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| EXTECH BUILDING MATERIALS, INC.,<br><br>Plaintiff/Respondent,<br><br>v.<br><br>E & N CONSTRUCTION, INC., SHAWN RONEY and JOAQUIM G. FERREIRA,<br><br>Defendants/Petitioner, | SUPREME COURT OF NEW JERSEY<br>DOCKET NO.: 089720<br><br>Civil Action<br><br>On petition for certification from the Superior Court of New Jersey, Appellate Division (No.: No. A-0191-23 T1)<br><br>Sat Below: Hon. Francis J. Vernoia, J.A.D. and Hon. Kay Walcott-Henderson, J.S.C. (t/a)<br><br>Law Division:<br>Hon. Robert C. Wilson, J.S.C. |

# DEFENDANT/PETITIONER JOAQUIM G. FERREIRA'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIFICATION

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Pursuant to Rule 2:12-8, Ferreira respectfully submits this reply memorandum of law in further support of his petition seeking certification.

## PRELIMINARY STATEMENT

Either the decision below was written on a blank slate – in which case, guidance from this Court is sorely needed – or it stands in conflict with New Jersey law. Either way, certification should be granted.

Extech concedes that the issue here has widespread importance, but it protests that Ferreira seeks "a special bright-line rule applicable only to guaranties." Opp19-20.[1] This is unremarkable. Guaranties are already subject to special rules. They a distinct species of contract that has been the subject of judicial attention for centuries. They are singled out for strict construction and interpretations. They have a dedicated provision in our Statute of Frauds.

Extech also protests that rule that "only" a separate agreement or a second signature suffices is a "rigid formalistic structure" and overly restrictive. Opp14, Opp18. In reality, the rule provides two eminently easy options to create the obligation. This very low hurdle merely reflects the principles and requirements already set forth in the controlling authority.

[1] Citations to "Opp___" refer to the opposition brief submitted by Respondent Extech in response to Ferreira's Petition for Certification.

## LEGAL ARGUMENT

### I. RESPONDENT'S OPPOSITION CONFIRMS THAT THIS APPEAL PRESENTS A QUESTION OF GENERAL PUBLIC IMPORTANCE.

#### A. The requirements for creating an enforceable personal guaranty have long been clear, simple, and reliable.

For decades, New Jerseyans have been able to rely upon clear guidance as to: (1) what a guaranty is, and (2) how a guaranty is formed.

With respect to what a guaranty is, the judicial guidance has been unambiguous. "Under a guaranty contract, the guarantor, in a separate contract with the obligee, promises to answer for the primary obligor's debt on the default of the primary obligor.'" *Cruz-Mendez v. ISU/Ins. Servs.*, 156 N.J. 556, 568 (1999); *Feigenbaum v. Guaracini*, 402 N.J. Super. 7, 18 (App. Div. 2008).

With respect to formation, the law is equally clear. Our Statute of Frauds requires that a guaranty "be in a writing signed by the person assuming the liability..." N.J.S.A. § 25:1-15. Further: "Generally, a guarantor is a different person from the maker or, if the same person, signs in different capacities when signing as maker and guarantor (*e.g.*, an individual may sign as an officer of a corporate maker and also sign individually as a guarantor of the corporate obligation)." *Ligran, Inc. v. Medlawtel, Inc.*, 86 N.J. 583, 589 (1981).

These principles are straightforward and easily synthesized. If an obligee wants to hold a third party responsible as a personal guarantor, they must have:

(1) a "separate contract" (*Cruz-Mendez*, 156 N.J. at 568); that is (2) "signed by the person assuming the liability." N.J.S.A. § 25:1-15. This requirement is not difficult to understand or onerous to satisfy.

### B. If every purported guaranty, no matter how deficient, requires discovery and presents an open question for litigation, then our case law and Statute of Frauds are rendered meaningless.

Here, Extech demands that the judiciary excuse it from the requirements of these settled principles. Extech argues that the "single signatures [of Ferreira and Mr. Roney] bound both E&N to the terms of the Credit Application and themselves as personal guarantors of E&N's debt." Opp18. If this is true, then what validity is left of the law already on the books?

For example, *Cruz-Mendez* tells us in no uncertain terms: a guaranty is a "separate contract." 156 N.J. at 568. Extech proposes that this fundamental principle simply be ignored whenever that benefits a party enforcing a guaranty.

Additionally, our Statute of Frauds requires that this separate contract be set forth in "a writing signed by the person assuming the liability." N.J.S.A. § 25:1-15. Extech glosses over this too, suggesting that the underlying contract with the corporate entity is also, at the very same time, a written agreement with the individual assuming its liability.[2]

[2] It is undisputed that the Credit Application at issue is in fact the underlying contract between Extech and the corporate obligor, E&N. All parties agree that Ferreira signed that document on behalf of E&N and no other agreement exists.

Most importantly, what meaning is left in *Ligran*? Because a guaranty is a separate contract, *Ligran* instructs that one individual "signs in different capacities" – once as an officer and then individually. 86 N.J. at 589. Otherwise, when only one person signs, words of guaranty are merely "surplusage." *Id.*

The decision below – and its specific disavowal the applicable formal requirements – is in direct conflict with all of these fundamental principles.

### C. Respondent mischaracterizes the public interest in the decision below but ultimately concedes the real issue.

Extech argues that no question of general importance is presented here because "[t]he unpublished decision of the Appellate Division is not consequential as precedent." Opp6. But this perfunctory statement misses the point.

If Extech's position is even potentially viable, then everything is fair game. Any inadvertent use of the first-person "I" in a contract, or any signature line that lists an individual's name rather than the company's, could be exploited and distorted in an attempt to create guarantor liability where none exists.

Extech eventually gives the game away. It argues that a reversal of its victory below "would flood the courts" and adds that "***it is likely*** that contracting parties that utilize guaranties would litigate to overturn the bright-line rule." Opp4 n.2 (emphasis added). In other words, Extech concedes that this issue is highly relevant to a large number of individuals and business in New Jersey.

Extech attempts to invert this obvious fact by suggesting that only the imposition of a "bright-line rule" – which, to be clear, is already the rule imposed by every New Jersey court that considered the issue – would have this result. In reality, the exact opposite is true. Clear guidance both prevents deficiencies in drafting and also discourages litigation of non-meritorious claims. The elimination of guidance creates an unstructured free-for-all where no claim is frivolous and every litigation has potential upside.

## II. THE DECISION BELOW IS IN CONFLICT WITH EVERY OTHER DECISION OF THE SAME OR A HIGHER COURT.

### A. Extech cannot have it both ways – if there is no issue of public importance here, that can only be because the issue has already been settled.

Extech argues that there is no rule a second signature. If Extech is wrong, then the decision below is in conflict with the controlling authority. If Extech is correct, then the existence of this open question would certainly be an issue of great public importance. Extech tries to have it both ways by advancing an untenable argument along the lines of "the rule is that there is no rule."

### B. Extech and the decision below are in direct conflict with the fundamental principles explained in *Cruz-Mendez*, *Ligran*, *Feigenbaum*, and *Ctr. 48 Ltd. P'ship*.

As described above and in Ferreira's Petition, there is no need to fashion a brand new "special bright-line rule applicable only to guaranties." Opp19, Opp20. The rules that govern this dispute have already been stated clearly. A

guaranty is a "separate contract" that must be in writing and signed by the guarantor. Further, "guaranties are strictly construed and interpreted most strongly against the entity which has prepared the form." *Ctr. 48 Ltd. P'ship v. May Dep't Stores Co.*, 355 N.J. Super. 390, 405 (App. Div. 2002) (citing *Nat'l Westminster Bank NJ v. Lomker*, 277 N.J. Super. 491, 499 (App. Div. 1994)).

Extech tramples these settled principles when it argues that the "single signatures [of Ferreira and Mr. Roney] bound both E&N to the terms of the Credit Application and themselves as personal guarantors of E&N's debt." Opp18. This is logically impossible under New Jersey law. There is no sperate contract, contradicting *Cruz-Mendez* and *Feigenbaum*. There is no written guaranty signed by the guarantor, in violation of the Statute of Frauds. There is neither a separate agreement nor a second signature in a different capacity, in violation of *Ligran* (only mere "surplusage"). Last, if the above defects created any ambiguity, the Appellate Division failed to construe the guaranty against Extech in violation of *Ctr. 48 Ltd. P'ship* and *Nat'l Westminster Bank*.

### C. If the decision below is not contrary to the controlling authority, then why is Extech unable to cite a single New Jersey case that reached a similar result?

Extech has had over two years to find a single New Jersey case enforcing a personal guaranty against where there was neither a separate agreement or a second signature. They have never cited one. There is none.

Previously, Extech had distorted the decisions in guaranty cases by arguing that some cases had "presumably" or "arguably" involved similar facts (arguments that Extech now appears to have properly abandoned). *See* Db19-20, Db24-25.[3] And, as described below, the *N.J. Advance Media* case that Extech continues to cite is not such a case because it involved a separate contract as required by *Ligran* and validity was not even disputed in that case.

The fact remains, that there is no New Jersey case, reported or unreported, that has entertained the possible viability of a personal guaranty like the one Extech seeks to enforce here.

**D. Extech continues to misconstrue the cases it cites.**

Extech argues that in the matter of *N.J. Advance Media v. Lombardo*, No. A-3078-18T1, 2020 N.J. Super. Unpub. LEXIS 736 (App. Div. Apr. 23, 2020), "the defendant signed a credit application concerning advertising that contained personal guaranty language without a second signature line." Opp11. This is incorrect for several reasons: (1) the individual defendant signed ***two separate documents***, (2) the court specifically found that the personal guaranty was separate from the "original contract," and (3) validity was not even in issue because the defendant explicitly admitted during his testimony that he personally guaranteed the payments. *Id.* at **2-3, 12.

[3] Citations to "Db__" refer to Ferreira's merits brief below.

At the same time, Extech minimizes the value of *Ligran*, *Feigenbaum*, and *Cruz-Mendez* because the guaranties arose in different factual contexts and because those cases "did not contain exclusionary or mandatory language when describing a personal guaranty that prohibited one signature line." Opp14 n.7. These arguments miss the point entirely. The principles articulated in *Ligran*, *Feigenbaum*, and *Cruz-Mendez* apply generally to all guaranties, regardless of the context in which they arise. Further, there is no way for a court to enforce a single-signature contract against a guarantor without violating those principles.

## III. EVEN IF THIS CASE DOES NOT INVOLVE A QUESTION OF GENERAL IMPORTANCE, THE DECISION BELOW IS PALPABLY WRONG.

### A. This case is an outlier in conflict with the controlling authority and all prior decisions.

As set forth above and in Ferreira's Petition, the decision below is in direct conflict with the controlling authority as well as prior cases that have considered the issue. Extech notes that many of the cases on point are unpublished. Although any one unpublished case can be dismissed as nonbinding, on this issue every single New Jersey case reaches the same conclusion.

Extech cannot escape that this case is an outlier, palpably wrong, and clearly cutting "against the grain of a long line of jurisprudence in New Jersey." *D.N. v. K.M.*, 216 N.J. 587, 589 (2014) (Albin, J., dissenting). The decision below imposes an injustice upon Ferreira and calls out for correction.

### B. Extech again tries to have it both ways, arguing that its guaranty is both ambiguous so as to require discovery, but also unambiguous so as to avoid strict construction.

The guaranty cannot be so unambiguous that it need not be "interpreted most strongly against the entity which has prepared the form" (*Ctr. 48 Ltd. P'ship.*, 355 N.J. Super. at 405) and simultaneously also be so ambiguous so as to require reversal of the summary judgment previously granted. Extech tries to reconcile these positions by arguing that, separate from the "overall Credit Application itself," only the specific "guaranty language was unambiguous." Opp17. This does not withstand scrutiny. First, it was not the overall contract that Extech tried to enforce or whose clarity was at issue on appeal. Second, the Appellate Division specifically found "ambiguity in the signature lines" that made "determining whether Ferreira or Roney executed the application as personal guarantors or strictly on behalf of E&N" unclear. PCa19-20.

The signatures and the capacity in which the signatures were provided are at the very core of the guaranty itself. Extech cannot offload the ambiguity from the core of this issue to other portions of the document.

### C. Even if the guaranty were ambiguous, the correct result would be affirmance and dismissal rather than reversal and discovery.

As set forth above and in Ferreira's Petition, there is no ambiguity and no need for discovery. In reality, the facial validity of the contract is a matter of law that could have been decided upon the pleadings pursuant to Rule 4:6-2.

However, even if the Appellate Division was correct that there was an "ambiguity in the signature lines of the application and determining whether Ferreira or Roney executed the application as personal guarantors or strictly on behalf of E&N" (PCa19-20), its decision to reverse the trial court's grant of summary judgment is still palpably wrong.

New Jersey law has already told us who bears the risk of imperfect guaranty drafting. Extech drafted the guaranty. If it is ambiguous, that ambiguity must be construed ***against*** Extech. *Ctr. 48 Ltd. P'ship*, 355 N.J. Super. at 405. By using that very ambiguity as an excuse to save Extech's claims, the Appellate Division did the exact opposite. Its decision is palpably wrong and unjust.

## CONCLUSION

For the foregoing reasons, Ferreira respectfully requests that the Court grant certification.

Respectfully submitted,

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Dated: September 20, 2024