

2015

**Pc Riverview, LLC, Respondent/Plaintiff, vs. Hang Gaung Lin, D/B/  
a/ Golden Isle Restaurant and Xiao-Yan Cao, Petitioner/  
Defendants**

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

<p>PC RIVERVIEW, LLC,</p> <p>Respondent/Plaintiff,</p> <p>vs.</p> <p>HANG GAUNG LIN, d/b/a/ GOLDEN ISLE RESTAURANT and XIAO-YAN CAO,</p> <p>Petitioner/Defendants.</p>	<p>Supreme Court No. 20150479</p> <p>Court of Appeals No. 20150479-CA</p> <p>District Court Case No. 149902947</p>
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**BRIEF FOR THE PETITIONER**

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## **JURISDICTIONAL STATEMENT**

This is before the Court after a grant of a Writ of Certiorari. This Court has jurisdiction under 78A-3-102(3)(a) to hear an appeal from the adjudication of the Court of Appeals. The Court of Appeals heard an appeal from a final Judgment of the Third Judicial District Court under 78A-4-103(2)(j).

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

Issue No. 1: Whether the Court of Appeals erred in concluding any modification of the lease agreement only extended the time for making payments.

Standard of Review: On certiorari, the Supreme Court reviews the decision of the Court of Appeals for correctness, ceding no deference to the Court of Appeals. [\*State v. Brake\*, 2004 UT 95, ¶ 11, 103 P.3d 699](#).

Issue No. 2: Whether the Court of Appeals erred in concluding an extension of time to make payments did not constitute a material modification of the lease that relieved the Petitioner of any obligations as guarantor.

Standard of Review: On certiorari, the Supreme Court reviews the decision of the Court of Appeals for correctness, ceding no deference to the Court of Appeals. [\*State v. Brake\*, 2004 UT 95, ¶ 11, 103 P.3d 699.](#)

Issue No. 3: Whether the Court of Appeals erred in declining to address Petitioner's arguments for an alternate ground for affirmance and in remanding with a directive to enter judgment in favor of Respondent.

Standard of Review: On certiorari, the Supreme Court reviews the decision of the Court of Appeals for correctness, ceding no deference to the Court of Appeals. [\*State v. Brake\*, 2004 UT 95, ¶ 11, 103 P.3d 699.](#)

### **CONTROLLING AUTHORITY**

None.

### **STATEMENT OF THE CASE**

*Nature of Case, Course of Proceedings and Disposition Below:*

Plaintiff/Respondent, PC Riverview (Plaintiff), brought an action against former Tenant, Defendant Hong Gaung Lin (Defendant Lin) for unpaid rent. The complaint also included a cause of action against Defendant/Petitioner Xiao-Yan Cao (Defendant Cao) as a guarantor on the lease. This is the second action filed by the Plaintiff against the Defendants.



In the first case filed May 18, 2010, Case No. 100908746, Defendant Cao filed a Motion for Summary Judgment against the Plaintiff on August 23, 2010, asserting that the Plaintiff lacked standing to bring an action on the guarantee against Defendant Cao because there was no privity of contract between the Plaintiff and Defendant Cao and no evidence that the guarantee was assigned to the Plaintiff from the prior landlord, Riverview Properties. On October 28, 2010, the Third District Court, the Honorable L.A. Dever, presiding, issued a minute entry order favorable to Defendant Cao. The Trial Court found that the Plaintiff failed to provide evidence of any alleged transfer of interest. The Trial Court stayed final entry of the order to allow the parties to attend mediation. On November 1, 2010, Plaintiff provided Defendant Cao with an Agreement that was reached between Plaintiff and Defendant Lin on September 8, 2010. Plaintiff requested Defendant Cao's stipulation to dismissal of that case. On November 3, 2010, Defendant Cao notified Plaintiff that Defendant Cao would not agree to the dismissal of the case. Defendant Cao was not involved in the negotiations between Plaintiff and Defendant Lin, Defendant Cao had no knowledge of the Agreement between Plaintiff and Defendant Lin when it was agreed upon by the parties. Defendant Cao also stated that the new Agreement between Plaintiff and

Defendant Lin abrogated Defendant Cao's surety obligations under the prior Lease Agreement. Plaintiff provided no response to Defendant Cao's letter. Plaintiff failed to further prosecute Case No. 10090874. Eventually, the case was dismissed for lack of prosecution on October 17, 2011. On March 3, 2014, Plaintiff filed the current action, Case No. 149902947, again claiming that Defendant Cao was the surety for the Agreement between Plaintiff and Defendant Lin. Plaintiff obtained summary judgment against Defendant Lin. Plaintiff was awarded \$7,326.55 in damages, \$1,208.88 in prejudgment interest, \$117.00 in costs and \$1,400.00 in attorney's fees. On April 29, 2015, a bench trial was held, the Honorable Katie Bernards-Goodman presided. After hearing the evidence, the Trial Court issued its ruling from the bench. The Trial Court found that Plaintiff and Defendant Lin materially modified the lease agreement thereby negating the suretyship of Defendant Cao. Because the Trial Court found in Defendant Cao's favor regarding the modification, the Trial Court declined to rule on Defendant Cao's argument that the assignment of the guarantee from Riverview Properties to PC Riverview was improper. An Order and Judgment was signed by the Court on May 26, 2015. The Plaintiff filed the Notice of Appeal on June 11, 2015. The Court of Appeals issued its decision on August 25, 2016 reversing the

Trial Court and ordering the Trial Court to enter judgment in favor of the Plaintiff.

*Statement of Facts:*

1. On or about October 7, 2003, Chai Teng Tsoa and Hong Min Zhang assigned their interest in a Lease with Riverview Properties to L&C Unlimited, with the approval of the Landlord, Riverview Properties. Defendant Cao signed the Lease personally as Guarantor to the agreement. The Lease expired on September 30, 2008. Plaintiff's Trial Exhibit 6.

2. On or about March 9, 2006, L&C Unlimited assigned their interest in a Lease with Riverview Properties to Hong G. Lin, with the approval of the Landlord, Riverview Properties. Defendant Lin signed a Guarantee to the Lease. Defendant Cao signed the Lease as Guarantor. Defendant Lin signed a Guarantee to the Lease. The Lease for Hong G. Lin was extended to September 30, 2013. Plaintiff's Trial Exhibit 7.

3. On or about June 19, 2006, PC Riverview acquired the leased property from Riverview Properties. TT(Trial Transcript) page 8.

4. On May 20, 2010, Defendant Cao was served with the Complaint in Case No. 10090874, CR (Court Record) page 108-110, TT 39.

5. Prior to being served with the Complaint, Defendant Cao was given no notice of that Defendant Lin had failed to make payments under the Lease. TT 39-40.

6. Prior to being served with the Complaint, Defendant Cao was given no notice of the transfer of the property from Riverview Properties and PC Riverview. TT 40-41.

7. On June 28, 2010, Defendant Cao filed a Motion to Compel Eviction Proceedings in Case No. 10090874. CR 108-110, TT 37-38.

8. On or about July 2, 2010, Plaintiff filed an Opposition to Motion to Compel Eviction, along with a Declaration of Carolyn Carter with the Court. CR 112-13.

9. According to Carolyn Carter, Plaintiff elected to delay enforcement of Defendant Lin's obligations in exchange for partial payments. The Plaintiff accepted partial payments from Defendant Lin for several months prior to filing their Complaint against Defendant Cao and Defendant Lin. CR 112-13.

10. Records produced by the Plaintiff show that Defendant Lin was behind on his rent obligations starting in October 2008. CR 034.

11. By the time Plaintiff filed their initial lawsuit in May 2010, Defendant Lin was \$20,050.12 behind in his rent. CR 036.

12. In May, 2010, Defendant Lin incurred \$969.25 in late charges for the month of May for his outstanding balance. CR 36.

13. The late charges reached a peak of \$1,069.18 in June 2010. CR 36.

14. Defendant Cao was completely unaware of this business arrangement between Plaintiff and Defendant Lin. TT 39-40.

15. On August 23, 2010, Defendant Cao filed a Motion for Summary Judgment in Case No. 10090874. CR 108-110.

16. On September 8, 2010, Plaintiff and Defendant Lin reached an agreement whereby they modified the payments due to Plaintiff from Defendant Lin. Defendant's Trial Exhibit 2.

17. When Plaintiff and Defendant Lin reached their agreement, Defendant Lin owed the Plaintiff \$23,951.28. CR 036 and Defendant's Exhibit 2.

18. The Agreement between Plaintiff and Defendant Lin acknowledges that it included 7/8<sup>th</sup> of the late fees that Defendant Lin incurred. Defendant's Exhibit 2.

19. On September 14, 2010, Plaintiff filed a Memorandum in Opposition to Summary Judgment. Plaintiff's Memorandum in Opposition to Summary Judgment failed to notify Defendant Cao or the Court that Plaintiff and Defendant Lin had reached an agreement modifying the terms of the Lease. CR 108-110

20. On September 27, 2010, Defendant Cao filed a Reply Memorandum. CR 108-110

21. On October 28, 2010, the Court issued a ruling on Defendant Cao's Motion for Summary Judgment. The Court looked favorably on Defendant Cao's Motion; however, the Court stayed final decision on the matter while the parties attempted a resolution through ADR. Defendant Exhibit 1.

22. On November 1, 2010, Plaintiff faxed the Agreement between Plaintiff and Defendant Lin to Defendant Cao. Defendant's Exhibit 2.

23. On November 3, 2010, Defendant Cao sent a letter to Plaintiff notifying Plaintiff that Defendant Cao would not agree to the dismissal of the case. Defendant Cao was not involved in the negotiations between Plaintiff and Defendant Lin, Defendant Cao had no knowledge of the Agreement between Plaintiff and Defendant Lin when it was agreed upon by

the parties. Defendant Cao also stated that the new Agreement between Plaintiff and Defendant Lin abrogated Defendant Cao's surety obligations under the prior Lease Agreement. Defendant's Exhibit 3.

24. Plaintiff provided no response to Defendant Cao's letter. Plaintiff failed to further prosecute Case No. 10090874. Eventually, the case was dismissed for lack of prosecution on October 17, 2011. CR 108-110.

25. On March 3, 2014, Plaintiff filed this case again, alleging that Defendant Cao was the surety for the Agreement between Plaintiff and Defendant Lin. See CR 3-6.

26. On December 9, 2014, judgment for the Plaintiff against Defendant Lin was entered by the Court. CR 200-201.

27. April 29, 2015, a bench trial was held before the Honorable Katie Bernards-Goodman. See Trial Transcript.

28. At trial, the parties and the Court raised the issue of when Defendant Cao's guarantee expired. TT 29-32.

29. At trial, Defendant Cao objected to the introduction of the lease agreement and argued that the assignment was impermissible. TT 45-46.

30. The Trial Court ruled that there was a material modification to the parties' contract and Defendant Cao was released from her surety obligation. TT 51.

31. The Trial Court specifically declined to rule on the assignment. TT 51.

32. The Trial Court did not issue a ruling on the expiration of the guarantee. TT 51.

33. An Order and Judgment was signed by the Court on May 26, 2015.

34. The Plaintiff filed the Notice of Appeal on June 11, 2015.

35. The Court of Appeals issued its decision on August 25, 2016 reversing the Trial Court and ordering the Trial Court to enter judgment in favor of the Plaintiff.

36. On appeal, Defendant Cao raised the issues of whether her obligations under the guarantee expired. Brief of Appellee pages 13-17.

37. On appeal, Defendant Cao contested that the assignment was not valid. Brief of Appellee pages 23-25.



38. The Court of Appeals did not issue any rulings on either the assignment or the expiration issues. See PC Riverview LLC v. Xiao-Yan-Cao 2016 UT App 178 paragraphs 6, 7 and 8.

39. The Court of Appeals decision relied solely on whether the September 8, 2010 Agreement between Respondent and Defendant Lin modified the parties' contact. PC Riverview LLC v. Xiao-Yan-Cao 2016 UT App 178 paragraphs 6, 7 and 8.

### **SUMMARY OF ARGUMENT**

The Trial Court found that the Plaintiff and Defendant Lin materially modified the lease agreement. The Trial Court found that the Plaintiff in allowing Defendant Lin to fall far behind on his rent and to make partial payments during this time, without notifying Defendant Cao, materially modified the parties' contract. The material modification relieved Defendant Cao as a surety to the lease agreement. The Court of Appeals failed to review the facts relied upon by the Trial Court. Instead the Court of Appeals chose to focus solely on the Workout Agreement. This Court should reverse the Court of Appeals and affirm the Trial Court. Plaintiff and Defendant Lin made material modifications when the Plaintiff, without

notice to Defendant Cao, allowed Defendant Lin to remain in the premises for 20 months prior to initiating their initial complaint<sup>1</sup>. This arrangement went beyond a mere extension of time, because under this arrangement, Defendant Lin incurred substantial late fees. The Court of Appeals also erred in their analysis of the Workout Agreement. When Plaintiff and Defendant Lin executed their Workout Agreement in September 2010, that Agreement also included late fees. The Workout Agreement went beyond an extension of time to make payments. The Workout Agreement included the late fee penalty. The Workout Agreement also modified the late fees due under the original contract. By proceeding in this manner, Plaintiff and Defendant Lin exposed Defendant Cao to excessive late charges under the original contract and then modified those charges under the Workout Agreement. The Court should issue a ruling requiring that extensions of time must be agreed upon by the surety to a contract. The Court should reverse Court of Appeals because even an extension of time under prior Utah Supreme Court precedents find that such extensions are a material modification which relief the surety. Finally, there remained outstanding

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<sup>1</sup> Even when the Plaintiff initiated their complaint, they did not seek to evict Defendant Lin. When Defendant Cao brought a motion to evict Defendant

issues that needed to be resolved by the Trial Court. The Court of Appeals should have remanded this case back to the Trial Court for resolution of those issues prior to directing a judgment.

## **ARGUMENT**

### **I. PLAINTIFF AND DEFENDANT LIN MODIFIED THE LEASE AGREEMENT**

The Trial Court determined that a material modification occurred “when they had Mr. Lin’s rent so far behind and allowed him to make changes and differences to that and didn’t notify the guarantor of that. If I’m guaranteeing something and there’s changes like that and somebody’s way behind and they’re letting them catch up and they’re not telling me, I would consider that a material modification.” Trial Transcript page 51-52. In reversing the Trial Court, the Court of Appeals stated “Cao was not relieved of her obligations as guarantor because the Workout was the sole modification to the original lease, and the Workout only modified the timing of the Tenant’s payments by extending the time in which past due rent could be paid.” Court of Appeals Memorandum Decision page 4. The statement by the Court of Appeals was incorrect on two levels.

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Lin, Plaintiff, not Defendant Lin, opposed the motion.

First, the Workout Agreement was not the sole modification to the parties' agreement. Well before the Workout Agreement, Plaintiff and Defendant Lin engaged in a series of actions that ran contrary to their obligations under the Lease Agreement. It was these actions that the Trial Court relied on in its ruling. The Court of Appeals failed to properly address these events. When the Court examines the actions of Plaintiff and Defendant Lin prior to the Workout Agreement, the Court will reach the same conclusion as the Trial Court.

Second, the Workout Agreement modified more than the timing of the Tenant's rent payments. The Workout Agreement made material modifications to the late payment provisions under the lease. The Workout did not fully waive the late fees. Instead, it lessened the late fees if Defendant Lin successfully completed the Workout. If Defendant Lin failed to complete the Workout, it reinstated the late fees that were incurred because Plaintiff and Defendant Lin agreed that Defendant Lin should make partial rent payments over several months. Finally, the Workout created did not merely extend time for payment it created balloon payments for Defendant Lin.

## **1. Status and the Applicable Law**

The law recognizes that parties to a contract may have different obligations and defenses depending on their status. Defendant Cao signed the Assignment and Extension of Lease as an accommodating party. Plaintiff's Exhibit 7 merely refers to Defendant Cao as "Guarantor." Defendant Cao signed the guaranty of the Lease personally, without compensation. This Court has long recognized the status of non-compensated sureties:

Sureties are persons favored by the law. Their obligations are ordinarily assumed without pecuniary compensation, and are not to be extended by implication or construction. Their liability is, as it is put, *strictissimi juris*. They have a right to stand on the terms of their obligation, and, having consented to be bound to a certain extent only, their liability must be found within the terms of that consent, strictly construed. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand on the very terms of his contract, and if he does not assent to any variation of it and a variation is made, it is fatal. [M.H. Walker Realty Co. v. American Surety Co., 60 Utah 435, 211 P. 998 \(1922\)](#)

The Courts' uniformly recognize that there is a significant difference between sureties for profit and those who are personal sureties.

The modern authorities seem to be almost a unit upon the proposition that a different rule of construction applies to different classes of sureties. In the case of a private or voluntary surety without compensation the surety is held to be a

favorite of the law, and the contract, the performance of which he guarantees, is construed strictly in favor of the surety. *Strictissimi juris* is the term used to express the rule by which his liability shall be determined. [Dennis Dillon Oldsmobile, GMC, Inc. v. Zdunich, Utah, 668 P.2d 557, 560 \(1983\)](#) quoting [M.H. Walker Realty Co. v. American Surety Co., 60 Utah 435, 211 P. 998 \(1922\)](#))

This Court affirmed the application of these principals in [U-M Invs. v. Ray, 701 P.2d 1061, 1062 \(Utah 1985\)](#) (We recognize that in construing the terms of a bond executed by a voluntary or private surety, the rule of *strictissimi juris* applies, and the private surety's liability is limited by the terms of the contract. Under the concept of *Strictissimi juris*, a creditor may not make alterations to the parties' contractual relationship. "Dealings between the debtor and the primary obligor which materially modify the terms of the guarantor's undertaking generally result in the discharge of the guarantor's obligation." [Carrier Brokers, Inc. v. Spanish Trail, 751 P.2d 258, 261 \(Utah Ct. App. 1988\)](#) quoting [Essex Int'l, Inc. v. Clamage, 440 F.2d 547, 550 \(7th Cir.1971\)](#)). See also [Baldwin v. Becker, 277 F. 930, 933-34 \(8<sup>th</sup> Cir, 1921\)](#) (Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, . . . Nor does it matter how trivial the change, or even that it may be of advantage to the

sureties. They have a right to stand upon the very terms of their undertaking.) Under these principals, any material alteration by Plaintiff and Defendant Lin to the underlying obligation relieved Defendant Cao of her surety obligation.

## **2. The Initial Modification**

The Trial Court determined that Plaintiff and Defendant Lin modified the Lease through their subsequent actions, rather than through the Workout Agreement. Defendant Lin first fell behind in his rent in October 2008. Over the next twenty months, Defendant Lin continued to incur past due rent and late fees to the sum of \$20,050.12. During this time, there is no evidence that the Plaintiff took any action to evict Defendant Lin. Defendant Lin benefited from this arrangement because he continued to operate his restaurant without the fear of eviction. Plaintiff benefitted from the partial payments from Defendant Lin and the presumption that Defendant Cao, as Guarantor, would ultimately be financially responsible for both the past due rent and the late fees of Defendant Lin. During these twenty months, neither Plaintiff nor Defendant Lin took any action to notify Defendant Cao of her increasing financial obligation under the Lease. The

actions of Plaintiff and Defendant Lin formed the basis for the Trial Court's determination that they modified the parties' contract.

The determination of whether a contractual breach is material is a question of fact. [\*Wilson v. Johnson\*, 2010 UT App 137, ¶ 25, 234 P.3d 1156, cert. denied, 241 P.3d 771](#). Likewise, whether there is a modification to the parties' contract is also a question of fact. See generally [\*Richard Barton Enters., Inc. v. Tsern\*, 928 P.2d 368, 373 \(Utah 1996\)](#) and also the concurring and dissenting opinion of Justice Howe at 384 ("Whether a contract has been modified by the parties thereto is ordinarily a question of fact for the trier of fact, as where the evidence is conflicting or the terms of the agreement are equivocal or uncertain." [\*Johnson v. Allied Stores Corp.\*, 106 Idaho 363, 679 P.2d 640, 645 \(1984\)](#)). The trial court's factual findings should not be set aside unless clearly erroneous. [\*Burton Lumber & Hardware Co. v. Graham\*, 2008 UT App 207, ¶ 8, 186 P.3d 1012](#). The Court of Appeals failed to attack the factual determination which formed the basis for the Trial Court's decision. Because the Trial Court's decision was based on the factual determination that the actions of Plaintiff and Defendant Lin constituted a modification of the contract, this Court should reverse the Court of Appeals.



The Trial Court's determination is also legally sound. Although the rule of *strictissimi juris* applies to Defendant Cao's defenses and obligations, ordinary tests of the meaning and intentions of the parties still applies. [U-M Invs. v. Ray, 701 P.2d 1061, 1062 \(Utah 1985\)](#). When interpreting the contract of the parties, the Courts should look at principals applicable to all contracts.

Plaintiff temporarily suspended their enforcement of the eviction rights under the Court while allowing late fees to accumulate against Defendant Cao without her knowledge or approval. This Court has held that temporarily suspending the right of enforcement against the principal debtor without knowledge and approval of the surety, relieved the surety of further liability on the original contract. [First Nat. Bank of Layton v. Egbert, 663 P.2d 85, 87 \(Utah 1983\)](#)(relying on §70A-3-606 U.C.A.). It is clear that Plaintiff and Defendant Lin suspended Plaintiff's right of enforcement under the contract to allow Defendant Lin more time to pay his back rent. At the same time, Plaintiff benefitted from this suspension by way of the ever increasing late fees. On this basis alone, the Trial Court was warranted in finding that there was a material modification. Although §70A-3-606

U.C.A. may not be applicable to this case, the same principals can be applied to these dealings through the covenant of good faith and fair dealing.

Both Plaintiff and Defendant Lin modified their obligation to Defendant Cao under the principals of the covenant of good faith and fair dealing. The covenant of good faith and fair dealing is present in every contract. Under the covenant of good faith and fair dealing, parties to a contract impliedly promise not to intentionally do anything to injure the other party's right to receive the benefits of the contract. [\*Eggett v. Wasatch Energy Corp.\*, 2004 UT 28, ¶ 14, 94 P.3d 193](#). In this case, Plaintiff and Defendant Lin modified that implied covenant of good faith and fair dealing by taking actions that strictly benefitted themselves while injuring Defendant Cao. Plaintiff benefitted from additional late fees and Defendant Lin benefitted from the operation of his restaurant while making partial rent payments. Defendant Cao, without any knowledge of this arrangement, was unable to bring any action earlier to assert her rights and protect her interests. Even when Defendant Cao did attempt to assert her rights by seeking Defendant Lin's eviction, Plaintiff opposed the eviction in order to maintain this beneficial relationship. Plaintiff actions were again contrary to the covenant. The covenant prevents a party from impeding the other's

rights under the contract. [Markham v. Bradley](#), 2007 UT App 379, ¶ 18, 173 P.3d 865. The Trial Court properly determined that the actions of Plaintiff and Defendant Lin modified the parties' obligations under the Lease. The Trial Court determined that the actions of the Plaintiff and Defendant Lin violated their duty of good faith and fair dealing towards Defendant Cao. Plaintiff and Defendant Lin altered the Lease when they disregarded their obligations of good faith and fair dealing. This Court should reverse the Court of Appeals on this basis.

### **3. The Workout was More than an Extension of Time**

The Court of Appeal's improperly determined "the Workout only modified the timing of the Tenant's payments by extending the time in which past due rent could be paid." Court of Appeals Memorandum Decision page 4. The four corners of the Workout contradict that statement. The Workout states:

"We agree to write off \$6,451.28, of which is 7/8 of the late charges if, and only if, the monthly back balance payments are received in the Landlord's office on or before each payment due date.

If any payments are late, you agree to pay the previous late charges amount of \$6,451.28 as well as any additional interest, collection/legal fees, or late charges that may accrue based on the lease." Defendant's Trial Exhibit 2.

By its own terms, the Workout not only restructured the timing of the lease payments, it also restructured the late payments due.

Plaintiff restructure the amount of late fees due under the Lease. Plaintiff also made that restructured amount contingent completion of the Workout Agreement. By its own language, the Workout Agreement went beyond extending the time for payment. Because the Workout Agreement modified the parties' obligations under the Lease, Defendant Cao had the right to object under the principal of *strictissimi juris*. Defendant Cao had the right to stand on the terms of her original obligation. Whether Defendant Cao sustained no injury from the change, or that it may have been to her benefit it does not matter. Defendant Cao's right to stand on the very terms of the original contract, and her refusal to consent to the Workout is fatal to the Plaintiff's claim against her. [\*M.H. Walker Realty Co. v. American Surety Co.\*, 60 Utah 435, 211 P. 998 \(1922\).](#)

In addition to modifying the late fee provisions of the lease, the Workout Agreement created balloon payments for Defendant Lin. Although Defendant Lin's rent payments for September 2010 through December 2010 were supposed to be \$5,416.92, Defendant Lin paid \$9,416.92. These

potential balloon payments could have seriously undermined the remaining financial viability of the restaurant and to the detriment of Defendant Cao.

Defendant Cao's refusal to consent to the Workout was not without reason. Plaintiff allowed Defendant Lin to make partial rent payments for several months without notifying Defendant Cao. During this time, Defendant Cao's financial burden increased without any notice from either party. Defendant Cao reasonably concluded that Plaintiff and Defendant Lin would continue to work together to the financial detriment of Defendant Cao. This fear was also reinforced by the circumstances surrounding the creation of the Workout. After Defendant Cao filed a Motion to Evict Defendant Lin, Plaintiff, not Defendant Lin, opposed the Motion. It was through the Plaintiff's Motion that Defendant Cao finally learned the extent to which Plaintiff was permitting Defendant Lin to make the partial rent payments, incurring late fees and financially exposing Defendant Cao. After Defendant Cao filed a Motion for Summary Judgment, Plaintiff and Defendant Lin negotiated the Workout Agreement without the knowledge or consent of Defendant Cao. Plaintiff then filed a Memorandum in Opposition to Summary Judgment without notifying Defendant Cao or the Court regarding the Workout Agreement. It was only after Defendant Cao

received a favorable ruling that the Plaintiff provided a copy of the Workout Agreement. It was reasonable for Defendant Cao no longer wanted to be financially attached to any agreement between Plaintiff and Defendant Lin.

Because the Workout Agreement modified the late fees due under the Lease and created balloon payments, the Court of Appeals' assertion that it merely extended the time for payment is incorrect. The Court of Appeals' reliance on the [Restatement \(Third\) of Suretyship & Guaranty § 41 \(Am. Law Inst. 1996\)](#) and its decision in [DiMeo v. Nupetco Associates, 2013 UT App 188, 309 P.3d 251](#), are misplaced. The facts in this case do not fit within the exception that an extension of time does not relieve a secondary obligor when there is a modification. If the Court affirms the exception that an extension does not modify the underlying agreement the Court should narrowly construe that exception. Based on the facts before this Court, that exception is not applicable. The Court should reverse the Court of Appeals.

## **II. AN EXTENSION OF TIME DOES MATERIALLY MODIFY A LEASE**

This Court has not previously adopted the position that an extension of time for payment is not a material modification of a contract. In dicta, this Court seemingly adopted a more strict approach when the Court said

that a Surety “has a right to stand on the very terms of his contract, and if he does not assent to any variation of it and a variation is made, it is fatal.

[\*M.H. Walker Realty Co. v. American Surety Co.\*, 60 Utah 435, 211 P. 998 \(1922\).](#) The Court should reject exception as stated in the [\*Restatement \(Third\) of Suretyship & Guaranty § 41\* \(Am. Law Inst. 1996\)](#) and adopted by the Court of Appeals in [\*DiMeo v. Nupetco Associates\*, 2013 UT App 188, 309 P.3d 251](#) and hold that extensions of time for payment without the consent of the Surety, modify the contract and relieve the Surety.

Even the Court of Appeals’ determination that the Workout Agreement was a mere extension of time still warrants restrictions of such extensions. This Court has held that a surety for hire will not be relieved from his contract by an extension of time without showing injury. [\*Murray City v. Banks\*, 62 Utah 296, 219 P. 246.](#) The problem with this approach is that it is uneconomical. It encourages the principal obligor and obligee to engage in behavior that may very well be contrary to the interests of the surety without the surety’s knowledge.

There is a practical reason for requiring the Surety to sign off on extensions of time before the damage is done. When the Surety signs off to the underlying contract, the Surety is in the best position to evaluate the

principal's default on the underlying contract. When there is an extension, that Surety is also in the best position to determine the impact on the Surety. The facts in this case support that proposition. For twenty months, the Plaintiff extended the time for Defendant Lin to pay his full rent. During this time, Plaintiff continued to levy ever increasing late fees. Had the Plaintiff sought Defendant Cao's input, Defendant Cao could have made up the monthly difference in the rent. Defendant Cao could seek that difference directly from Defendant Lin. Economically, Defendant Cao would have been in a much stronger position to extract this amount from Defendant Lin because neither Defendant Lin nor Defendant Cao would have been incurring unnecessary late fees. In addition, Defendant Cao could have sought concessions from Defendant Lin in the operation of the restaurant so as to insure its financial viability and thus limiting Defendant Cao's future exposure.

The Court of Appeals has restricted lease guarantees to the length of the original lease. [\*Trolley Square Assocs. v. Nielson\*, 886 P.2d 61, 68 \(Utah Ct.App.1994\)](#). This approach is consistent with the concept that the surety should only be bound to the contract that the surety guaranteed. Guarantees



represent credit risks for sureties. Extending payments beyond the contract length would extend the credit risk without the sureties assent.

The credit risk of extensions beyond the length of the contract also are present when balloon payments are involved. This Lease Agreement, like most leases, required set monthly payments. Monthly lease payments for small businesses and landlords are practical. Rarely does a small business have the funds to prepay on their lease. Rarely would a landlord allow a tenant to occupy a unit for a lengthy period of time with the expectation that the tenant would just pay the lease amounts in full at the end of the tenancy. Business plans for both the tenant and the landlord are made on the expectations of monthly payments. When Plaintiff agreed to allow Defendant Lin to remain in the property while making balloon payments for past due rent, Plaintiff and Defendant Lin engage in behavior that increased the likelihood of Defendant Lin's business failing by substantially increasing his monthly expenses. Defendant Cao should have been afforded the opportunity to evaluate this arrangement in accordance with the risks that were being place on her in the event of the failure of the restaurant. In this case, had the Workout not worked, Defendant Cao would have been on the hook for the past rent and late fees and Defendant Cao

would have been responsible for Defendant Lin's rent during the Workout time. The Workout may have been the optimal arrangement, but it was for all of the parties to make that determination, not just the Plaintiff and Defendant Lin.

All extensions have the potential of modifying the risks to the surety. Because the surety is in the best position to determine the risks to the surety, the Court should find that any extension to be a material modification which requires the agreement of the surety.

### **III. THE COURT OF APPEALS SHOULD HAVE REMANDED THIS MATTER FOR ADDITIONAL FACTUAL DETERMINATIONS**

At trial and on appeal, Defendant Cao raised to additional reasons why she should not be liable for Defendant Lin's debt. First, Defendant Cao argued that she signed the Lease and Extension of Lease because she was the Guarantor on the prior lease and she signed as an accommodating party. Second, Defendant Cao argued that there was not an appropriate assignment of the lease. Because the Trial Court found that there was a material modification of the lease, the Trial Court declined to make any further rulings. The Memorandum Decision of the Court of Appeals failed to address Defendant Cao alternate arguments. Because both arguments need

factual determinations by the Trial Court, the Court of Appeals should have remanded this matter. When the Trial Court fails to make critical factual determinations necessary to resolve the legal issue, it is appropriate to remand the case back to the Trial Court. *Pioneer Builders Co. v. KDA Corp.*, [2012 UT 74, ¶ 30, 292 P.3d 672](#) see also *Colonial Pacific Leasing Corp. v. J.W.C.J.R. Corp.* (Utah App.1999), [¶ 24, 977 P.2d 541](#).

**1. Defendant Cao was the Guarantor on the Prior Lease and Her Obligations Expired with That Lease**

Defendant Cao, throughout this process was merely a guarantor on the prior lease. The tenant prior to Defendant Lin was L & C Unlimited Corporation. L & C Unlimited Corporation signed Plaintiff's Exhibit 7 as the Assignor. Defendant Cao signed Plaintiff's Exhibit 7 as a Guarantor. The Plaintiff never sought to make L & C Unlimited a party to this action. Because the Plaintiff failed to bring in L & C Unlimited, all obligations of the Assignor have been waived by the Plaintiff. Those obligations cannot be transferred to Defendant Cao personally merely because the Plaintiff asserts that she is the Assignor. Defendant Cao is merely an accommodating party throughout these transactions.

An examination of the history of the leases, assignments and extensions helps to determine the intent of the parties. Plaintiff's Exhibit 5 is a Lease Extension and Modification between Riverview Properties and Chai Teng Tsao and Hong Min Zhang (Tsao and Zhang). Under paragraph 4 of Plaintiff's Exhibit 5, the lease extension expired on September 30, 2003. There was no guarantor to Plaintiff's Exhibit 5. At the end of the lease term of Plaintiff's Exhibit 5, Riverview Properties and Tsao and Zhang sought to assign the interest Tsao and Zhang had in the lease to L & C Unlimited in Plaintiff's Exhibit 6. Defendant Cao became the Guarantor in Plaintiff's Exhibit 6. L & C Unlimited became the Tenant in Plaintiff's Exhibit 6. The lease with the landlord, Riverview Properties, was extended to September 30, 2008. In paragraph 4 of Plaintiff's Exhibit 6, Cao is specifically named as the Guarantor to this lease, thereby obligating Defendant Cao until September 30, 2008. In March 2006, L & C Unlimited sought to transfer its interest in the lease to Defendant Lin. Plaintiff's Exhibit 7 states that the "Landlord, Assignor and Assignee desire to extend this Lease for an additional Five (5) year(s) period." Plaintiff Exhibit 7 page 2. There is no mention of the guarantor's intention to extend the lease. In addition, although the lease repeatedly uses the singular when referring to the

Guarantor, the extension has the signatures of two guarantors. Defendant Cao signed Plaintiff Exhibit 7 as Guarantor on page 4. However, Plaintiff's Exhibit 7 contains a specific Guarantor provision on page 6. The specific guaranty was signed by Defendant Lin. Defendant Cao signed Plaintiff Exhibit 7 because Defendant Cao was the Guarantor on the prior lease that was set to expire on September 30, 2008. As Guarantor to that lease, Defendant Cao was giving her approval to the assignment of the lease to Defendant Lin. Had the lease been assigned and extended without Defendant Cao's approval, Defendant Cao's obligation would have expired immediately on the transfer. Under the prior lease, Defendant Cao remained obligated to the Riverview Properties until September 30, 2008. By approving of the transfer, Defendant Cao remained obligated until the prior lease expired on September 30, 2008. Defendant Lin, in signing the explicit Guaranty attached to Plaintiff's Exhibit 7 was then the designated Guarantor for the entire period of the extension. Defendant Cao's Guarantor obligations were specifically defined by paragraph 4 of Plaintiff's Exhibit 6. Defendant Lin's obligations were specifically defined by his Guaranty at the end of Plaintiff's Exhibit 7. Plaintiff acknowledged that Defendant Cao signed the Extension because of her status as the Guarantor in the prior

lease. Plaintiff merely assumed that Defendant Cao guaranty lasted as long as Defendant Lin was in the property. (TT page 30). “We accept the general principle that in determining the nature and extent of the guarantor's liability under a guaranty of payment of rent ... the general rules of construction apply, and the contract will be strictly construed to impose only those burdens clearly within its terms.” [\*Trolley Square Assocs. v. Nielson\*, 886 P.2d 61, 68 \(Utah Ct.App.1994\)](#) (alteration in original) (quoting [\*Orange–Co., Inc. v. Brown\*, 181 Ind.App. 536, 393 N.E.2d 192, 196 \(1979\)](#)). Defendant Cao’s guaranty of the lease only covered the obligations under her lease. Defendant Cao’s obligation did not extend for as long as Defendant Lin occupied the space, as the Plaintiff urges. See [\*Trolley Square Assocs. v. Nielson\*, 886 P.2d 61, 68 \(Utah Ct.App.1994\)](#). By having Defendant Lin sign as a Guarantor under the lease extension, it is clear that the parties’ intent was that Defendant Lin would be the Guarantor under the extension. Defendant Cao’s specific obligations expired as of September 30, 2008 when her portion of the lease expired. The Plaintiff provided no evidence that Plaintiff incurred any damages prior to September 30, 2008. On this basis, the Court should uphold the decision of the Trial Court. In the

alternative, the Court should remand this matter to the Trial Court for a decision on this issue.

## **2. There was No Appropriate Assignment**

When Defendant Cao signed the guaranty, she signed it with Riverview Properties. Several months after Defendant Cao signed the guaranty, Plaintiff acquired the property from Riverview Properties. Defendant Cao was never informed of this transfer. When Defendant Cao was initially sued, Defendant Cao did not know PC Riverview at all. (TT page 40-41). Defendant Cao believed her guarantee was with Riverview Properties. (TT page 41).

Defendant Cao raised the lack of privity of contract in the parties' first litigation. In that litigation, the Plaintiff failed to present any evidence of the transfer of interest which would allow the Plaintiff to proceed against Defendant Cao. The Court agreed with Defendant Cao's position, but stayed the ruling to allow the parties to work out an agreement. Defendant's Exhibit 1<sup>2</sup>. Defendant Cao again raise the question of privity of contract at trial. (TT

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<sup>2</sup> The Court should note that one of the reasons that the Trial Court stayed its ruling was because the Plaintiff asserted that if Defendant Cao could find a new tenant, Plaintiff would evict Defendant Lin. The Trial Court stayed its ruling to allow the parties to potential reach an agreement. Plaintiff

page 45-46). The Plaintiff offered Plaintiff's Exhibit 1, a photo copy of a purported assignment from Riverview Properties to the Plaintiff. Plaintiff's Exhibit 1 contains the signatures of Orin R. Woodbury, and Roger T. Sharp. Neither signature is dated or notarized. No affidavits from Mr. Woodbury or Mr. Sharp were offered to authenticate their signatures. Neither Mr. Woodbury nor Mr. Sharp testified at trial. The only evidence offered to authenticate this document was the testimony of Grace Mitchell, President of the Plaintiff, who merely stated that she was present when Mr. Woodbury and Mr. Sharp signed the documents. (TT page 9). Prior to its admission, the Plaintiff's offered no details surrounding its creation or execution. The Plaintiff's offered no verification from a disinterested party. This document lacked a notary, contrary to almost every document concerning Riverview Properties offered by the Plaintiff. See Plaintiff's Exhibits 4, 5, 6 and 7. There was simply insufficient evidence to warrant the Trial Court admitting

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however, failed to notify either the Trial Court or Defendant Cao, that Plaintiff and Defendant Lin has already reached an agreement. In fact, Plaintiff and Defendant Lin reached their agreement on September 8, 2010. Plaintiff filed their Opposition to Defendant's Cao's Motion for Summary Judgment on September 14, 2010. In reality, there was no reason for the Trial Court to stay the matter for further settlement, because Defendant Lin and Plaintiff had already reached an agreement which would negate Plaintiff's offer to evict Defendant Lin. Plaintiff's offer was purely illusory.



Plaintiff's Exhibit 1 at that stage in the trial without additional foundation and authentication. Although the Trial Court is granted great discretion in admitting evidence, the Trial Court abused its' discretion in this case.

Documents may be admitted, after authentication, under [rule 901 of the Utah Rules of Evidence](#). The rule places the burden of authenticating the document on the party seeking its admission. [Barrientos ex rel. Nelson v. Jones, 2012 UT 33, ¶ 31, 282 P.3d 50](#). Without Exhibit 1, Plaintiff has no evidence that Plaintiff was assigned the right to pursue this matter against Defendant Cao.

Further, the assignment in Plaintiff's Exhibit 1 assigns the leases and the deposits for those leases. There is no mention of transfer of the guarantees to the leases. There is no evidence that Riverview Property conveyed or intended to convey any guarantees that they had in their possession. Lacking specific language transferring the guarantees, the Plaintiff lacks the necessary privity with Defendant Cao to enforce the guaranty against her. Because the evidence was insufficient to support the Plaintiff's claim of assignment, the Court should affirm the decision of Trial Court on these grounds. In the alternative, The Court should remand this matter to the Trial Court for a decision on this issue.

## **CONCLUSION AND RELIEF SOUGHT**

The Court should reverse the Court of Appeals and affirm the decision of the Trial Court. The Trial Court properly held that Plaintiff and Defendant Lin modified the lease agreement by allowing partial payments without the knowledge of Defendant Cao. The modification of Plaintiff and Defendant Lin without the approval of Defendant Cao, released Defendant Cao as the surety to Plaintiff and Defendant Lin. The Workout Agreement went beyond a mere extension of time and modified the late fee obligations of the parties. The Workout Agreement also modified the Lease terms. In the alternative, a review of the Lease Extension shows that Defendant Cao's obligation as surety expired on September 30, 2008 when the lease between Defendant Cao and Riverview Properties expired. Alternately, there is insufficient evidence to support the Plaintiff's claim that Plaintiff was assigned the guarantee of Defendant Cao from Riverview Properties.

Dated: January 23, 2017.

\_\_\_\_\_  
/s/  
RUSSELL T. MONAHAN  
Attorney for Defendant Cao

### **Certificate of Compliance**

The undersigned does hereby certify that this Brief complies with the word count and font limitation. The Brief uses Times New Roman with a 14 point font. Based on the word count program of my Word program, this Brief contains 7341 words.

Dated: January 23, 2017.

/s/  
\_\_\_\_\_  
RUSSELL T. MONAHAN  
Attorney for Defendant Cao

## CERTIFICATE OF SERVICE

RUSSELL T. MONAHAN hereby declares that he is the attorney for the Defendant Cao herein; and that he served the attached **PETITIONER'S BRIEF** upon:

Carl E. Kingston  
3212 South State Street  
Salt Lake City, UT 84115

Hong Gaung Lin  
2051 West 5620 South  
Salt Lake City, UT 84118

by placing a true and correct copy thereof in an envelope and depositing the same, sealed, with first-class postage prepaid thereon, in the United States mail in Salt Lake City, Utah on: January 23, 2017.

Executed on: January 23, 2017.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

\_\_\_\_\_  
/s/  
RUSSELL T. MONAHAN  
Attorney for Defendant Cao

THE UTAH COURT OF APPEALS

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PC RIVERVIEW LLC,  
Appellant,  
*v.*  
XIAO-YAN CAO,  
Appellee.

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Memorandum Decision  
No. 20150479-CA  
Filed August 25, 2016

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Third District Court, Salt Lake Department  
The Honorable Katie Bernards-Goodman  
No. 149902947

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Carl E. Kingston, Attorney for Appellant  
Russell T. Monahan, Attorney for Appellee

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JUDGE GREGORY K. ORME authored this Memorandum Decision,  
in which JUDGES MICHELE M. CHRISTIANSEN and KATE A. TOOMEY  
concur.

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ORME, Judge:

¶1 Appellant PC Riverview LLC appeals the district court's judgment concluding that the guarantor of a lease, Appellee Xiao-Yan Cao, was not liable for amounts owed to Riverview on the lease. We reverse.

¶2 This case arises out of a dispute over unpaid rent for premises in a strip mall (the Property). Cao's business was a tenant under a lease that it later assigned to another tenant (Tenant) in 2006. To secure the owner's approval of the lease assignment, Cao personally guaranteed Tenant's obligations under the lease, in an agreement entered into among Tenant, Cao, and the owner. The agreement provided, in part, as follows:

Assignor and Guarantor agree to and shall remain obligated to Landlord for the full performance of all covenants, conditions and obligations and duties required of Tenant under said Lease and shall not be relieved of any performance of obligation thereunder as the result of this assignment.

¶3 Some time later, Riverview purchased the strip mall of which the Property was a part. The purchase was subject to existing leases, including Tenant's lease. In May 2010, Riverview sued Tenant and Cao for payment of past due rent exceeding \$22,000.00. Riverview and Tenant negotiated an agreement (the Workout) that would resolve the lawsuit by extending Tenant's time to pay the delinquent rent.<sup>1</sup> Cao was not a party to those negotiations, and when Riverview asked her to stipulate to dismissal of the action, Cao refused, claiming that the Workout rescinded her obligations as the guarantor of the lease.<sup>2</sup> The district court eventually dismissed the action, without prejudice, for failure to prosecute.

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1. According to counsel at oral argument, Tenant actually owed common area maintenance fees, not past due rent in the colloquial sense. But because the parties refer to the then-outstanding debt as "rent" in their briefs and because the exact nature of the amount owed pursuant to the lease is not relevant to our disposition, we refer to the 2010 lawsuit and the Workout as regarding rent.

2. Cao characterizes the Workout as "[t]he restructuring of lease payments." But as she acknowledges, the only change it effected was the extension of time to make payments, and the district court characterized the Workout as an extension of time to pay acknowledged debts.

¶4 Thereafter, Tenant continued to make all payments due under the lease and the Workout until shortly before the expiration of the lease, and he occupied the Property until the lease term ended on September 30, 2013. He failed, however, to pay the last month's rent and a portion of the previous month's rent. Riverview again sued Tenant and Cao for payment of the past due rent. The district court determined that Tenant owed Riverview \$7,326.55 in unpaid rent, \$1,208.88 in prejudgment interest, \$117.00 in costs, and \$1,400 in attorney fees. The court also determined that the Workout constituted a material modification of the lease, thus relieving Cao of her obligations as guarantor. Therefore, the court concluded, "Cao is not liable for the judgment obtained by Plaintiff P.C. Riverview, LLC against [Tenant]."

¶5 The rights and obligations of a guarantor are often defined in the terms of the guaranty. 38 Am. Jur. 2d *Guaranty* § 53 (2016) ("[T]he terms and provisions of a guaranty should generally be construed according to the intention of the parties in view of the surrounding circumstances. . . . [T]he parties' intent is defined by the written terms of the guaranty."). *See also Seftel v. Capital City Bank*, 767 P.2d 941, 947 (Utah Ct. App. 1989) (concluding that guarantors waived their right to a common law defense by the "express terms of the original guaranties"). But absent express terms to the contrary, "[t]he basic rights and duties of parties under a guaranty are governed by common law." 38 Am. Jur. 2d *Guaranty* § 53 (2016). Here, the guaranty agreement contained no provisions spelling out particular rights in favor of Cao, such as a right to notice or a bar on extensions or modifications absent her consent. Thus, we apply the common law.<sup>3</sup>

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3. "Where [the parties'] intention may be gathered from the four corners of the instrument, interpretation of the guaranty is a question of law." 38 Am. Jur. 2d *Guaranty* § 53 (2016). Likewise,  
(continued...)

¶6 According to the Restatement, as a general rule a guarantor is relieved of her obligations “[i]f the principal obligor and the obligee agree to a modification.” Restatement (Third) of Suretyship & Guaranty § 41 (Am. Law Inst. 1996). But the Restatement specifically excludes “an extension of time” from the modifications that would discharge a guarantor. *Id.* We embraced that exception in *DiMeo v. Nupetco Associates*, 2013 UT App 188, 309 P.3d 251, stating that time extensions are “minor alterations [and] are not of the nature or degree that would trigger a discharge of [guarantor’s] pledge of security under suretyship law.” *Id.* ¶ 9 n.2.

¶7 Here, Cao was not relieved of her obligations as guarantor because the Workout was the sole modification to the original lease, and the Workout only modified the timing of Tenant’s payments by extending the time in which past due rent could be paid. *See supra* note 2. Furthermore, the Workout caused Cao no harm. Indeed, it actually benefitted her. She was “obligated to Landlord for the full performance of all . . . duties required of Tenant under said Lease,” which included paying the remaining unpaid rent. Without the Workout, she would have been liable for at least \$22,000 in past due rent as well as the rents coming due for the balance of the lease term. Instead, because of the Workout, Tenant satisfied the bulk of that obligation, correspondingly reducing Cao’s liability.

¶8 Because the Workout only extended the time for Tenant to pay past due rent, it was not a material modification of the

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(...continued)

application of the common law presents a question of law. *Associated Gen. Contractors v. Board of Oil, Gas & Mining*, 2001 UT 112, ¶ 18, 38 P.3d 291. “We review questions of law for correctness[.]” *Utah Chapter of the Sierra Club v. Utah Air Quality Board*, 2006 UT 74, ¶ 9, 148 P.3d 960.



original agreement. As a result, Cao's obligations as guarantor were not discharged. Therefore, we reverse the judgment in favor of Cao and remand the case to the district court for the entry of an appropriate judgment against Cao.<sup>4</sup>

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4. The basic amount of that judgment will be the same as the judgment entered against Tenant. Riverview has requested and is also entitled to an award of costs and attorney fees reasonably incurred in this appeal, in accordance with the terms of the agreement entered into among Tenant, Cao, and the prior owner: "In the event of default under any of the terms of this Agreement or the Lease, defaulting party agrees to pay all costs incurred in enforcing this Agreement or the Lease or any right arising ou[t] of the breach of either, and including reasonable attorney's fees." On remand, the amount of that award will be determined by the trial court.