Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

216 JAMAICA AVENUE, LLC,	)	Civil Action No. 06-1288
Plaintiff,	)	(Judge Boyko)
v.	)	
S & R PLAYHOUSE REALTY CO.,	)	
Defendant.	)	

SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S *INSTANTER* MOTION FOR LEAVE TO FILE SUPPLEMENT TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

We have already offered several reasons why the Court should deny S&R's Supplemental Motion, including that the affidavit is inadmissible parol evidence offered to vary the unambiguous terms of the Lease and the 1982 Assignment and Assumption. But in light of our deposition of Mr. Ketteler, additional reasons now exist for the Court to deny S&R's Supplemental Motion. We set out these additional reasons below.

At his deposition, Mr. Ketteler stated that he recalls almost nothing at all about the Lease, the 1982 Assignment and Assumption, or the negotiation thereof. For example:

- He was not responsible for managing the leased property that is the subject of this lawsuit and he does not recall who was responsible for managing that property. Deposition of Thomas R. Ketteler ("Ketteler Dep.") at 11.
- He does not recall ever having any contacts with the lessor or being informed about contacts between anyone responsible for managing the leased property and the lessor. Ketteler Dep. at 11–13.
- He does not recall ever reading the Lease prior to this lawsuit. Ketteler Dep. at 12–13.

- His only role in the 1982 Assignment and Assumption was "reviewing tax implications of the transaction," but he does not recall what he found. Ketteler Dep. at 13–14, 30.

- He does not recall who represented S&R in the negotiations over the 1982 Assignment and Assumption. Ketteler Dep. at 14, 30.

- He does not recall ever reviewing the 1982 Assignment and Assumption prior to this lawsuit. Ketteler Dep. at 17.

- The **only** discussion of the terms of the Lease or the rent that Mr. Ketteler recalls participating in or hearing about at **anytime** prior to this lawsuit with or between **anyone** occurred when S&R's predecessor in interest, the Halle Brothers Co., was acquiring the lease from its own predecessor in interest, the Marshall Fields Co. According to Mr. Ketteler, someone from the Marshall Fields Co. "indicated … that it was a very cheap lease." Ketteler Dep. at 20–21, 28; *cf.* Ketteler Dep. at 13, 19–28, 30 (otherwise, no recollection of any discussions of the terms of the Lease or the rent).

In light of Mr. Ketteler's near total lack of recollection about the Lease, the 1982 Assignment and Assumption, and the negotiations thereof, Mr. Ketteler lacks personal knowledge about all issues that might be relevant to this lawsuit. It is well-established that a "present recollection" is a prerequisite of personal knowledge. 27 CHARLES ALAN WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6023 (1990). Because affidavits offered to support or oppose a motion for summary judgment "shall be made on personal knowledge," the Court should deny S&R's Supplemental Motion. FED. R. CIV. P. 56(e); *see also* FED. R. EVID. 602.

S&R seems to want to use Mr. Ketteler's lack of recollection affirmatively, but that will not render Mr. Ketteler's affidavit admissible for purposes of the summary judgment motion because Mr. Ketteler's affidavit states only that he lacks present recollections, not that the events that he does not recall did not occur: he has "no recollection about whether rent in excess of $35,000 per year was ever paid," Ketteler Aff. ¶ 5; and he has no recollection that the parties to the 1982 Assignment and Assumption "ever raise[d] as an issue that the rent under the 1912 Lease was adjustable based upon the price of gold" during the negotiation of that transaction,

Ketteler Aff. ¶ 6. The lack of a present recollection that an event occurred is not the same as an affirmative statement that that event did not occur. Particularly in light of the pervasive lack of relevant recollections that Mr. Ketteler exhibited at his deposition, Mr. Ketteler's statements in his affidavit cannot suffice to resolve an issue of material fact in S&R's favor on its motion for summary judgment, let alone create a genuine issue to defeat our motion for summary judgment. *See Posey v. Skyline Corp.*, 702 F.2d 102, 106 (7th Cir. 1983) (Non-moving party failed to establish genuine issue of material fact sufficient to defeat summary judgment because its "affidavit merely indicates that Posey never saw the ADEA notice, which is not the same as an averment that the notice was not in fact conspicuously posted. This is no doubt a very close distinction, but it is one we must draw, especially in light of the strict requirements of Rule 56 of the Federal Rules of Civil Procedure[, which] demands that Posey show **specific** facts indicating that a genuine issue does indeed exist for trial."); *MGPC, Inc. v. Duncan*, 581 F.Supp. 1047, 1060 (D.C. Wyo. 1984) (citing Wright & Miller § 2741) ("The officials who participated in such meetings now deny present recollection of them which does not mean that Plaintiff's version is untrue but only means they do not recall the facts. The Defendants' claim of ignorance is not adequate to show that there is a genuinely disputed issue as to a material fact such as would preclude the Court from granting Plaintiff's Motion for Summary Judgment.").

Moreover, in light of his deposition, Mr. Ketteler's affidavit is not even relevant to this case because it does not tend to make the existence of any material fact more or less probable. FED. R. EVID. 401. S&R seems to operate from the premise that one can infer from Mr. Ketteler's lack of recollection of a discussion about a particular clause of the Lease that the parties to the 1982 transaction did not consent to that clause. This premise is not valid. As is apparent from Mr. Ketteler's deposition, Mr. Ketteler does not recall **any** discussion of **any**

provision of the Lease with **anyone** during the course of the 1982 transaction, including such important provisions as those concerning renewal, indemnification, insurance, and release upon destruction. *See* Ketteler Dep. at 13, 19–28, 30. If S&R's premise were correct, then the parties to the 1982 transaction did not agree to **any** of these terms. But S&R does not deny that it is generally bound by the Lease, nor could it reasonably do so given the plain language of the Lease and the 1982 Assignment and Assumption. Thus, one cannot infer from Mr. Ketteler's lack of recollection anything at all about what the parties to the 1982 transaction consented to, including whether they consented to the gold clause.

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For the foregoing reasons and the reasons stated previously, the Court should deny defendant's *instanter* motion for leave to file supplement to its motion for summary judgment.

January 3, 2007

Respectfully Submitted,

/s/ Charles J. Cooper

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CERTIFICATE OF SERVICE

I hereby certify on January 3, 2007, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this through the Court's system.

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