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| EXTECH BUILDING MATERIALS, INC.,<br><br>Plaintiff/Respondent,<br>vs.<br><br>E & N CONSTRUCTION, INC.,<br>SHAWN RONEY and<br>JOAQUIM G. FERREIRA,<br><br>Defendants/Petitioner. | SUPREME COURT OF NEW JERSEY<br>DOCKET NO.: 089720<br><br>ON PETITION FOR CERTIFICATION<br>FROM THE SUPERIOR COURT OF<br>NEW JERSEY<br>APPELLATE DIVISION<br>DOCKET NO. A-000191-23 |

# BRIEF OF PLAINTIFF/RESPONDENT EXTECH BUILDING MATERIALS, INC. IN RESPONSE TO DEFENDANT/PETITIONER JOAQUIM G. FERREIRA'S PETITION FOR CERTIFICATION

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## PRELIMINARY STATEMENT

Appellate Division Judges Frances J. Vernoia and Kay Walcott-Henderson issued a well-reasoned, narrowly tailored, per curium decision on July 5, 2024 in this collection matter concerning enforcement of personal guaranties to satisfy an unpaid business debt for construction materials. PCa05-22. [1] They applied familiar contract principles concerning the guaranty language, and reversed the trial court's grant of summary judgment issued on November 4, 2022 dismissing the case as to the guarantors. PCa17-22. The Appellate Division applied the familiar summary judgment standard to determine that the record before the trial court failed to support dismissal of the guaranties as a matter of law. PCa13-15; PCa17-18. It took no position concerning the facts and the ultimate enforceability of the guaranties. PCa17-18.

Counsel for Defendant/Petitioner Joaquim G. Ferreira ("Defendant/ Petitioner") is incorrect in his overstatement that "years of uniform authority" have been upended by the Appellate Division decision. No such event has

[1] "PCa" shall refer to Defendant/Petitioner's appendix. "Pa" shall refer to Plaintiff/Respondent's appendix submitted to the Appellate Division in support of its appeal. "Pb" shall refer to Plaintiff/Respondent's moving brief submitted to the Appellate Division in support of its appeal. "Prb" shall refer to Plaintiff/ Respondent's reply brief submitted to the Appellate Division in further support of its appeal. "DPb" shall refer to Defendant/Petitioner's brief in support of his Petition for Certification.

occurred. The Appellate Division merely held that the record on summary judgment was insufficient to support dismissal of the personal guaranties as a matter of law. The caselaw in New Jersey examines personal guaranties through established contract principles, which the Appellate Division did here, finding a potentially ambiguous contract that deserved continued discovery and potential adjudication by the trier of fact.

Defendant/Petitioner falsely states that the decision held there is "no controlling rule of law." DPb01. That is incorrect. The controlling rule of law is application of contract principles, as set forth in the decision. PCa17-22. To benefit himself, Defendant/Petitioner now requests that this Honorable Court accept his petition for certification for the purpose of establishing a bright-line rule that mandates that all New Jersey personal guaranties be either embodied within a separate contract and/or that a second separate signature line for the guarantor be present if the guaranty is located within the underlying contract, which is not the case. As the Appellate Division decision correctly stated, “[t]here is no such brightline requirement and, in our view, whether Ferreira or Roney are deemed to be personal guarantors based on their execution of the credit application shall be based on the facts and evidence presented and the application of general contract principles to give effect to the parties’ intentions.” PCa20-21.

Defendant/Petitioner incorrectly and self-servingly attempts to portray the decision as a rogue opinion out of step with all authority in the state concerning guaranties. This is utterly false and should not be countenanced. Nor does the decision create "legal uncertainty." DPb01. Defendant/Petitioner's idea of "legal uncertainty" is any guaranty contract that does not contain a second signature line for the guarantor, or is not a physically separate document from the underlying contract. Defendant/Petitioner merely wants to eviscerate the proper and well-established contract analysis of the facts and circumstances, which does constitute "legal certainty" - but a more thoughtful and complex "legal certainty" than benefits Defendant/Petitioner.

Nor is this a dire matter of public importance creating an "open issue" for business people throughout the state. DPb01. Defendant/Petitioner's petition is merely a pretext to suggest this Honorable Court impose a top-down form-over-substance simplistic rule favorable to him that limits enforceability of personal guaranties. Defendant/Petitioner also falsely attempts to set up the incorrect dichotomy that because there is not a bright-line rule, that this Honorable Court is somehow obligated to establish such a rule, ignoring the applicable contract analysis and summary judgment analysis that was correctly applied.[2] PCa13-14;

[2] Defendant/Petitioner also falsely alleges that he is really trying to help those who seek to enforce guaranties by assisting them in drafting enforceable guaranties, which is absurd and contrary to his interests and position in this

PCa17-22. Accordingly, it is respectfully submitted that there is no reason for this Honorable Court to grant Defendant/Petitioner's petition for certification.

## CONCISE STATEMENT OF FACTS

Plaintiff/Respondent Extech Building Materials, Inc. ("Plaintiff/ Respondent") is a corporation that is in the business of sale and distribution of building materials. Defendant E & N Construction, Inc. ("E & N") is a corporation that entered into a Credit Application and Agreement with Plaintiff/Respondent in March of 2012 to purchase building materials. Pa046-047. The Credit Application and Agreement was signed by Defendant/Petitioner and Shawn Roney, who each personally guaranteed E & N's purchases. Pa110-111. By their signatures and personal guaranties, they induced Plaintiff/ Respondent to provide a line of credit and building materials to E & N. Pa423 at ¶ 8.

After significant sales to and paid for by E & N beginning in 2012, from approximately January 2019 through March 2021, Plaintiff/Respondent sold and

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case as a guarantor. DPb07. He also asserts he is trying to cut down on expensive litigation over guaranties; also false, speculative, and completely self-serving because even should such an improper bright-line rule be imposed by this Honorable Court, the litigation challenging guaranties on that basis would flood the courts even if applied only prospectively because realistically, through inertia, old business forms and practices would continue to be used and applied, and additionally, it is likely that contracting parties that utilize guaranties would litigate to overturn the bright-line rule.

delivered to E & N significant building materials in the amount of approximately $1,016,627.65. Pa423 at ¶ 9. E & N failed to pay for the building materials, despite invoices and requests from Plaintiff/Respondent. Pa422-429. Default judgment was entered against E & N on August 19, 2023 in the amount of $1,488,208.05. E & N, as well as the individual guarantors, have failed to pay the well-documented debt.

## LEGAL ARGUMENT

### I. DEFENDANT/PETITIONER'S PETITION FOR CERTIFICATION SHOULD BE DENIED SINCE IT FAILS TO DEMONSTRATE THE EXISTENCE OF ANY GROUNDS WARRANTING CERTIFICATION AND IT HAS FAILED TO MEET THE HIGH THRESHOLD SET FORTH IN R. 2:12-4

R. 2:12-4 lays out the very high threshold a petition for certification must meet in order to warrant review by the New Jersey Supreme Court.

R. 2:12-4 states in relevant part:

> Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires.

"Typically, a case for certification encompasses several relevant factors controlling the exercise of the Court's discretionary appellate jurisdiction." Mahoney v. Danis, 95 N.J. 50, 52 (1983). Satisfaction of any of the criteria

should "forcefully appear" in the appeal. See id. Unsettled questions of general public importance must "transcend the immediate interests of the litigants" and not be confined by the factual constraints of the contested matter. See Bandel v. Friedrich, 122 N.J. 235, 237-238 (1991) (finding "application of established principles of proximate cause to an intensely-factual situation in no way implicated 'an unsettled question of general public importance'"); Mahoney, *supra*, 95 N.J. at 52 (finding petition for certification should be denied when issues fail to impact beyond the parties in suit). Moreover, as to judgments that do not involve a matter of general public significance, a showing that the Appellate Division's decision was "palpably wrong, unfair, or an egregious miscarriage of justice" is required to satisfy the "interest of justice" ground set forth in R. 2:12-4. See Mahoney, *supra*, 95 N.J. at 52.

In this case, the Defendant/Petitioner cannot make any showing that the unpublished decision of the Appellate Division at issue presents a question of general importance that mandates consideration by the New Jersey Supreme Court. The unpublished decision of the Appellate Division is not consequential as precedent. See R. 1:36-3. It does not involve an issue presented on another appeal to the New Jersey Supreme Court, nor is it in conflict with any decision of the same or higher court. See discussion below regarding the inapplicability and lack of conflict in the published cases relied upon by Defendant/Petitioner.

Nor is the decision "palpably wrong, unfair, or an egregious miscarriage of justice." See Mahoney, *supra*, 95 N.J. at 52. Nor does the petition require an exercise of the Supreme Court's supervision nor does the interest of justice require review.

## II. THE APPELLATE DIVISION CORRECTLY HELD THAT PURSUANT TO APPLICABLE CONTRACT PRINCIPLES AND APPLICATION OF THE SUMMARY JUDGMENT STANDARD, THE TRIAL COURT'S DECISION GRANTING SUMMARY JUDGMENT WAS ERRONEOUS

### A. Strict Construction of the Guaranty is Irrelevant Because Plaintiff/Respondent Only Seeks Enforcement of the Specific Terms of the Guaranty

Defendant/Petitioner admits that guaranties are interpreted according to general contract principles. DPb10. See Center 48 Ltd. Partnership v. May Dept. Stores Co., 355 N.J. Super. 390, 405 (App.Div. 2002), citing Garfield Trust Co. v. Teichmann, 24 N.J. Super. 519, 526 (App.Div. 1953). That is precisely what the Appellate Division did. PCa17-22.

Defendant/Petitioner argues that guaranty contracts are strictly construed, interpreted against the entity that prepared the form, and a guarantor cannot be held beyond the strict limits of the guaranty, citing Center 48 Ltd. Partnership, *supra*, 355 N.J. Super. at 405; National Westminster Bank NJ v. Lomker, 277 N.J. Super. 491, 498-499 (App.Div. 1994). DPb10-11. Yet strict construction of the guaranty terms, and adherence to the strict limits of the guaranty are not issues in the instant matter as Plaintiff/Respondent is only seeking exactly what

was promised in the contract: namely enforcement of the guaranties of the unpaid E & N debt. Plaintiff/Respondent does not seek to hold Defendant/ Petitioner liable beyond "the strict terms of the guaranty": namely Paragraph 6 of the E & N credit application, which is payment of the indebtedness of E & N. [3] Pa110-111. Specifically, in the guaranty, Joaquim G. Ferreira and Shawn Roney represented as follows:

> 6. IN CONSIDERATION OF EXTECH BUILDING MATERIALS, ITS SUBSIDIARIES OR AFFILIATES EXTENDING CREDIT, WE JOINTLY AND SEVERALLY DO PERSONALLY GUARANTEE UNCONDITIONALLY, AT ALL TIMES, TO EXTECH, ITS SUBSIDIARIES OR AFFILIATES, THE PAYMENT OF INDEBTEDNESS OR BALANCE OF INDEBTEDNESS OF THE WITHIN NAMES FIRM. THIS GUARANTEE SHALL CONTINUE UNTIL 10 FULL BUSINESS DAYS AFTER GUARANTOR SENDS A WRITTEN REVOCATION OF THE GUARANTEE TO EXTECH.

Pa111. [Capital letters are from the referenced document]

There was no "deferential" analysis by the Appellate Division as unfairly asserted by Defendant/Petitioner. DPb11. Instead, there was a thorough examination of the underlying contract and the guaranty. See discussion below.

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[3] Even the 1874 New Jersey Supreme Court case cited by Defendant/Petitioner, although within the context of a surety and not a guaranty, found strict construction completely irrelevant to the matter at hand by agreeing that the undertaking of a surety is to receive a strict interpretation, but explaining “about this rule of construction, there is no difference; the questions between the parties, arise from the facts." Paulison v. Halsey, 37 N.J.L. 205, 210 (Sup. Ct. 1984). DPb10-11. As in Paulison, enforcing strict terms of the guaranty is completely irrelevant here.

## B. The Appellate Division's Decision Is Not in Conflict with Any Published Decisions of the Same or a Higher Court and Does Not Require New Jersey Supreme Court Supervision

Defendant/Petitioner is incorrect in his insulting assertion that the decision "is in stark conflict with every other decision of equal or higher courts." DPb12. This is simply not true. Defendant/Petitioner is also incorrect in complaining of the decision's statement that his claims were largely supported by unpublished opinions. DPb13. In fact, six unpublished opinions, which are non-binding and non-precedential pursuant to R. 1:36-3, and do not qualify as conflicting decisions subject to R. 2:12-4, that addressed guaranties were analyzed by both sides in the various appellate briefs: specifically three Appellate Division unpublished opinions; one Chancery Division unpublished opinion authored by the same judge whose orders are the subject of this appeal; one United States District Court, District of New Jersey unpublished opinion; and one United States District Court, Southern District of New York unpublished opinion.[4] See also Guido v. Duane Morris LLP, 202 N.J. 79, 91

[4] The unpublished cases cited below by both parties were Am. Furniture Mfg. v. Value Furniture & Mattress Warehouse, 2008 N.J. Super. Unpub. LEXIS 2995 (App.Div. Nov. 18, 2008) (Appellate Division found a guaranty contained within the underlying contract unenforceable after analyzing six different factors pursuant to contract law and not based upon a lack of a second signature); Century Star Fuel Corp. v. Jaffe, 2014 N.J. Super. Unpub. LEXIS 2764 (Ch.Div. Nov. 21, 2014) (The same Law Division, Civil Part judge that decided this case, sitting temporarily in the Chancery Division, held that a separate and distinct guaranty document was required where guaranty language

n.4 (2010) (rejecting the use of unpublished decisions as precedent). Only three evaluated the personal guaranty based on whether there was a second signature line and/or a separate contract (including the Chancery Division opinion authored by the trial court in this matter); three applied a contractual analysis of multiple factors. However, no published decisions explicitly support Defendant/Petitioner's position and there is certainly no conflict among published decisions of courts of the same or higher level.

Defendant/Petitioner is also incorrect in his assertion that Plaintiff/ Respondent failed to cite a single case in which a credit application with only

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was buried in the underlying contract); Home Buyers Warranty v. Roblyn Dev. Corp., 2006 N.J. Super. Unpub. LEXIS 3000 (App.Div. Aug. 4, 2006) (A complex homebuyers warranty contract signed once by the owner, that contained no personal guaranty language whatsoever, was found not to bind the owner personally); N.J. Advance Media v. Lombardo, 2020 N.J. Super. Unpub. LEXIS 736 (App.Div. April 23, 2020) (A personal guaranty contained within a credit application that contained one signature, analogous to this case, was found enforceable against the individual guarantor), TR 39th St. Land Corp. v. Salsa Distrib. USA, LLC, 2013 U.S. Dist. LEXIS 87329 (S.D.N.Y. June 18, 2013) (Southern District of New York completely rejected the formulaic Salzman Sign Co. v. Beck, 10 N.Y.2d 63 (N.Y. 1961) two-signature requirement, and applied five "Lollo" factors that analyzed the contract and its circumstances and determined that the lack of a second signature did not render a personal guaranty contained within the underlying contract unenforceable); and Travelodge Hotels, Inc. v. Huber Hotels, LLC, 2022 U.S. Dist. LEXIS 1852 (D.N.J. Jan. 5, 2022) (District of New Jersey denied the guarantors' motion for dismissal on summary judgment where there was a separate guaranty contract). Pa273-276; Pa277-281; Pa296-303; Pa474-481; Pa304-315; Pa316-326. See further discussion of TR 39th St. Land Corp. Prb04-05.

one signature was held to create an enforceable guaranty. DPb13-14. In a 2020 unpublished Appellate Division opinion, N.J. Advance Media v. Lombardo, which was cited and discussed by Plaintiff/Respondent before the Appellate Division in its moving brief and reply brief, the defendant signed a credit application concerning advertising that contained personal guaranty language without a second signature line, that was enforced by the trial court following trial. See N.J. Advance Media, 2020 N.J. Super. Unpub. LEXIS 736, at *1-3, 4-6, 11-12 (App.Div. April 23, 2020). "Defendant's testimony also confirmed he signed an 'application for agency recognition' in which he personally guaranteed 'payment of all advertising charges and other obligations incurred to NJ Advance Media.'" N.J. Advance Media, *supra*, 2020 N.J. Super. Unpub. LEXIS 736 at *3.

> The guaranty language stated: 'In consideration of the extension of credit by NJ Advance Media to ( ) with respect to the placement of advertisements in NJ Advance Media, the undersigned does hereby personally and unconditionally guarantee payment of all advertising charges and other obligations incurred to NJ Advance Media.' This language clearly stated defendant personally guaranteed all advertising charges incurred to plaintiff from DeCozen's advertising. Moreover, the personal guaranty was attendant to and part of an application for agency recognition and credit.

Id. at *11-12.

As quoted, the N.J. Advance Media credit application with guaranty language contained within it is completely analogous to the credit application here. Following a bench trial, the trial court found there was an enforceable guaranty,

which was upheld by the Appellate Division. See id. at *5-6, *11-14.

None of the "established law" referred to by Defendant/Petitioner mandates either a second signature line or a physically separate guaranty contract for a guaranty to be enforceable, and the cases are all distinguishable from the instant matter. DPb12. Therefore, the decision under review is not in conflict with another decision of the same or a higher court. There is no per se rule in New Jersey that there must be two separate signatures on a contract in order to uphold enforcement of a personal guaranty, nor a per se rule that to be valid, a guaranty must be a physically separate and distinct document.[5]

Nor can Defendant/Respondent rely upon Feigenbaum v. Guaracini, 402 N.J. Super. 7 (App.Div. 2008) for the incorrect proposition that there is a conflict

[5] Defendant/Petitioner complains that the decision only mentions the New Jersey Supreme Court's opinion in Ligran, Inc. v. Medlawtel, Inc., 86 N.J. 583 (1981) once and did not follow Ligran, which is one of the reported cases Defendant/Petitioner incorrectly claims this decision is in conflict with. DPb 13. In fact, the Appellate Division decision did address and acknowledge Ligran, even the precise passage referenced by Defendant/Petitioner concerning signing in different capacities. PCa16. The Appellate Division also referenced Feigenbaum v. Guaracini, 402 N.J. Super. 7 (App.Div. 2008). PCa16. However, the references to signing in different capacities in Ligran are general and not limiting. Nowhere does Ligran state that a guarantor must be different from a maker. Moreover, Ligran can be distinguished because it concerned when a cause of action accrues against a person who is both the maker and the guarantor of payment of a promissory note, and expressly applied N.J.S.A. 12A:3-416, one statute within New Jersey's adoption of the Uniform Commercial Code, Chapter 3, Negotiable Instruments. See Ligran, *supra*, 86 N.J. at 585, 587-592. See further discussion distinguishing Ligran. Prb05-07.

in the Appellate Division concerning enforcement of a guaranty. Feigenbaum concerned a guaranty, that happened to be a separate document, of a ten-year commercial lease of a supermarket signed by two individuals, who were sued when subsequent assignees of the lease defaulted. However, the issue in Feigenbaum was an erroneous grant by the trial court of the right of equitable subrogation between two parties who had no contractual relationship whatsoever, and not enforcement of, the form of, or the validity of a guaranty. Feigenbaum, *supra*, 402 N.J. Super. at 12-16. Nowhere in the Feigenbaum opinion did the Appellate Division mandate that a guaranty must always be a separate and distinct document. The Feigenbaum Court referred to a separate contract merely within the context of comparing it to a suretyship contract.[6]

Similarly, Cruz-Mendez v. Isu/Insurance Servs., 156 N.J. 556 (1999), the third case alleged by Defendant/Petitioner to be in conflict with the instant

[6] In Feigenbaum, the issue was equitable subrogation, where the obligee has "[t]he availability of a direct action against a secondary obligor." Feigenbaum, *supra*, 402 N.J. Super. at 18. Describing a guaranty as a separate contract does not prohibit one signature line from serving as execution of both the underlying contract and a guaranty. The definition as used was informational, general, for comparison, and not limiting or indicative of a per se or exclusionary rule that either eliminates guaranties contained within the underlying contract, explains that a "separate contract" must be a physically separate document, or mandates a second signature line if the guaranty is contained within the underlying contract. Id. at 18.

decision, and which is factually distinguishable because it concerned a liability claim against various insurance companies by a country club grounds-keeper who was injured by a firework and involved a suretyship, not a personal guaranty, also described a guaranty as a "separate contract with the obligee" merely within the context of comparing it to a suretyship. Cruz-Mendez, *supra*, 156 N.J. at 568. Again, the definition was informational, general, not requiring separate signatures, not requiring a physically separate contract, used as a comparison, and not indicative of a per se or exclusionary rule. Id. at 568.

Contrary to Defendant/Petitioner's assertion about "established law" being in conflict with the instant decision, neither Ligran, Feigenbaum, nor Cruz-Mendez in any way mandate that a guaranty, in order to be enforceable, must be a physically separate and distinct contract, or if contained within another contract, must contain a second signature line.[7] Therefore, the Appellate Division decision is not in conflict with the cases relied upon by Defendant/ Petitioner and is not obliged to impose the rigid formalistic structure sought by Defendant/Petitioner. Supervision by this Honorable Court is not required.

[7] None of the facts in any of the three cases was analogous to the instant matter because they concerned a promissory note, equitable subrogation and a suretyship, respectively, and not a personal guaranty, and did not contain exclusionary or mandatory language when describing a personal guaranty that prohibited one signature line.

### C. The Appellate Division Correctly Applied the Summary Judgment Standard

Instead, the Appellate Division correctly applied the summary judgment standard set forth in R. 4:46-2(c); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (quoting R. 4:46-2(c)) and Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). PCa13-15. An Appellate Court reviews an appeal of a grant of summary judgment de novo. See Crisitello v. St. Theresa Sch., 255 N.J. 200, 218 (2023). PCa13. It determined that the record before the trial court failed to support dismissal of the guaranties as a matter of law and took no position concerning the facts and the ultimate enforceability of the guaranties. PCa19-22.

### D. The Appellate Division Correctly Applied Well Established Contract Principles

The Appellate Division correctly applied well established contract principles to the guaranty set forth in Center 48 Ltd. Partnership, *supra*, 355 N.J. Super. at 405-406, as well as relying upon other contract law precedent. PCa17-22. An agreement to provide a guaranty is governed by the same rules of construction as any other contract. See Center 48 Ltd. Partnership, *supra*, 355 N.J. Super. at 405. "While any ambiguity should be construed in favor of the guarantor, the agreement should be interpreted according to its clear terms so as to effect the objective expectations of the parties." Id. at 405-506, citing

Housatonic Bank and Trust Co. v. Fleming, 234 N.J. Super. 79, 82 (App.Div. 1989). "The rules governing the construction of contracts generally are to be referred to, of course, in resolving a question as to the interpretation of a contract of guaranty. Primarily, the terms and provisions of the contract are to be considered with a view to discovering and giving effect to the intention of the parties thereto." Garfield Trust Co., *supra*, 24 N.J. Super. at 526. The Appellate Division here concluded the Credit Application was ambiguous and warranted remand for additional discovery. [8] PCa19-22. An Appellate Court interprets a contract de novo. See Accounteks.Net, Inc. v. CKR Law, LLP, 475 N.J. Super. 493, 504 (App.Div. 2023) PCa17.

### E. Plaintiff/Respondent Asserted that Only the Guaranty Was Unambiguous

[8] Defendant/Petitioner's reference to the recent unpublished Inglesino opinion is misplaced. See Inglesino, Webster, Wyciskala & Taylor, LLC v. Sapphire Assisted Living, LLC, 2024 N.J. Super. Unpub. LEXIS 293 (App.Div. Feb. 27, 2024). Aside from the fact that the decision is non-binding and non-precedential pursuant to R. 1:36-3, the Inglesino Court acknowledged that "[w]hen resolving questions concerning the interpretation of guaranty contracts, we look to the rules governing construction of contracts generally." See Inglesino, *supra*, 2024 N.J. Super. Unpub. LEXIS 293, at *3, relying on Garfield Trust Co., *supra*, 24 N.J. Super. at 526. Yet, curiously, the Inglesino Court did not engage in the requisite contractual analysis but relied solely on the absence of a second signature line or a physically separate and distinct guaranty contract, arguably an overly formulaic approach. Far from being the benchmark, the unpublished opinion merely joins the outcomes of the non-precedential unpublished opinions already discussed above. See R. 1:36-3. See discussion above.

Contrary to Defendant/Petitioner's mischaracterizations, Plaintiff/ Respondent never asserted in its briefs that the overall Credit Application itself was unambiguous, merely that the guaranty language was unambiguous.[9] DPb15. In its moving brief before the Appellate Division, Plaintiff/Respondent respectively asserted "[t]he guaranty clause is unconditional, unambiguous and explicit in creating liability . . . "; "[a]s the words 'personally guarantee unconditionally' were used by the individual defendants, they clearly intended to personally guaranty the credit agreement. The language is unconditional, unambiguous and explicit in creating liability. . . "; "[h]ere the personal guaranty was clear, unambiguous, and enforceable"; "[g]iven the unambiguous language, prominence, proximity and unmistakable clarity of the guaranty. . . "; "[t]he guaranty is unconditional, unambiguous and explicit in creating liability. . . " Pb07; Pb08; Pb18; Pb23. Similarly in its reply brief before the Appellate Division, Plaintiff/Respondent described the guaranty language as unambiguous and clear: "[t]he guaranty language in the credit application is not facially invalid as a matter of law, as held by the trial court. Instead it is unambiguous, unconditional, clear and explicit in creating and identifying personal liability . . . "; "the agreement should be interpreted according to its unambiguous terms so

[9] Plaintiff/Respondent had no cause to comment on or characterize the overall Credit Application from the standpoint of clarity in its briefs submitted to the Appellate Division.

as to effect the objective expectations of the parties" (referring again to the guaranty language); and "if the terms of a contract are clear and unambiguous, courts must enforce the terms as written", summarizing the holding in City of Orange Twp. v. Empire Mortg. Svcs., Inc., 341 N.J. Super. 216, 224 (App.Div. 2001). Prb1; Prb11. Regardless of what Plaintiff/Respondent asserted, the Appellate Division is free to analyze the Credit Application pursuant to contract principles for ambiguity.[10] Defendant/Petitioner's question "if Ferreira and Roney signed in their personal capacities - then who signed on behalf of E&N?" can easily be answered: their single signatures bound both E & N to the terms of the Credit Application and themselves as personal guarantors of E & N's debt. Defendant/Petitioner's insistence that only a second signature line can create a personal guaranty and/or that only a physically separate guaranty contract can

[10] It is also absurd for Defendant/Petitioner to argue that Plaintiff/Respondent's position is that both guarantors only signed on behalf of E & N: why would it have filed the instant appeal? DPb15. Defendant/Petitioner cites sentences of the Plaintiff/Respondent's moving brief before the Appellate Division out of context: one of the sentences referenced was "[t]he Credit Application and Agreement was signed on behalf of E & N by defendants, Joaquim G. Ferreira and Shawn Roney, who personally guaranteed E & N's purchases." Pb3. This referred to the guarantors signing both as representatives of E & N and as personal guarantors, and certainly not that they signed only as representatives of E & N. Pb3. The next cited sentence: "[m]oreover, they clearly acted as representatives of E & N" was used within the context of distinguishing the facts of City of Millville v. Rock, 683 F.Supp.2d 319 (D.N.J. 2010) and not for the purpose of limiting the guarantors' role to exclusively representatives of E & N. DPb15. Pb10.

create a personal guaranty is not the rule in New Jersey. DPb16. It is respectfully submitted that this Honorable Court decline Defendant/Petitioner's self-serving petition for certification, which seeks imposition of a special bright-line rule applicable only to guaranties.[11]

## CONCLUSION

As already argued, the matter presented to this Honorable Court is not an open issue of great public importance, is not in conflict with any other binding decisions of the same or a higher court, does not require New Jersey Supreme Court supervision, is not palpably unreasonable or required by the interest of justice. The decision is a proper adjudication of a whimsical and unjustified grant of summary judgment to guarantors by the trial court. PCa39-41; Pa003; Pa004-005. See also discussion above. That Defendant/Petitioner is unhappy that the underlying litigation will resume is not grounds for this Honorable Court to grant certification. See Lombardi v. Masso, 207 N.J. 517, 538-539 (2011).[12]

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[11] It is highly foreseeable the placement, visibility and language adjacent to the proposed required second signature line as well as other details concerning the second signature line would also generate challenges in the form of litigation concerning a bright-line rule, if set by this Honorable Court.

[12] "[A]lthough a party who obtains summary judgment may believe he is absolutely free of the litigation, it is a contradiction in terms to say that an interlocutory decree should be a finality. The policy that litigation must have an end is not threatened in such a case, because litigation has not yet terminated. In other words, a party's sense of finality upon summary judgment is just that - a feeling unsupported by the notion of what is, in fact, interlocutory.

There is no "long line of jurisprudence" concerning guaranty contracts as incorrectly argued by Defendant/Petitioner.[13] New Jersey residents and business people already have clear guidelines within the well-established body of contract law for guidance as to enforcement of guaranties, and do not need a special bright-line rule to be established only for guaranties. There is no "miscarriage of justice" in the Appellate Division's well-reasoned decision remanding the matter back to the trial court for continuing discovery and possible submission to the trier of fact of the issue of the guarantors' liability.

It is respectfully submitted that Defendant/Petitioner's request for certification to this Honorable Court be denied for the reasons set forth above.

Respectfully submitted,

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By: Lisa J. Jurick
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Dated: September 10, 2024

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Interlocutory orders are always subject to revision in the interests of justice." Lombardi, *supra*, 207 N.J. at 538-539.

[13] The dissent relied upon by Defendant/Petitioner as stating that the decision "cuts against the grain of a long line of jurisprudence in New Jersey" is inapplicable because it concerned a criminal case about the denial of a petition for certification concerning the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35.