IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
GUE Liquidation Companies, Inc.,[1]	)	Case No. 19-11240 (LSS)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	
	)	Re: D.I. 1137
	)	

RESPONSE OF RANDSTAD GENERAL PARTNER (US), LLC AND RANDSTAD NORTH AMERICA, INC. TO THE THIRD OMNIBUS OBJECTION (SUBSTANTIVE) OF THE DEBTOR LIQUIDATION TRUST TO CERTAIN DISPUTED CLAIMS

Randstad General Partner (US), LLC ("***Randstad GP***") and Randstad North America, Inc. ("***Randstad NA***," and collectively with Randstad GP, "***Randstad***") file this response to the Third Omnibus Objection (Substantive) (the "***Claim Objection***") of the Debtor Liquidation Trust (the "***Debtor Liquidation Trust***") regarding the priority and administrative nature of Randstad's claims.

1. The Claim Objection raises a great many disputed factual issues and legal issues, which require discovery. As discussed below, various of the Debtor Liquidation Trust's legal and factual assertions are incorrect. In addition, the Debtor Liquidation Trust refutes arguments that Randstad is not even making. At other points the Debtor Liquidation Trust is relying on a prior ruling by this Court in this case as to the priority of staffing company claims (a proceeding which surprisingly did not even involve Randstad, leading to the inefficiency of having this Court cover some of the issues again). In short, these disputes cannot and should not be resolved

[1] The Post-Effective Date Debtor is and the last four digits of its taxpayer identification number are GUE Liquidation Companies, Inc. (5852). The address of the Post-Effective Date Debtor is: GUE Liquidation Companies, Inc., c/o Howley Law PLLC, Pennzoil Place – South Tower, 711 Louisiana Street, Suite 1850, Houston, Texas 77002.
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via summary claim objection process. Counsel for Randstad has discussed this with counsel to the Debtor Liquidation Trust, and Randstad is prepared to enter into a short discovery period, followed by stipulated facts (or a hearing on any disputed facts), and then clarified and focused briefing at the conclusion thereof, on the substantial priority and administrative claims of Randstad.

2. This would be highly beneficial to both parties – and this Court – for as the below indicates, in many respects the Debtor Liquidation Trust and Randstad are simply talking past one another by virtue of the Randstad claims and the initial Claim Objection. Randstad acts in good faith - as set forth below, by this Response, Randstad is **already** narrowing the issues and noting certain matters which simply do not require this Court's attention or analysis in order to resolve this dispute.

Randstad's Priority Claim

3. As to Randstad's priority claim, matters in the Claim Objection which are factually incorrect, legally unsupported, misstate Randstad's position, or are not addressed at all are as follows.

4. The Claim Objection spends substantial time asserting that Randstad is not entitled to a priority claim solely by virtue of Section 507(a)(4), for all of the pre-petition wages Randstad paid to the temporary staff it supplied to the Debtors (which is over $750,000). **But Randstad makes no such argument anywhere in its proofs of claim**. Nor does Randstad seek to set aside Section 507(d)'s anti-subrogation clause.

5. Instead, as to Randstad's "pure" Section 507(a)(4) rights, it would be limited to a single amount of $13,650, to which Randstad is plainly entitled as Section 507(a)(4) applies to "corporations."

6. The Debtor Liquidation Trust might seek to dispute this limited priority claim – it is unclear – by citing *Grant Industries* and *Tropicana Entertainment*. But *Grant Industries* was decided **before** Section 507(a)(4) was amended via the 1994 Bankruptcy Code amendments to include claims of corporations. And *Tropicana Entertainment* is a Section 507(a)**(5)** case – and a ruling on summary judgment to boot, with full facts and briefing complete, which is not the case here - making distinctions as to employee benefits provided by Debtors and by third parties that are not the least bit applicable since by the plain language of Section 507(a)**(4)**, Randstad has a priority claim, as a corporation, for $13,650. Finally, the use of the word "corporation" in the **initial** part of Section 507(a)(4) means it clearly applies to claims of a type on Section 507(a)(4)(A) as well as (B).

7. At bottom, Randstad is **not** in any way arguing that its entire claim is entitled to priority solely by virtue of Section 507(a)(4) and in derogation of Section 507(d). In any event, Randstad is willing to work with the Debtor Liquidation Trust, or submit to briefing to this Court if they cannot resolve, Randstad's entitlement to a $13,650 priority claim.

8. However, the **primary** thrust of Randstad's argument – that $677,500, a portion of Randstad's entire claim is entitled to priority - is based on the Debtors' Motion for Interim and Final Orders (I) Authorizing the Debtors to Pay Prepetition Employee Wages, Benefits, and Related Items and (II) Granting Certain Related Relief (the "***Employee Wage Motion***") [D.I. 5], and this Court's orders thereon

9. Randstad is **fully aware** of the prior litigation in this case on the meaning and effect of the Employee Wage Motion in the context of a claim (albeit, a much smaller claim) of a temporary staffing provider known as "XL Pro", and this Court's order. *See* Transcript of Hearing of Dec. 18, 2019, at pp. 3-9. It is unfortunate that the issues raised as to Randstad's

claims were not brought up then, so this matter could be resolved, whether for all the staffing claimants or for the Debtors, in one fell swoop. But at bottom, as a result of this piecemeal claim objection process, some of this now must be litigated again, for Randstad has unique **legal arguments not raised by the prior staffing company**, or briefed in any fashion whatsoever. Moreover, Randstad has additional **facts** as set forth below that may bear on this analysis, or about which this Court may wish to learn more and as to which the parties would engage in discovery. Specifically:

i. While this Court's ruling in the XL Pro claim litigation indicated that the Employee Wage Motion and order thereon did not convert staffing company claims to priority, XL Pro did not raise the argument of judicial estoppel. Under principles of judicial estoppel and its seminal case *New Hampshire v. Maine*, 532 U.S. 742 (2001),

> several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. … Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance in a later proceeding would create "the perception that either the first or the second court was misled," … Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," … and thus poses little threat to judicial integrity. … A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if no estopped.

ii. All of the factors of judicial estoppel are present. While the Debtors certainly reserved the right to not pay the particular wage claims **at that time** (or only pay a portion due to liquidity concerns), the Debtors absolutely took the position that the claims of Randstad's non-seasonal staffing were priority claims. *See* Employee Wage Motion at ¶ 42 ("Claims for Prepetition Compensation are entitled to priority treatment, subject to the Employee Cap. Specifically, section 507(a)(4) of the Bankruptcy Code provides that individuals holding prepetition claims for "wages, salaries, or commissions, including vacation, severance, and sick

leave pay earned" within 180 days before the petition date are entitled to priority claim status up to an allowed amount of $13,650 on account of such claim. *See* 11 U.S.C. § 507(a)(4)(A).”). See also *id*. at ¶ 42 (“The Debtors have ample justifications to pay the Employee Obligations as such payments will benefit the Debtors' estates and their stakeholders by allowing the Debtors' business operations to continue without interruption…. The loss of valuable employees and the resulting need to recruit new personnel to replenish the Debtors' workforce would be distracting and counterproductive at this critical time, particularly while the Debtors are (a) executing the ProFlowers Restructuring and (b) actively engaged in ongoing Sale Efforts. Accordingly, the Debtors must do their utmost to retain their workforce by, among other things, continuing to honor all wage, benefit, and related obligations, including Employee Obligations that accrued prepetition.); *id*. at ¶ 56 (“In light of the foregoing, the Debtors respectfully submit that the payment of the Employee Obligations is essential to the Debtors' efforts to maximize value for their stakeholders in these Chapter 11 Cases, represents an exercise of the Debtors' sound business judgment, and is in the best interests of the Debtors' estates and creditors.”).

iii. This Court was convinced of that position, by granting the Employee Wage Motion.

iv. The evidence will show this was done in order to portray a “business as usual” approach to vendors such as Randstad – when, Randstad suspects the evidence will also show – the Debtors had no liquidity, or perhaps any intention to begin with, of paying the claims they described.

v. Aside from judicial estoppel, the Debtors’ assertions as to the priority nature of the Randstad’s non-seasonal claims, once approved by the Court, are law of the case.

10. Again, Randstad fully recognizes that this Court already considered the

"permissive" language of the wage orders, but Randstad submits the permissive nature was meant to apply to the timing of payment – a matter of liquidity, and not priority. (And indeed, the evidence will show that is **exactly what the Debtors tried to do with respect to Randstad** – pay only a small portion of its now-priority claim due to very tight liquidity in the initial weeks of these cases.) But the balance of the claim, due to the language above, fully accepted by this Court, would still be priority subject to Section 507(a)(4), to be paid upon plan confirmation.

11. Randstad does not wish to re-do the XL Pro litigation, but as indicated above, Randstad has different arguments, and expanded arguments, than that raised by XL Pro, some of which will require discovery, such as judicial estoppel. Such discovery can be prompt and limited, and indeed, the internal emails (and then deposition) of the Debtors' non-lawyer advisor(s) will likely make this all clear. This Court can then be presented with all arguments at one time, and rule.

Randstad's Administrative Claim

12. As to Randstad's administrative claim, various of the **factual** positions of the Debtor Liquidation Trust are also very surprising. To the extent they are not outright rejected per the below, discovery is warranted. Other of the **legal** arguments are based on simply incorrect facts, or are distinguishable.

13. First, the Debtor Liquidation Trust asserts that there could be no post-petition breach of the relevant Randstad contract, despite the Debtors' abrupt, without-notice, ceasing the use of all Randstad personnel in violation of the **very simple ten day termination provision** of the contract, which the Debtors could have used.

14. Specifically, the Debtor Liquidation Trust focuses on a contract provision requiring the Debtors to pay all fees due to Randstad, once "implementation" of the use of

temporary staff ends. *See* Claim Objection at ¶ 39. According to the Debtor Liquidation Trust, this means the Debtors can cease performance **under each and every part of the contract** despite a clear requirement in Section 1 of the contract that simply requires the Debtors to provide ten days' notice of termination. This is not a proper approach to contract interpretation; the more specific (the time and process to terminate) always controls the more general (various fees due after implementation).

15. Indeed, the Debtors' prior assertions in their motion to reject the Randstad contract made it clear the Debtors **certainly** intended to terminate the Randstad contract. *See* Docket No. 258 at ("Accordingly, the Debtors no longer have any need for the Contracts and rejecting the Contracts will reduce postpeptition operating expenses. Therefore, in the Debtors' sound business judgment, rejection of the Contracts is appropriate."). Moreover, in the hearing on the Motion to reject, counsel to the Debtors made it very clear that the Debtors' goal was at all times to terminate the contract: "We're just trying to, you know, have a clear demarcation line where we hired those employees directly, **where we no longer engaged Randstad under that contract**." Comments of Debtors' counsel, Docket 438 (Transcipt of hearing on Debtors' motion to reject Randstad's contracts, nunc pro tunc, to the date of the Debtors' purported termination, which nunc pro relief was denied), at p. 27, lines 5-7.

16. At bottom, a better record is needed, certainly if the Debtor Liquidation Trust is taking the position, for the first time, that its actions were **not** a termination of the contract.

17. Second, the Debtor Liquidation Trust takes the position, also for the first time, that it actually was utilizing an *ipso facto* clause to have terminated the contract without consequence, due to its own bankruptcy. Yet as with the Employee Wage Motion, these specific argument and positions of the Estates keep shifting – if this were indeed what the Debtors were

doing when they ended the contract, why file the Motion to Reject? And why seek *nunc pro tunc* relief to the date they terminated the contract (which this Court rejected)?

18. At bottom, the Debtor Liquidation Trust should take a position – either it never terminated the agreement, or it terminated it due to *ipso facto* – and the parties can then use discovery to get to the truth. Only then can this Court determine if the Debtors' actions amounted to a post-petition breach.

19. Regardless of post-petition breach, the Debtor Liquidation Trust also seeks to disallow any damages to Randstad for its administrative claim for such post-petition breach. The Debtor Liquidation Trust states that it could "convert" certain Randstad employee without financial penalty so long as such employees had worked for the Debtors for a specified period of time. *See* Claim Objection at ¶ 41.

20. Yet it is axiomatic under California law (which governs the contract) that a party in breach of a contract (the Debtors, by terminating the contract without following the simple ten days' notice termination provision) can no longer enjoy the benefits of the terms of that contract. *Coughlin et ux. v. Blair*, 41 Cal.2d 587, 603 (Cal. 1953) (Traynor, J) ("Parties who have totally breached a contract cannot force performance on the injured parties."). Thus, this Court must first determine if the Debtors were in post-petition breach due to their termination of the Contract without notice, before the Debtors can seek to take advantage of any limitations on the "conversion fee" in the Contract.

21. The Debtor Liquidation Trust also notes the limitation of the kinds of damages allowed under the contract, as a way to foreclose any analysis of Randstad's administrative claim. Yet under California law, the parties did not waive "reliance damages," which are separate and distinct from each provision listed in the contract. *See, e.g.*, *Advanced Thermal*

Sciences Corp. v. Applied Materials, Inc., 2010 WL 2015236, at *54 (C.D. Cal. 2010). As that court stated, under California law:

> Reliance damages are an alternative to expectation damages, only one component of which is consequential: a party may seek, "[a]s an alternative to the measure of damages stated in § 347, ... damages based on his reliance interest, including expenditures made in preparation for performance or in performance." Restatement (Second) of Contracts § 349. Under the Restatement (Second) of Contracts, the general measure of damages for breach of contract is the party's "expectation interest as measured by (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, less (c) any cost or other loss that he has avoided by not having to perform." *Id.* § 347. Thus, "consequential damages"—which are "losses that do not flow directly and immediately from an injurious act but that result indirectly from the act," *Black's Law Dictionary* 445–46 (9th ed.2009)—are a subset or component of expectation damages. There is no aspect of consequential damage in reliance damages.

Id. at *54.

22. In this case, under California law, Randstad has every entitlement to damages for ordinary breach (which is the full conversion fee, **without** any discount the Debtors would have otherwise enjoyed if they had **not** been in breach), **as well as** reliance damages.[2]

23. Finally, the damages limitation by its very terms excludes any damages that result from willful misconduct. Randstad has no interest in denigrating the parties involved; this was a challenging case, and in the fog of restructuring, things happen. But that said, Randstad has still never heard an explanation of (i) why it was told it would be paid under the Employee Wage Motion and Order, subject only to a reconciliation of amounts, (ii) why it was never paid anything, and then (iii) why it was abruptly terminated as a service provider (other than for spite), causing substantial disruption to Randstad and the employees Randstad had to try to place

[2] As a separate matter, Randstad disputes the Debtor Liquidation Trust's calculation of the conversion fee. *See* Exhibit A. Discovery is needed, although it should be very simple, and the facts can then be stipulated – who was hired by the Debtors, how many hours they had previously worked (if indeed the Debtors are entitled to the reduced conversion fee despite their breach), and what would the arithmetic conversion fee actually be.

elsewhere, when (iv) the Debtors could have avoided **everything** by making no promises of priority treatment in the wage order, and simply placed Randstad in the discretionary critical vendor bucket, and when things went sour, simply giving ten days' notice of termination. The Debtors did none of this, leading to this litigation. In any event, discovery is warranted on this, and if such actions rise to the level of willful misconduct, then no damage limitation is applicable at all.

24. Lastly, the Debtor Liquidating Trust spends substantial time explaining how post-petition breaches of contract provide no value to the estate, and cannot be an administrative claim in any event.

25. First, this completely ignores the teachings of *Reading Co. v. Brown*, 391 U.S. 471 (1968), which was discussed with this Court at the hearing on the motion to reject Randstad's contract (but which, again, is not addressed by the Debtor Liquidating trust). *See* Docket 438 at p. 30. *See also* 28 U.S.C. § 959 ("Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property.").

26. Second, the cases cited by the Debtor Liquidating Trust, even if it could ignore *Reading*, are completely inopposite:

- In *In re GT Advanced Technologies*, 547 B.R. 3, 12-13 (Bankr D.N.H. 2016), the Debtor had been in **pre-petition** violation of a pre-petition contract, resulting in a **pre-petition** judgment against the Debtor – here, the underlying facts of Randstad's contractual dispute with the Debtors and abrupt termination without any notice, all took place post-petition.

- In *In re Continental Airlines, Inc.*, 146 B.R. 520 (Bankr. D. Del. 1992) (Balick, J) explained that post-rejection obligations of a debtor to repair leased equipment upon its return would not be administrative claims. And of course this is correct – if a debtor could reject an expensive airplane or other equipment lease, but must spend large amounts to return the equipment to its original, pre-petition form, estates would be insolvent. Repairing an engine, **post-rejection**, for its pre- and post-petition use, is not what this case is about at all. Unlike *Continental*, where the estate may have to spend millions to repair an engine, here the Debtors simply would have had to give ten days' notice of termination to avoid all of this harm, and all of this litigation.
- In *MBNA America Bank v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.)*, 275 B.R. 712 (Bankr D. Del. 2002), this court held that there was **no post-petition transaction or conduct** that would elevate the rejection damages to post-petition damages. Yet again, that is not the case here – Randstad is only pointing to the Debtors' improper post-petition actions as the basis for its claim, and not using rejection for any purpose whatsoever.

27. The Debtor Liquidation Trust will certainly dispute all of this; that is its right. But all of this analysis is to say, that this record requires clarity. Once this Court has a clear indication of what transpired – was the contract terminated without notice, terminated by *ipso facto* (a new theory raised for the first time in the Claim Objection), or has still never been terminated – then the Court can determine if there was a post-petition breach. At the same time, that breach will determine the damages, including the Debtor Liquidation Trust's ability (or not) to rely on the limitation of damages, or the lower conversion fee despite the Debtors' breach.

And this clean factual record can be filtered through Section 503(b)(1)(A), instead of competing sets of facts leading to competing uses of cases, most of which appear not analogous.

Conclusion

This matter can and should be resolved by simple litigation, with a proper and limited amount of discovery. The complete facts will be stipulated, and any disputed ones will be tried. The legal theories and their responses will be briefed based on a proper factual record, which does not exist today, especially with the Debtor Liquidation Trust's revised explanation of termination *vel non*. Randstad suggests the parties enter into a simple scheduling order and the matter be set for final hearing in 90-120 days, subject to this Court's calendar.

Dated: March 4, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 12, 2019, a true and correct copy of the foregoing was sent via the Court's CM/ECF electronic noticing system to all parties receiving electronic notices in this proceeding

Dated: March 4, 2020

/s/ Mark I. Duedall

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