IT IS ORDERED as set forth below:

Date: September 24, 2015

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	**CASE NO. 09-67151-MGD**
THE S&Q SHACK, LLC,	:	
Debtor.	:	CHAPTER 7
IN RE:	:	**CASE NO. 09-68410-MGD**
RAVING BRANDS, INC.,	:	
Debtor.	:	CHAPTER 7
DARYL DOLLINGER And H. MARTIN SPROCK, III,	:	CONTESTED MATTER
Movants,	:	
v.	:	
BV RETAIL, LLC,	:	
Respondent.	:	JUDGE DIEHL

ORDER ON REMAINING OBJECTIONS TO CLAIMS OF BV RETAIL, LLC

This matter is before the Court on the Objection of Movants H. Martin Sprock, III and Daryl Dollinger ("Objectors") filed on October 2, 2013 (*see* Case No. 09-67151-MGD, Docket No. 137; Case No. 09-68410-MGD, Docket No. 73) regarding claims filed by Respondent BV Retail, LLC against the estates of the above-named involuntary Debtors. In its Order Partially Disallowing Claims of Respondent and Notice of Status Conference as entered in the above cases, the Court resolved the issues of Respondent's available state law contractual damages, and the proper analysis for calculating Respondent's claims for lease rejection damages under 11 U.S.C. § 502(b)(6).[1] Concluding that the remaining issues related to the numerical amount of the claims as allowed, the Court directed the parties to recalculate the claims in accordance with its ruling and to determine whether additional proceedings were necessary on the objections. The Court held a Status Conference on April 9, 2015 at which time counsel for Respondent tendered a summary sheet indicating revised claim amounts in response to the Court's direction. Counsel for Objectors, however, also identified several disputed legal issues. Supplemental briefs have now been filed on the matters raised, and upon review the Court decides them herein.[2]

I. In Determining the Amount of Respondent's Prepetition Claim, Whether Debtor's Prepetition Partial Rent Payments, Applied by Respondent to Certain

[1] *See* Order of March 2, 2015 (Case No. 09-67151-MGD, Docket No. 168); *and see* Order of March 4, 2015 (Case No. 09-68410-MGD, Docket No. 99). Previously, the Court had entered an Order on February 13, 2015 overruling the objections to the extent that Respondent was held to have valid claims against these Debtors. *See* Case No. 09-67151-MGD, Docket No. 159; Order of Feb. 17, 2015 (Case No. 09-68410-MGD, Docket No. 97).

[2] All of the legal issues that the Court has addressed in its two prior Orders (Docket Nos. 159 & 168, Case No. 09-67151-MGD, and Docket Nos. 97 & 99, Case No. 09-68410-MGD), were addressed at the request of the parties so as to narrow the issues for trial as set forth in the Joint Pretrial Order.

"Failure to Open Charges," Must Be Reallocated to Rent in Light of the Court's Ruling that Said Charges or Fees Are Not Included as Rent Under 11 U.S.C. § 502(b)(6)?

A. Argument of Objectors

The first issue argued by Objectors is whether the Court should order a reallocation of prepetition partial rent payments made by Debtor S&Q Shack, LLC that Respondent applied to "breach of covenant (failure to open) fees." This argument follows from the Court's ruling that "rent" as defined in Section 502(b)(6) does not include such fees as they are in the nature of a penalty. *See* Order Partially Disallowing Claims, at 21-22.[3] Objectors contend that by applying the base rent payments made by S&Q Shack to this charge instead of actual rent during the period before the bankruptcy filing, Respondent effectively increased the amount of its allowable prepetition rent claim herein. Moreover, even though Respondent argues that it applied these partial payments in exercise of its sole discretion as provided in the subject lease agreement (*see* Lease, page 17, para. 23), Objectors assert these fees are simply not enforceable under North Carolina law.

As they have previously argued, Objectors contend that this charge is arbitrary and oppressive in amount. Further, no damages have been shown to have been suffered by Respondent as a result of Debtor's failure to open. Thus, not only is Respondent's prepetition claim for same properly disallowed under the definition of rent provided in Section 502(b)(6), any allocation of Debtor's rent payments toward this charge, and the corresponding reduction in

[3] In its Order Partially Disallowing Claims, the Court analyzed Respondent's claims according to the framework in *Kuske v. McSheridan (In re McSheridan)*, 184 B.R. 91 (B.A.P. 9th Cir. 1995), in deciding the extent to which its component parts could be included in the rent damages claim calculation in bankruptcy consistent with Section 502(b)(6). Order, at 19.

payment on its rent for that period, is not appropriate because the charge was not a "debt or obligation" of Debtor but a penalty. Since Respondent's claim for prepetition rent cannot include such a charge, Debtor's payments must be reallocated to rent and Respondent's claim adjusted accordingly under Section 502(b)(1) from $157,202.82 to $120,695.85.

B. Argument of Respondent

Respondent counters that Objectors have provided no legal authority for this over-extension of this Court's rate cap analysis under Section 502(b)(6) in terms of the amount of its claim as asserted in bankruptcy to order an additional retroactive change in the allocation of prepetition payments.[4] Further, its application of these partial payments, which Objectors never challenged before now, is supported in the Lease and consistent with state law. As directed at the Status Conference, Respondent states that the Lease addresses the allocation of partial payments in paragraph 23, which authorizes the exercise of its discretion as landlord in applying such payments. Moreover, even at this late date when discovery has closed according to the Joint Pretrial Order, Objectors have yet to offer any competent expert evidence tending to place the validity of the allocation in question as a penalty.[5] For instance, there is no evidence suggesting that this fee was not a reasonable estimate at the time of the agreement. Such

[4] Objectors state in reply that the argument Respondent's claim is inflated because it includes an unenforceable penalty is not based on Section 502(b)(6), but rather Section 502(b)(1).

[5] Subsequent to the filing of the original objections, and before the entry of the Orders identified above, the parties submitted a Joint Pretrial Order to the Court in March of 2014. As discussed below, Respondent contends that Objectors assertion of these most recent issues is an attempt to raise new matters and/or re-argue matters encompassed by the Pretrial Order and previous rulings herein on the objections and thus, should not be allowed herein.

proffer is necessary, Respondent contends, in satisfaction of Objectors' burden under state law to challenge enforcement of a negotiated liquidated damages provision between experienced business entities. *See Seven Seventeen HB Charlotte Corp. v. Shrine Bowl of the Carolinas, Inc.*, 641 S.E.2d 711, 713-14 (N.C.Ct.App. 2007).[6]

C. Analysis of the Court

As this Court previously concluded in its prior Order (at 13), in which it ruled on the application of Section 502(b)(6) to Respondent's claims herein, this section is not intended as a means for determining a lessor's total allowable damages. Instead, as noted by Respondent, it operates to cap or limit the amount that a lessor may recover from the bankruptcy estate once that claim amount has been established under applicable state law.[7] While Objectors contend that they are actually proceeding under Section 502(b)(1), either way they are still attempting to use what appear to be contractually viable and related decisions made by Respondent prior to the filing of this case in applying the partial payments (made during the period of the underlying claim's formation) as a reason for challenging the claim. In other words, while the bankruptcy claim itself no longer contains these charges, as they now appear to have been removed based on the Court's ruling, because the amount of Respondent's unpaid allowable rent claim is arguably

[6] *See also* Lease, page 12, para. 12 ("…such Additional Rent shall constitute reasonable liquidated damages due Landlord for Tenant's breach of such covenants"). Under North Carolina law, liquidated damages, as distinguished from an unenforceable penalty, are generally allowed when damages for breach are difficult to ascertain and the amount provided is a reasonable estimate or proportionate to the actual damages. *See Eastern Carolina Internal Med., P.A. v. Faidas*, 564 S.E.2d 53, 56 (N.C.Ct.App.), *aff'd*, 572 S.E.2d 780 (N.C. 2002); *Knutton v. Cofield*, 160 S.E.2d 29, 34 (N.C. 1968).

[7] The Court also notes that contrary to Respondent's assertion, its ruling regarding the exclusion of failure to open charges addresses both prepetition and post-petition claim amounts.

exaggerated due to the application of payments to the disputed charges, the overall claim herein remains suspect.[8] As mentioned above, Objectors insist that the validity of this assertion endures notwithstanding the above-cited lease provision, as the breach of covenant fee is not a "debt or obligation" to which Respondent was justified to apply any payment from S&Q Shack.

The Court observes, however, that Objectors have cited no legal grounds on which this Court may engage in such extenuated analysis and restructuring of prepetition payments, even if the charge at issue is unenforceable under North Carolina law as a penalty as they argue and assuming same could be raised at this stage of the proceedings. What Objectors are requesting is for the Court to avoid prepetition payments made by Debtor and then use those avoided payments to satisfy a portion of the prepetition claim. They cite no avoidance power to authorize the same. The manner of Respondent's application of these prepetition partial payments bears no marks of improperly attempting to manufacture a claim in preparation for a bankruptcy filing, and appears consistent with the discretion provided in the lease agreement. In addition, even if the Court found Objectors could mount such an objection, they have offered no evidence in support of their argument that the fee was not reasonable beyond the assertion that at $100.00 a day, fully one-third of the rent, it is shocking in amount.[9] Upon review of the argument presented, the Court overrules this additional ground of objection to Respondent's

[8] At the hearing, Respondent stated through counsel that in view of the Court's recent ruling, its adjusted claim for unpaid rent should now be $157,202.82, which allows for the removal of the failure to open covenant fees for Lease Year 2. Lease Year 1 (May 2007 – April 2008) is the focus of Objectors' argument regarding allocation of Debtor's partial payments.

[9] Objectors argue that they should be allowed to present evidence on their most recent objections at a further hearing. As discussed below, the Court concludes this opportunity has been waived.

claim in connection with its application of prepetition partial rent payments by Debtor.

II. Whether Respondent's "Gap Period" Claim Against S&Q Shack Is Automatically Disallowed Because Section 502(b)(6) Calculates A Rejection Damages Claim Starting From the Petition Date of March 2009?

A. Argument of Objectors

Respondent's "gap period" claim against S&Q Shack arises between the commencement of the involuntary case in March, 2009, continuing through December, 2009, when Respondent terminated the lease and partially relet the subject premises. The issue concerns whether this claim is automatically disallowed, even though the lease was not rejected during that period, to the extent it overlaps with rejection damages for rent calculated in the manner set forth by the Court under Section 502(b)(6) for the period of one year commencing in March of 2009.[10] Objectors initially assert that Respondent is entitled to no post-petition rent beyond lease rejection damages because S&Q Shack did not occupy or use the premises. Thus, such rent is not an "ordinary course of business" expense justifying priority treatment under Section 507(a)(3). In addition, rent is treated differently from other "ordinary course of business" expenses in an involuntary case as made evident by the relationship between Section 502(b)(6) and Section 502(f), and brought into relief herein following the Court's ruling that Respondent is entitled to certain post-petition rent.

In its Order Partially Disallowing Claims, the Court sustained the objection to the classification of Respondent's Section 502(f) gap claim as an administrative expense claim under Section 503(b). The Court further concluded, however, that the claim is entitled to priority

[10] As stated at the Status Conference, Respondent asserts a gap period claim in the amount of $84,515.01, and a rent rejection damages claim of $112,313.98.

under Section 507(a)(3), limited to the period between the petition date and the date when the premises were relet (Order, at 28). On such basis, Objectors contend a gap claim for rent during that timeframe under Section 502(f) results in double-dipping since Respondent's claim, as determined under Section 502(b)(6), also covers that same period. Moreover, they insist, any claim for post-petition rent beyond that allowed under Section 502(b)(6) is also foreclosed by implication due to the fact that a Section 502(f) claim and a claim for post-petition rent as well as unpaid rent under Section 502(b)(6) each references consideration of the date of surrender or repossession. According to Objectors, it is this statutory relationship that excludes the possibility of allowing both post-petition rent under Section 502(f) and damages under Section 502(b)(6). *See also* 11 U.S.C. § 501(d).

B. Argument of Respondent

Respondent contends that adopting Objectors' novel reading of these provisions effectively changes "a shield against a landlord's claim swamping the estate…[into] a sword" by reducing its Section 502(b)(6) claim even further by the period Debtor leased the property post-petition as some kind of credit. Section 502(b)(6) caps a landlord's state law claim, but is not intended to provide a basis to further reduce its claim in bankruptcy when a debtor leases the subject premises for part of the post-petition period and then rejects the lease.

C. Analysis of the Court

The Court observes that Respondent's claim for post-petition damages under Section 502(b)(6), consistent with this Court's Order, is capped under this provision to one-year's rent as the greater allowed sum. Application of this cap through the Court's analysis of the claim, however, is not an effort to calculate or set the actual amount of state law rejection damages over

that same period. Hence, the Court concludes that any perceived overlapping with the period addressed in Section 502(f) does not serve as a valid basis for reducing or disallowing one claim at the expense of the other. Objectors have offered no authority in support of such result, and this objection is overruled. *Accord In re USinternetworking, Inc.*, 291 B.R. 378, 382 (Bankr. D.Md. 2003) (discussing Sections 502(b)(6) and 365(d)(3)).

III. Whether the Language of the Guaranty, Calculating Damages Upon Bankruptcy as (I) Accrued Rent Plus (II) Future Rent Minus (III) Then Cash Value of the Premises, Requires that Raving Brands Guaranty of the Gap Period Claim and Rejection Damages Be $0?

A. Argument of Objectors

As a third ground for objection, Objectors contend that under the language of the Guaranty and North Carolina law, Respondent's claim for damages against Debtor Raving Brands as guarantor should be limited to unpaid rent as of the petition-filing date (*see* Section 365) plus certain "Additional Rent," which they insist equals zero under the terms of Guaranty. More specifically, the applicable provision at issue states that Raving Brands shall pay accrued rent "plus, (b) an amount equal to the then cash value of the rent and Additional Rent which would have been payable under the Lease for the unexpired portion of the term less the then cash rental value of the Premises for such unexpired portion of the term" along with interest. *See* Guaranty.

Objectors do not dispute that this provision became operative as a result of the entry of an Order for Relief against S&Q Shack, but seek to enforce it.[11] They set unpaid rent at

[11] In its Order Partially Disallowing Claims, the Court determined that this claim against Raving Brands as guarantor is subject to the limitations of Section 502(b)(6). Order, at 27. The Court also notes that this language is not a model of clarity as it appears it could be read to

$112,608.64 (from April 2008 through March 2009) with interest at 10%. *See* Attachment 1 to Supplemental Brief. But, in calculating future rent, they argue that the only evidence of the "cash rental value of the Premises" presented is the rent paid by a substitute tenant, Extreme Pita, who leased a portion of the Premises (1,200 square feet) for an initial annual rent amount of $35,400.00. Because this amount actually exceeded the per square foot amount due under Lease by S&Q Shack ($29.50 per square foot versus $24.15 per square foot), there is no Additional Rent to include. Objectors do not identify the factual basis for this assertion, though it has been included in a prior pleading.[12]

B. Argument of Respondent

Respondent claims Objectors' argument that it received greater rent due to Debtor's breach and Respondent's renting to a new tenant in mitigation of its damages is unfounded. Respondent further alleges that Objectors have misstated the amount of rent S&Q Shack was paying, which actually surpassed that paid by the replacement tenant, at $33.94 per square foot for an annual base rent of $90,677.00. *See* Joint Exhibit 24; *and see* p. 7, sec. VI.C ¶ 18, Joint Pretrial Order (future rent and mitigation). Thus, it is simply untrue that it received more from Extreme Pita than the amount Debtor was paying for rent.

C. Analysis of the Court

---

add accrued rent *plus the value of such rent* to Additional Rent as then determined. In any event, the parties do not seem to read it that way and neither will the Court.

[12] *See* Brief, filed on May 14, 2014 (Docket No. 153). Objectors contend Respondent has failed to calculate the present value of the future rent stream due under the unexpired term, and deduct from that amount the present value of the cash rental value for that term. Instead, Respondent only calculated the future rent claimed. This alleged deficiency is offered as another basis for denying this portion of the claim.

The Court notes that monthly base rent for S&Q in January and February of 2010 is shown on this Exhibit as $7,556.44, which seems to support the annual rent figure reported above by Respondent, though no explanation is offered why this period was chosen ($7,556.44 x 12 = $90,677.28). While the Court does not understand why the parties cannot seem to agree on S&Q's per foot rent figure for the period in question, as discussed below, it appears that Objectors have not preserved this legal issue as a basis for disputing Respondent's claim in relation to the mitigation of damages under the Guaranty. Even if Objectors had not waived this contention, the Court concludes that the evidence of record does not support it and it is overruled.

IV. Whether Objectors' Arguments Have Been Waived?

A. Argument of Respondent

As mentioned above, based on an extensive, final, and binding Joint Pretrial Order that was signed by the parties after months of discovery and negotiation, and submitted to the Court (though never actually entered of record), Respondent maintains that Objectors have waived their newly asserted legal objections since they were not set forth as part of their case in that document.[13] Objectors offered no facts in support of such objections in the Pretrial Order, and according to Respondent, they should not now be allowed to introduce previously undisclosed evidence or seek evidentiary hearings in connection with same. It would render the parties' Joint Pretrial Order, and the time and effort expended producing same, meaningless to allow otherwise. Moreover, the Court has entered final Orders on the objections as originally filed

[13] At the Pretrial Conference, the parties requested that the Court decide certain of the purely legal issues so as to simplify the actual trial.

and argued by Objectors, which further serves to preclude the assertion of new arguments herein.

B. Argument of Objectors

In response, Objectors insist that their arguments have not been waived through the Pretrial Order because they have presented sufficient evidence to disprove at least part of Respondent's claims. Thus, the burden of proof has shifted to Respondent to offer evidence and authority supporting the validity of the claims. *See Foster v. Homeward Res. Inc. (In re Foster)*, 500 B.R. 197, 202 (Bankr. N.D.Ga. 2013). Further, Respondent has not established grounds for waiver in that neither an "intentional relinquishment or abandonment of a known right or privilege," nor a basis for inferring same, by Objectors has been shown with respect to their most recent objections to Respondent's claims. *See Allen v. State of Alabama*, 728 F.2d 1384, 1388 (11th Cir. 1984).[14] Objectors also state that the record on this matter has never been closed. Because the Court has not entered a definitive ruling on the scope of material facts to be considered in accordance with the parties' stipulation in the Joint Pretrial Order, a further hearing is needed to hear such evidence. Finally, they state these issues only emerged after entry of the Court's Order Partially Disallowing Claim.

C. Analysis of the Court

1. Effect of the Joint Pretrial Order

Facts stated in a joint pretrial order can be considered a binding judicial admission, especially when jointly presented following prolonged negotiations and thorough review by both

[14] Waiver can be implied through conduct or circumstances if clearly shown. *MDS (Canada) Inc. v. Rad Source Tech., Inc.*, 720 F.3d 833, 852 (11th Cir. 2013).

sides.[15] The purpose of a pretrial order is to narrow the issues and evidence to be offered at trial, and party litigants along with the court must be able to rely on its contents. If a particular issue is not preserved for trial, it may be waived and offers of proof regarding same will be precluded to the loss of the party who has the burden on the issue.

Subsequent to the filing of the objections, and before entry of the Orders identified above, the parties submitted a Joint Pretrial Order to the Court in March of 2014. Though the Order is signed by counsel for both Objectors and Respondent, it was not signed or entered by the Court. To become binding, a court must adopt the order by signing it, but a court can treat such an order as operative in terms of framing the issues for decision. *See generally Dargahi v. Kest Inv. Co. (In re Dargahi)*, 2010 WL 6452906, *5 (B.A.P. 9th Cir. Oct. 21, 2010); *cf. Howard v. Kerr Glass Mfg. Co.*, 699 F.2d 330, 333 (6th Cir. 1983) (finding parties on notice that trial judge treated unsigned pretrial order, and its inclusion of particular issue, as a matter of record). The fact that the Pretrial Order is unsigned is not sufficient grounds to allow a party to live by its terms and then decide it no longer agrees to do so without just cause. *See Conti v. Sanko Steamship Co.*, 912 F.2d 816, 818 (5th Cir. 1990). Any detriment to Respondent could possibly be addressed by allowing it to present evidence in response. The parties submitted a thoroughly negotiated and detailed pleading, however, containing a stipulation of facts and a precise description of the issues presented for decision. Given the long history of this case, and the reality that the Pretrial Order was used and relied upon in framing the issues as ruled on by the

[15] *Accord Ciesla v. Harney Mgmt. Partners (In re KLN Steel Prod. Co., LLC)*, 506 B.R. 461, 478 (Bankr. W.D.Tex. 2014) (parties bound by inclusion of matter in controversy for trial in separately submitted pretrial orders).

Court, Objectors may not now set aside its terms to assert new legal theories on an existing record of known facts.[16]

The Pretrial Order does appear to address matters Objectors attempt to assert in their most recent objections. For instance, Objectors did include the argument therein that the breach of covenant fee is not allowable under Section 502(b)(1) as a penalty. *See* Joint Pretrial Order, p. 19, sec. VII.B ¶ 49(f)(i). Similarly, the right reserved in section VIII, paragraph 53, note 15, at pages 26-27, does not seem to extend beyond the issue of whether these fees should be included in Respondent's proof of claim. As noted above, Respondent has now removed these fees from its claim for Lease Year 2. Objectors did not preserve the separate and additional argument that Respondent's claim is further subject to reallocation due to its application of Debtor's partial rent payments to such fees for Lease Year 1.

Likewise, Objectors failed to raise their contention that the gap claim is already included in the rejection damages claim in the Pretrial Order. Because Objectors did not identify this argument when they otherwise addressed Section 502(f) and its effect on the priority of Respondent's claim, this ground for disallowance of part of the claim has also been waived. *See* Joint Pretrial Order, p. 19, sec. VII.B ¶ 49(e)(i); *see also* Order Partially Disallowing Claims, at 28 (allowing parties to raise "any remaining factual issues" at the status conference).

With respect to the argument under the Guaranty, as set forth in the Pretrial Order, Respondent reduced the amount of its claim dollar-for-dollar using the future expected rent of

[16] Although Objectors state that there has never been an event closing the record, the Pretrial Order states that discovery has been completed subject only to identifying additional witnesses regarding the failure to open charge, which apparently has not yet been done. *See* Joint Pretrial Order, p. 1, sec. I ¶ 1 and pp. 32-33, sec. XI ¶ 88 & n. 17.

the replacement tenant. At no point in the Order, however, did Objectors make the additional demand that use of the replacement tenant's future expected rent, instead of "the then cash value of the premises," was unacceptable in terms of the mitigation calculation required by the Guaranty. Rather, they confined their objection to the upfitting and out-of-pocket costs allegedly incurred by Respondent for the new tenant. S*ee* Joint Pretrial Order, p. 7, sec. VI.C ¶ 18 & n. 3; and pp. 19-20, sec. VII.B ¶ 49(e), & (g)(i); *cf.* pp. 31-32, sec. IX ¶ 82 (Undisputed Material Facts).[17] Based on the foregoing, the Court concludes that the parties are bound by the stipulations set forth in the Joint Pretrial Order.

2. Effect of Court's Prior Orders

Assessing the posture of this matter, the Court further concludes that Objectors' current set of arguments appear more in the nature of a motion for reconsideration of this Court's prior Orders on the objections.[18] Such a motion is governed by Fed. R. Bankr. P. 9023, which incorporates Fed. R. Civ. P. 59(e). *See also* Fed. R. Bankr. P. 3008. Rule 59(e) provides that while a court may amend a prior judgment, such relief "may not be used to re-litigate old matters or to raise arguments or present evidence that could have been raised prior to the entry of

[17] *See also* Order Partially Disallowing Claims, at 13.

[18] Recourse to res judicata does not appear appropriate since this doctrine generally applies to the preclusive effect of prior rulings in subsequent litigation. *See Hospital Auth. Credit Union v. Smith (In re Smith)*, 207 B.R. 26, 32 (Bankr. N.D.Ga. 1997). The Court also does not conclude that litigation of these legal issues is barred under the law-of-the-case doctrine, as the Court did not decide upon a particular rule of law in connection with the issues most recently raised by Objectors. *See United States v. Hubbard*, 520 Fed.Appx. 930 (11th Cir. 2013), citing *United States v. Escobar-Urrego*, 110 F.3d 1556, 1560-61 (11th Cir. 1997). The scope of the Order Partially Disallowing Claims along with the Joint Pretrial Order, however, encompassed such related challenges and serves to prevent their assertion now.

judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n. 5, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008) (citing 11 C. Wright & A. Miller, Fed. Prac. & Proc. § 2810.1, pp. 127-28 (2nd ed. 1995). *See also Condor One, Inc. v. Homestead Partners, Ltd. (In re Homestead Partners, Ltd.)*, 201 B.R. 1014, 1017-18 (Bankr. N.D.Ga. 1996) (noting reconsideration not appropriate for purpose of advancing arguments that could or should have already been made). Thus, courts are reluctant to grant such relief in the absence of one of the following: "(1) an intervening change in controlling law; (2) the availability of new evidence; [or] (3) the need to correct clear error or manifest injustice." *Wendy's Int'l, Inc. v. Nu-Cape Constr., Inc.*, 169 F.R.D. 680, 685 (M.D.Fla. 1996).

As mentioned above, with respect to its argument on the issue of the breach of covenant fees, Objectors insist they are entitled to an opportunity to present evidence, especially as their burden of proof may be altered since the provision at issue is unenforceable on its face as a matter of law. Respondent counters that Objectors do not have the right to raise new objections at this stage of the proceedings after months of briefing and hearings and discovery has been closed. Moreover, citing the Court's prior Order Partially Disallowing Claims (at 6-7), Respondent observes that Objectors must produce evidence refuting at least one essential allegation for the burden to shift to Respondent as claimant. Objectors have failed to make any showing in support of their concerns regarding unenforceability of the liquidated damages provision, which Respondent notes it has claimed from the start. Consistent with the Court's direction, and under applicable state law as well as applicable bankruptcy law, it insists that they should not be allowed to do so now. To permit Objectors to seek evermore hearings on such undisclosed evidence challenging the liquidated damages provision in the lease as a penalty at

this late date, Respondent asserts, would only require Respondent to re-litigate matters that have already been resolved.

Given the range of issues thereafter presented and decided in the Order Overruling in Part Objections to Claim and the Order Partially Disallowing Claims, the Court concludes that Objectors may not present further evidence on the separate issue of enforceability of liquidated damages in connection with their objection that Respondent's claim is subject to a reallocation in view of same, which, as discussed above, the Court has ruled is without legal support and is overruled. Further, while Objectors argued in a previous brief that the fees constituted a penalty under North Carolina state law, the Court has now ruled that these fees are not included for purposes of Respondent's claim within the Section 502(b)(6) calculation for rent in bankruptcy, and they have been removed. The additional argument that the claim is subject to further disallowance due to its unenforceability under applicable state law as the basis for reallocation of payments would come within the scope of the Court's ruling on the issue of damages, which only reserved the matter of applying the proper numbers to the calculation method set forth therein.[19]

Next, Respondent states that the Court has previously determined Respondent holds valid

[19] Although Objectors argue they should be allowed to show how previously identified witnesses and documents satisfy their burden of proof, they do not explain why they have not attempted to do so before now. Citing *Walston v. PYOD, LLC*, 606 Fed.Appx. 543, 547 n. 7 (11th Cir. 2015), Objectors further insist that it is an open question whether such evidence must even be presented when a claim is invalid on its face as is the case here where it contains a penalty. *Walston*, however, does not stand for the proposition that a state law burden of production is altered if an objecting party asserts a legal challenge to the enforceability of a claim under Section 502(b)(1), such as a defense under the statute of limitations. Moreover, this type of defense is distinguishable from an argument that a claim contains an unenforceable penalty, which would require proper evidence to establish same and so negate the claim's viability.

claims against Debtors (s*ee* Order of February 13, 2015 (Case No. 09-67151-MGD, Docket No. 159)), and Objectors failed to raise their new theory under Section 502(f) in connection with the Court's subsequent ruling partially disallowing claims. Whether or not counsel for Objectors perceived the legal basis for this latest argument, which appears to center solely on the interplay between statutes, prior to entry of the Court's most recent Order Partially Disallowing Claims, the underlying facts have been known to all parties for some time. Therefore, this particular legal challenge to Respondent's claim should have already been made and may not be pursued now.

In its Order Partially Disallowing Claims the Court ruled on the objection to classification of the Section 502(f) claim. Expressly observing that this claim is "in addition to the future rent BV Retail calculated under section 502(b)(6)," the Court determined that the gap claim is limited to the period between the petition date and the date the premises were relet. The Court also permitted the parties to present any remaining issues of fact on this claim at the Status Conference. Order, at 27-28. Contrary to Objectors' contention, the fact that the legal issue of alleged duplication may have become clear after the Court's ruling, coupled with the assertion of same by them at the Status Conference, do not establish that this particular ground of objection was not waived, or that it does not go beyond the direction to calculate the rent in view of the Court's ruling on the gap claim issue.

Similarly, with respect to the claim under the Guaranty, the Court held that the "rent cap" of Section 502(b)(6) did apply and again afforded the parties an opportunity to present evidence regarding calculations under the Guaranty, also limited to factual issues. A conclusion that Objectors waived an insistence on requiring Respondent to convert the replacement tenant's rent

into a present value does not shift the burden of proof as maintained by Objectors, as they still must first overcome the prima facie validity and amount of the claim by asserting the applicable basis for their challenge.

In sum, in connection with Orders as entered by the Court on their objections, as well as the Joint Pretrial Order, Objectors were on notice that they needed to present their arguments and evidence in support of their objections. They raised specific legal objections to Respondent's claims that the Court has heard and decided. Their most recent grounds for objection were not raised in their original objection or joint stipulation. Such grounds could have been raised as they are legal arguments based on known facts, but were not presented until now. The Court resolved all remaining substantive issues in its Order Partially Disallowing Claims with the exception of the proper numerical calculations for Respondent's claims. Objectors have presented no arguments to the Court suggesting its prior rulings were in error, nor have they argued that the law has changed or that they have new evidence to offer on these matters. Based upon the foregoing, the Court concludes that any further legal challenges to the claims by Objectors have now been waived.

V. Attorney's Fees

Finally, in its Order Partially Disallowing Claims, the Court held that although attorney's fees under the Lease and the Guaranty are not included in the Section 502(b)(6) calculation, Respondent could bring a claim for such fees outside the scope of this provision. Respondent contends that its claim for attorney's fees under the Promissory Note with Raving Brands, independent of the Lease, should be allowed and are recoverable under *Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 449-50, 127 S.Ct. 1199, 1204, 167

L.Ed.2d 178 (2007), though they include amounts generated litigating bankruptcy issues. It also states that upon entry of a final order that allows the Consent Judgment entered in the North Carolina District Court litigation as a claim herein (s*ee* Joint Exhibit 12), these fees should be allowed in accordance with Federal Rule of Bankruptcy Procedure 7054(b)(2)(A).

Objectors argue that any right to attorney's fees has been extinguished through merger of all Respondent's claims under the Raving Brands Promissory Note into the Consent Judgment. Respondent's Proof of Claim reflects that the Consent Judgment was pursuant to the Note. *See* Proof of Claim No. 4 (Case No. 09-68410-MGD). In response, Respondent contends that the Note is independent from the Lease and that performance (or non-performance) under the latter does not affect enforcement of the former with respect to future obligations thereunder such as the right to attorney's fees.

A review of Respondent's Proof of Claim reveals that it includes an amount for "Attorneys Fees From NC Action" in the sum of $8,085.00. The Consent Judgment expressly approved that amount in fees along with $350.00 in costs based on Respondent's request in that action as provided for in the Note and Guaranty, and the court included these amounts as part of its Judgment. As such, this Court agrees with Objectors that Respondent may not recover additional attorney's fees on the Note as its claim for fees under the Note merged into the Judgment on the original action and, thus, there is no longer a Note to support such claim.

The Court further observes that while attorney's fees incurred litigating issues of federal bankruptcy law may be allowable under *Travelers*, this decision upholds the rule that an enforceable claim for such fees still must satisfy state law as applicable. *See* 11 U.S.C. § 502(b)(1). The question, then, becomes whether North Carolina law permits attorney's fees to

be charged for collection on a judgment. Generally, recovery of attorney's fees under North Carolina law must be supported by statutory authority as in the case of an obligation upon an "evidence of indebtedness." *See* N.C. Gen. Stat. § 6-21.2 (2009), discussed in *Harborgate Property Owners Ass'n., Inc. v. Mountain Lake Shores Dev. Corp.*, 551 S.E.2d 207 (N.C.Ct.App. 2001).

The Court concludes that Objectors' objection to the claim for additional attorney's fees on the Consent Judgment is sustained. The Court further concludes, however, that Respondent is allowed ten (10) days to submit any authority to the Court (as well as serving same upon counsel for Objectors who is allowed five (5) days thereafter to respond as necessary), that it believes supports its claim for such fees in connection with the enforcement or collection on a consent judgment under North Carolina law in accordance with Fed.R.Bankr.P. 7054(b)(2)(A).

VI. Conclusion

The Court having heard the argument of counsel, and based upon a review of the briefs and legal argument as submitted, and upon a consideration of the record in this matter, it is

ORDERED that the objections of Objectors as stated above against the claims of Respondent be, and the same hereby are, **overruled** to the extent provided herein, and **sustained** with respect to Respondent's claim for additional attorney's fees herein for the reasons as stated above.

The Clerk is directed to serve a copy of this Order upon counsel for Objectors, counsel for Respondent, counsel for Debtors, and the United States Trustee.

[END OF DOCUMENT]