STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

WELLS FARGO BANK, N.A.,
Plaintiff,

v. **Case No. 19-172860-CB**
Hon. James M. Alexander

MICHAEL J. WALSH,
Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition.

According to Plaintiff's Complaint, Plaintiff and nonparty Custom Touch, Inc., through its agent Michael Walsh, requested a business line of credit from Plaintiff via paperless application on November 21, 2003. On or about December 2, 2003, Plaintiff opened the business line of credit for Custom Touch. As consideration for the business line of credit, Defendant agreed to guarantee the repayment of the monies borrowed. Defendant affirmed his guaranty during the recorded audio application for the business line of credit. Custom Touch is in default on the business line of credit, and Plaintiff is seeking to enforce Defendant's guaranty for the balance due and owing.

On these general allegations, Plaintiff filed a single-count complaint seeking to enforce Defendant's guaranty on the business line of credit.

As stated, both parties now move for summary disposition. Defendant so moves under MCR 2.116(C)(8) and (C)(10). In response to Defendant's motion, Plaintiff moves for summary under (I)(2), (C)(9), and (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v*

Rozwood, 461 Mich 109, 120; 597 NW2d 817 (1999).[1] A (C)(9) motion tests a defendant's defenses to a claim. *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 730; 476 NW2d 506 (1991).[2] And a (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden*, 461 Mich at 120.[3]

In his motion, Defendant argues that under California law, a personal guaranty must be in writing and signed by the guarantor. Here, since Plaintiff alleges that Defendant orally agreed to guarantee the line of credit, Defendant argues that the guaranty in unenforceable. Further, Defendant argues that the underlying contract with Custom Touch was modified, which exonerates a personal guaranty. In the alternative, Defendant argues that Plaintiff has failed to state a claim for breach of contract against Defendant.

In response, Plaintiff argues it is entitled to summary disposition arguing that the recorded phone conversation in which Defendant agreed to guarantee the line of credit is a valid and enforceable contract. Further, Plaintiff argues that the guaranty does not need to be in writing when it is made to benefit the guarantor. Based on the same, Plaintiff argues that the Court must enforce the guaranty and that Plaintiff is entitled to judgment in the amount of $100,905.65.

Although the parties dispute whether the recorded phone transcript is a contract or an

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1 Such a motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).
Further, "[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

2 Such a motion tests whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery. *Lepp*, 190 Mich App at 730.

3 In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden, 461 Mich* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the

application for the line of credit, they do agree that both the line of credit and personal guaranty are governed by California law as represented in the recording.

On November 21, 2003, Plaintiff and Defendant processed a paperless application through a phone call that was recorded. The parties did discussed Defendant personally guaranteeing the business line of credit. During the conversation, the following exchange occurred:

> [Wells Fargo] You personally guaranty to pay Wells Fargo upon demand all that you own on the business line account. As guarantor, you authorize Wells Fargo without notice or prior consent to change any of the terms of the amount of your company's business line account. In addition, you agree to pay attorney's fees and other expenses incurred in enforcing this guaranty.
>
> [Walsh] Uh-huh.
>
> [Wells Fargo] This guaranty benefits the Wells Fargo bank and its successors and assigns. Finally, you agree that this audiotaped application may be used as evidence of your agreement to the terms of this guaranty.
>
> [Walsh] Uh-huh.
>
> [Wells Fargo] Do you understand and agree to these terms?
>
> [Walsh] Yes. (Plaintiff's Resp. Exhibit A, at 12).

Defendant relies on Cal Civ Code 2793 for the proposition that the alleged oral guaranty is unenforceable. Cal Civ Code 2793 provides, "[e]xcept as prescribed by the next section, a suretyship obligation must be in writing, and signed by the surety; but the writing need not express a consideration."[4]

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moving party is entitled to judgment as a matter of law. *Id.* at 120.

4 Cal Civ Code 2787 abolished the distinction between sureties and guarantors. A surety or guarantor is one who promises to answer the debt of another. *Id.*

Plaintiff argues that the oral guarnatee is valid pursuant to Cal Civ Code 2794(4) because the guaranty was made to benefit the guarantor. Cal Civ Code 2794 provides that "[a] promise to answer for the obligation of another, . . . , is deemed an original obligation of the promisor, and need not be in writing: . . . (4) [w]here the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person." In the alternative, Plaintiff argues that the recorded transcript is a writing pursuant to the Uniform Electronic Transaction Act,

In *RCA Corp v Hunt*, 133 Cal App 3d 903, 906 (1982), the court was called upon to determine is whether a guaranty with the amount to be guaranteed left blank was, as a matter of law, unenforceable. The court explained, "[t]o make that determination, we interpret surety contracts by the same rules used in construing other types of contracts, with a view towards effectuating the purposes for which the contract was designed." *Id.* The *RCA* court found that although the amount to be guaranteed was left blank, the guaranty was still enforceable. *Id.* The *RCA* court reasoned:

> [t]he public policy of strictly construing surety contracts so as to protect the surety has long been held inapplicable where the guarantors gained a business or personal advantage from their guaranties. Indeed, the law declares that under such circumstances the Statute of Frauds normally applicable to surety agreements cannot be asserted and oral guaranties are enforceable. *Id.* (Internal citations omitted).

In *Farr & Stone Ins Brokers, Inc v Lopez*, 61 Cal App 3d 618, 621 (1976), Lopez argued that the statue of frauds barred enforcement of his oral guaranty. The *Farr* court found that the statute of frauds did not apply, and the oral promise was enforceable. *Id.* The *Farr* court explained that "[i]t is well settled that whenever the leading and main object of the promisor is not to become surety or guarantor of another but to subserve some purpose or interest of his own, the promise is not within

the statute of frauds even though performance of the promise may pay the debt or discharge the obligation of another." *Id.* at 622 (internal citations omitted).

Although not binding on the Court, the Court of Appeals of Iowa has addressed the issue of an oral guarantee on a business line of credit. In *Wells Fargo v Nevins*, 847 NW2d 236 (Iowa Ct App 2014), defendant was the owner of a business and was solicited by Wells Fargo to open a business line of credit. *Id.* at 1. The parties had a phone conversation, which was recorded, discussing the terms of the line of credit. In a nearly identical exchange to the one at issue in the present case, the defendant in *Nevins,* agreed to personally guarantee the business line of credit upon default of the company. *Id.*

The defendant argued that the oral promise to personally guarantee the business line of credit was collateral to the contract and inadmissible because it violated the statute of frauds. The *Nevins* Court found that Nevins's promise to personally guarantee the debt was an original promise and a specific term of the agreement. *Id.* Without the guarantee, credit would not have been extended. *Id.* Therefore, not only did the defendant benefit from the line of credit, but Wells Fargo would not have offered the line of credit without the personal guarantee. *Id.* The *Nevins* Court explained:

> The statute of frauds is an evidentiary rule that precludes the admission of certain oral agreements. One of those instances is a promise "to answer for the debt, default or miscarriage of another." This section applies when the promise to pay is collateral, that is, "when a promise is made in addition to an already existing contract and the surety has no personal concern in the debtor's obligation and gains no benefit from the debtor's obligation." However, when the promise to pay the debt of another is an original promise, the statute of frauds does not apply and the evidence may be admitted. As discussed above, a factor that may be considered in determining whether the promise was original is whether the promisor personally benefitted from the promise. Additionally, "[w]hether a promise is collateral to an existing contract or creates a primary obligation on the part of the promisor is a question of fact." *Id.* (Internal citations omitted).

The *Nevins* Court ultimately held that the personal guarantee was a term of the offer extended by Wells Fargo and created a primary obligation on Nevins. *Id.* at 3. Therefore, the court found that the oral promise was not within the statute of frauds and evidence of the same can be admitted. *Id.* the *Nevins* court affirmed the district court's finding that Nevins personally guaranteed the Wells Fargo line of credit extended to her business. *Id.* at 3.

The Ohio Court of Appeals also addressed the issue of an oral guaranty in *Wells Fargo Bank v Blough*, 2009 WL 2220065 (Ohio App 2009). Again, in a near identical exchange the defendant agreed to personally guaranty a business line of credit. *Id.* at 1. Defendant argued that Wells Fargo's failure to produce a written document in which he agreed to personally guaranty the business line of credit was fatal to Wells Fargo's claim. *Id.* at 2.

The *Blough* court, applying California law held:

> The courts of California have construed these statutes to mean that a verbal agreement to personally guarantee a loan from which an individual gains a personal or business advantage is valid and enforceable. In short, in this type of situation oral guaranties are enforceable.
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> In the case at bar, appellant owed the business. His business owed the debt. He agreed to be personally liable for the debt. Under California law, his oral agreement is valid and enforceable.

In the instant case, like *Nevins* and *Blough*, Defendant, as the owner of the company utilizing the business line of credit, personally benefitted from the same. Further, Plaintiff relied on Defendant's personal guaranty, and would not have advanced the monies without the same. (Plaintiff's Response, Exhibit 2). As such, this Court finds, as a matter of law, that Defendant's promise to personally guaranty the debt was an original promise and a specific term of the agreement. Based on the foregoing, the Court finds that the statute of frauds does not bar

Defendant's oral promise to guaranty the business line of credit.

This finding is consistent with the rulings in both *RCA* and *Farr* and Cal Civ Code 2794 that provide the statute of frauds does not bar an oral guaranty when the promise is beneficial to the promisor. As previously discussed, Defendant was the president and sole shareholder of the corporation that sought the business line of credit. The *Farr* court held that an owner's business reputation was enough to find that guarantor received a benefit from the guaranty. *Farr*, 61 Cal App at 622. Like the defendant in *Farr*, the line of credit was used to improve the company that Defendant owned. As such, Defendant did benefit from the guaranty and subsequent line of credit. Again, based on the same, Defendant's oral promise to guaranty the line of credit is not subject to the statute of frauds. And under California law, Defendant's oral agreement is valid and enforceable.[5]

Next, Defendant argues that if the Court were to find that Defendant personally guaranteed the business line of credit, he is exonerated of the same due to Plaintiff modifying the underlying contract. Defendant's sole argument is that Plaintiff changed the line of credit from being governed by California law to being governed by South Dakota law.

In response, Plaintiff argues that Defendant agreed that the terms and conditions could be amended by Plaintiff in the recorded phone exchange. Further, Plaintiff argues that Defendant consented to any changes to the underlying contract when he continued to utilize the line of credit. The exchange Plaintiff relies on is as follows:

> [Wells Fargo] As guarantor, you authorize Wells Fargo without notice or prior consent to change any of the terms of the amount of your company's business line account. In addition, you agree to pay attorney's fees and other expenses incurred in enforcing this guaranty.
>
> [Walsh] Uh – huh. (Plaintiff's Response, Exhibit A).

5 Based on the Court's ruling, the Court does not need to address whether the recorded phone call is considered a "writing" under the Uniform Electronic Transaction Act, Cal Civ Code 1633.7.

Cal Civ Code 2819 provides, "[a] surety is exonerated, except so far as he or she may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

Although generally, a surety is exonerated if the underlying contract is altered, a surety is not exonerated if the change is made with his or her consent, and "such consent may be given in advance of the alteration of the principal's obligation as well as at or after the time of such act. *Southern Cal First Nat Bank v Olson*, 41 Cal App 3d 234, 240 (1974).

The *Olson* court explained:

> The continuing guaranty provided: "Guarantors authorize Bank, without notice or demand and without affecting their liability hereunder, from time to time to ... change the terms of the indebtedness ... including increase ... of the rate of interest thereon." As shown by this provision, defendants plainly gave advance consent to an increase in the rate of interest on the obligation of Kaspar Burgi Co., Inc., to plaintiff. *Id.*

Here, Defendant consented to any changes to the terms of the underlying contract. Although consent was given prior to any alterations, under California law, a surety's obligation is not exonerated. As such, Defendant consented to any modifications to the underlying contract, and as such, his obligation as a surety was not exonerated.

Finally, at the end of his response, Defendant (in a single-page argument) also claims that the Court should dismiss the case pursuant to an arbitration clause in Business Line Customer Agreement. But the Court is unconvinced by Defendant's cursory argument that it should dismiss this case when the true nature of both Plaintiff's and Defendant's motions were brought pursuant to MCR 2.116(C)(8) and (C)(10). The Court will not address the same absent full and complete briefing

on the issues.[6]

Based on the foregoing, the Court finds that there are no genuine issues of material fact that (1) Defendant oral promise to guaranty the business line of credit is valid and enforceable, and (2) Defendant consented to any modifications of the underlying contract. Based on the same, the Defendant's motion for summary pursuant to MCR 2.116(C)(8) and (C)(10) is DENIED. Plaintiff's motion for summary pursuant to (I)(2), (C)(9), and (C)(10) is GRANTED and judgment is entered against Defendant and in favor of Plaintiff for $100,905.65.[7]

This is a final order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

August 8, 2019_____ __/s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge

6 It is well established that "[t]rial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008).
7 Defendant has not submitted any evidence disputed the amount Plaintiff claims is owing.