. No. 854] (the "RRG Response"). PHGA further submits this Reply 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 of this Reply, PHGA relies on its *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[1] (the "PHGA Response") [AP Doc. No. 48] [Bankr. Doc. No. 847], its *Evidentiary Submission in Support of Plaintiff Premier Holdings of Georgia, LLC's Motion for Summary Judgment*[2] (the "Evid. Subm.") [AP Doc No. 47; Bankr. Doc. No. 846], the pleadings in the above-styled bankruptcy case (the "Bankruptcy Case"), the pleadings in the above-styled adversary proceeding (the "Adversary Proceeding"), and states as follows:

I. SUMMARY OF THE FACTS AND ARGUMENT

The facts of this dispute are straight forward. The Debtor assumed the Ground Lease on the Port Wentworth location and assigned it to RRG. RRG acknowledges that it assumed the Ground Lease. RRG contends that it took assignment of the Ground Lease, but that it did so free and clear of the Development Agreement. The APA specifically lists the Development Agreement and the assignment documents provide that the Ground Lease is subject to the terms of the Development Agreement (specifically, that the Ground Lease is "subject to that certain Development Agreement between [PHGA] and [PKGI] dated May 17, 2019"). RRG's assumption of the Ground Lease necessarily includes the obligations due pursuant to the Development Agreement. A party cannot take assignment of a portion of a contract when it agrees to take it subject to other contractual obligations. It must take the burdens along with the benefits.

RRG admits that it received the Development Agreement in an email dated January 5, 2024, which e-mail also states that RRG did not have a copy of the Ground Lease for the Port Wentworth location. Mr. Pianin admitted that he had the opportunity, but that he did not read the Development Agreement. Mr. Pianin admits that he discussed the Development Agreement with his attorneys. After having an opportunity to read the Development Agreement and discussing it with his attorneys, RRG executed the assignment document.

[1] All terms not otherwise defined herein shall have the meaning as defined in the PHGA Response.
[2] Citations to the evidentiary record in this Reply are citations to the Evid. Subm. previously filed by PHGA.

These facts alone establish that RRG is fully obligated to perform the terms of the Development Agreement under the terms of the Development Agreement. RRG's executive had the Development Agreement right in front of him, but chose not to read it. RRG's failure to read the Development Agreement before it executed the Assignment Agreement may have been unwise, but that does not relieve RRG from its obligations under the Development Agreement.

RRG would have been obligated under the terms of the Development Agreement even if it had never seen the Ground Lease or the Development Agreement. RRG drafted and executed the documents under which it agreed to the assumption of both the Ground Lease and the Development Agreement.

RRG has constructed a whopper of an argument; however, RRG's argument fails. RRG cannot both have the Port Wentworth location and avoid its obligations under the Development Agreement.

II. REPLY AND CLARIFICATION TO THE RRG RESPONSE CONCERNING PHGA'S VERSION OF THE STATEMENT OF UNDISPUTED FACTS

1. In Paragraph 6 of the PHGA Response, PHGA states that certain of Pianin's deposition testimony referred to general construction of store locations and not the store location specific to this Adversary Proceeding. In the RRG Response, RRG alleges that it is the opposite and includes the portion of the deposition testimony at issue. PHGA maintains its position as to its summary of the deposition testimony, but defers to the precise and quoted language set forth by RRG in the RRG Response.

2. RRG claims that, in Paragraph 9 of the PHGA Response, PHGA failed to explain that the Aurora Drop Box was merely a "pass-through" drop box. However, that process is explained in Paragraphs 9 and 10 of the PHGA Response. RRG is correct that there is no evidence that the buyers accessed the Aurora Drop Box or that Aurora communicated directly with RRG

regarding the Development Agreement. RRG also is correct that the Development Agreement was not uploaded to Buyer's Data Room, but the RRG Response did not reflect that the Ground Lease also was not included in the Buyer's Data Room. AP Doc. No. 55, pp. 3-4.

3. In Paragraph 16 of the PHGA Response, PHGA states that "[t]herefore, the Development Agreement was listed in the APA as a lease which RRG could choose to assume." RRG takes issue with that characterization. PHGA stands by its position that the Development Agreement was in fact listed in the APA as an "Assignable Lease," as explained in Paragraph 16 of the PHGA Response.

4. In Paragraph 17 of the PHGA Response, PHGA states that "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." RRG states that this statement is not supported by the record and that the Development Agreement speaks for itself. However, the APA also speaks for itself and includes the definitions for the various types of contracts included and excluded therein (as further explained in the PHGA Response and below).

5. In Paragraph 12 of the PHGA Response, PHGA stated that Mr. Pianin chose to sign the Assumption Agreement without reviewing the Development Agreement, citing to the Pianin Deposition at page 37:10-38:5. In the RRG Response, RRG states that this deposition testimony was misstated, citing to the Pianin Deposition at page 38. Following is the deposition testimony

in which PHGA relied on, which is accurately summarized in Paragraph 12 of the PHGA Response.

> Q If you look under "Recitals," the very first paragraph, it states, "Whereas, Assignor, as tenant, and Port Wentworth Fee Owner, LLC, as landlord, are parties to 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 Premier Holdings of Georgia, LLC and Assignor, dated May 17, 2018."
>
> When you reviewed this document, did you notice the reference to the development agreement?
>
> A We discussed this with our outside counsel.
>
> Q Did you ask to see this development agreement?
>
> ....
>
> A I did not see it prior to signing.
>
> Q And you did sign this document, correct?
>
> A I did, yes.

Pianin Dep., 37:1-38:5.

6. RRG provides a statement of certain facts labeled as "RRG 3" on pages 6 and 7 of the RRG Response. This paragraph summarizes various filings that occurred during the course of the Bankruptcy Case with respect to this Court's entry of the Sale Order. In the last sentence of this paragraph, RRG does not provide the full quotation from the Sale Order, which is that the Port Wentworth store assets were sold to RRG "free and clear of any and all liens, claims, interests and encumbrances **other than as set forth in the [APA]**." (Emphasis added.)

7. On pages 7-10 of the RRG Response, there are additional facts asserted which are labeled as "RRG 4" which address facts related to the transfer of the Development Agreement and the calculations of the amounts due. PHGA disputes many of these facts. However, as explained in PHGA Response, these facts are irrelevant because (a) RRG cannot now make an argument which it already opposed by filing an objection to PHGA's motion to substitute and (b) the amount

due and owing is a simple calculation which can be made, but was not made at the time of Jay Gill's deposition.

III. LEGAL ARGUMENT

For the sake of brevity, PHGA will not address any arguments set forth in the RRG Response which PHGA has already addressed in the PHGA Response.

A. The Ground Lease was Assumed Subject to the Development Agreement.

PHGA maintains that the Development Agreement is an executory contract, as set forth in the PHGA Response. See AP. Doc. 48, p. 23. However, even if this Court determines that the Development Agreement is not an executory contract, the Ground Lease is an executory contract. Because RRG assumed the Ground Lease subject to the Development Agreement in the Assumption Agreement, RRG must comply with the obligations thereunder. *See In re Weinstein Co. Holdings*, LLC, No. BR 18-10601-MFW, 2020 WL 1640296 at *4 (D. Del. Apr. 2, 2020) (holding that a purchaser can purchase non-executory contracts out of bankruptcy and is thereafter obligated to perform under said contracts post-closing). Even a free and clear transfer of the Port Wentworth Store to RRG would not erase the Development Agreement or its obligations, as contract burdens assumed in a bankruptcy sale remain. *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.").

RRG argues that because the Assumption Agreement says the Ground Lease is subject to the Development Agreement, it does not mean the Development Agreement is part of the "Lease" RRG assumed in the Assumption Agreement. AP Doc. No. 55, p. 15. However, the Assumption

Agreement, which RRG drafted, states otherwise. Alabama courts interpret "subject to" as meaning the contract is linked to, and dependent on, the underlying contract, rather than being a separate promise. *See Verner v. White*, 214 Ala. 550, 550 (1926) (holding that the phrase "subject to" written on a promissory note made the note conditional and therefore incorporated the conditions from the underlying contract directly onto the note). Thus, in accordance with the *Verner* ruling, the Ground Lease is intrinsically linked to the fulfillment of the Development Agreement by RRG's use of the phrase "subject to." Thus, RRG's claim that the Ground Lease exists independently of the Development Agreement is incorrect.

B. Whether or Not the Development Agreement is a Lease by its terms, the Development Agreement is an "Assignable Lease" under the APA.

RRG asserts that the Development Agreement is not a lease, but merely a contract, and therefore could not have been a Designated Lease under the Assignment Agreement. AP Doc. No. 55, p. 15. In addition to the reasons set forth in the PHGA Response and above, the terms of the Development Agreement itself do not determine whether it was a "lease" for purposes of the APA. Instead, it is the APA which determines whether the Development Agreement constituted a lease for purposes of the APA. As explained in the PHGA Response, the Development Agreement is in fact considered a "lease" for the purposes of the APA based on the plain language of the APA.

IV. 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 RRG has taken assignment of the Development Agreement and therefore is liable for the unpaid and future amounts due under the Development Agreement; (2) enters judgment against RRG and in favor of PHGA for the amounts to date which

RRG has failed to pay under the Development Agreement; (3) orders RRG to reimburse PHGA for the costs of discovering the Pre-Sale Email, including attorneys' fees; (4) sets a hearing in which PHGA may establish the amounts due and owing it under the Development Agreement and for the costs of discovering the Pre-Sale Email; and (5) grants such other and further relief as this Court deems appropriate.

DATED this the 4th day of December, 2024.

/s/ Heather A. Jamison
Heather A. Jamison (ASB-8673-H49L)
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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 4th day of December, 2024:

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