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COURT OF APPEALS

STATE OF NEW YORK

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PAF-PAR LLC,

Appellant,

-against-

No. 42

SILBERBERG,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
February 18, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Good afternoon,  
2 everyone. First matter on the calendar is number 42,  
3 Paf-Par v. Silberberg.

4 Counsel.

5 MR. CHARRON: Thank you, Your Honor.

6 Good afternoon and may it please the court. My  
7 name is William Charron; together with Vanessa Costantini  
8 from Pryor Cashman, we represent the plaintiff-appellant  
9 Paf-Par in this matter. With the court's permission, I'd  
10 like to reserve three minutes for my rebuttal.

11 CHIEF JUDGE DIFIORE: Of course, three  
12 minutes.

13 MR. CHARRON: Thank you.

14 This case is the opportunity for this court to  
15 establish rules regarding absolute and unconditional  
16 guarantees, just as the Second Circuit and Judge Sotomayor  
17 did and anticipated would be done in Compagnie. These are  
18 not ordinary guarantees; these are a special breed of - -  
19 -

20 JUDGE ABDUS-SALAAM: Before we get to the  
21 merits, counsel, could I ask you, does - - - why does  
22 your client have standing to be here; have you not  
23 sold off this loan to someone else?

24 MR. CHARRON: No, Judge Abdus-Salaam, we -  
25 - - so there were two standings challenges made; with

1           respect to Your Honor's question, all that was done  
2           here was the loan, with respect to the borrower - - -  
3           and throughout my presentation you'll hear me  
4           distinguishing between the borrower and the  
5           guarantors because those are two different people and  
6           two different contracts. The loan, with respect to  
7           the borrower, two million dollars of it was forgiven.  
8           At that point, the borrowers were off the hook; they  
9           were done.

10                         And the reason that was done was because  
11           the borrowers wanted to free up the collateral that  
12           they had securing the loan, because they wanted to  
13           enter into another loan with another lender called  
14           Syracuse. And so the collateral, when the eleven of  
15           thirteen million dollars was paid off, the borrower  
16           gave instructions that the collateral should not be  
17           sent back to the borrower, it should actually be  
18           transferred over to Syracuse, which was done.

19                         So while the collateral was transferred,  
20           Syracuse did not become a continuing lender over the  
21           borrower with respect to our note. Our note was  
22           done. And the guarantee, which was an independent  
23           contract, never left Paf-Par's hands.

24                         JUDGE PIGOTT: What's the diff - - - when I  
25           was reading this, it seemed to me that, in your

1 theory, you could - - - you could say to the  
2 borrower, you don't have to pay back any of the  
3 thirteen million, go your happy way, we're just going  
4 to jump over you and have the guarantor pay the whole  
5 thing.

6 MR. CHARRON: In the - - - well, that's  
7 actually quite similar to the situation in *Compagnie*,  
8 which was a complete release of the borrower, but as  
9 the Second Circuit explained, with respect to  
10 traditional guarantees - - - such as was at issue in  
11 this court's decision in *Becker v. Faber* seventy-five  
12 years ago - - - traditional guarantees might have  
13 been off the hook at that point as well, or they  
14 would have been. But absolute and unconditional  
15 guarantees are different; and that's what the Second  
16 Circuit observed - - -

17 JUDGE PIGOTT: Wasn't there - - - I don't  
18 want to call it good faith, but it would just seem to  
19 me that if - - - if I borrowed a hundred dollars from  
20 you and - - - and Judge DiFiore was the guarantor and  
21 you said, look, you know, I don't want it from you, I  
22 want it from Judge DiFiore, so I'm letting you off  
23 the hook and I'm going straight to the guarantee.

24 MR. CHARRON: If - - - if that was the  
25 benefit of the bargain that Judge DiFiore struck with

1 me, that's correct. And in this case, if Judge  
2 DiFiore is the res - - - are the respondents, that is  
3 precisely the benefit of the bargain that they  
4 struck, which is evidenced throughout article 2 of  
5 the guarantee.

6 JUDGE RIVERA: Well, assu - - - assuming  
7 there's no fraud involved in this particular  
8 scenario, with the Chief Judge and the lender,  
9 correct?

10 MR. CHARRON: So actually, Judge Rivera,  
11 fraud in the inducement was the subject of this  
12 court's decision in Plapinger, which also dealt with  
13 an absolute and unconditional guarantee; and this  
14 court said, not even fraud in the inducement would be  
15 an available defense to Judge DiFiore, in this  
16 hypothetical.

17 JUDGE RIVERA: But fraud related to the  
18 release.

19 MR. CHARRON: If the - - - if the - - - I'm  
20 sorry, when you say the release, the release of the  
21 borrower?

22 JUDGE RIVERA: Uh-huh, yes.

23 MR. CHARRON: If - - -

24 JUDGE RIVERA: His collusion.

25 MR. CHARRON: Under Plapinger, no; under

1 Plapinger, the absolute and unconditional guarantee  
2 constitutes a disclaimer, and this is the language  
3 used by this court and the Second Circuit, the  
4 absolute and unconditional guarantee is a disclaimer  
5 of reliance by the guarantor - - - by Judge DiFiore,  
6 if I may continue - - - Judge DiFiore would have  
7 disclaimed reliance on anything - - -

8 JUDGE RIVERA: Uh-huh.

9 MR. CHARRON: - - - that would reduce or  
10 discharge her obligation to pay me back the hundred  
11 dollars that I actually loaned to Judge Pigott.

12 JUDGE RIVERA: However, there is no claim  
13 of fraud here.

14 MR. CHARRON: There is none, no.

15 JUDGE RIVERA: Okay. So let me ask you  
16 about - - - so I understand that in this particular  
17 case, the - - - well, you say there's no thirteen - -  
18 - let's stick with the thirteen million, that first  
19 number that was, at least, listed on the first page  
20 of the guarantee, that thirteen million is now  
21 reduced, that is to say the guarantor is not being  
22 asked to repay the amount that initially was lent; is  
23 that correct?

24 MR. CHARRON: The guarantor is being asked  
25 to repay two million.

1                   JUDGE RIVERA: It's a difference of two  
2 million, okay.

3                   MR. CHARRON: Correct.

4                   JUDGE RIVERA: I understand that, because  
5 you've said you've forgiven two million, they've  
6 accepted the lower payout - - -

7                   MR. CHARRON: Yes.

8                   JUDGE RIVERA: - - - from the borrower.

9                   MR. CHARRON: Yes.

10                  JUDGE RIVERA: If - - - if instead there  
11 had been a modification that changed the amount above  
12 the thirteen million, what happens to the guarantor  
13 under those circumstances?

14                  MR. CHARRON: So in this case, this is  
15 actually similar to one of the cases they cite called  
16 GE Capital, which is an Eastern District of  
17 Pennsylvania case, and what that case stands for, and  
18 what really hits precisely with what we're advocating  
19 should be the law of this state, is that if you've  
20 got the guarantor signing on for, in this case,  
21 guaranteed obligations that expressly equal a loan  
22 amount that's the definition of the loan of thirteen  
23 million, that amount is never changed, then that's  
24 it, you're locked in.

25                  In the GE Capital case, the reason that

1 summary judgment was denied was because the court had  
2 actually found an issue of fact that there had been  
3 an actual novation, a novation meaning that the  
4 definition of the loan amount is changed. So if the  
5 definition of the loan amount is changed, then the  
6 guarantor has certain rights.

7 But in this case, as expressly reflected in  
8 the borrower modification at paragraphs 6 on page 67  
9 of the record, "The lender and the borrower agree  
10 that a novation is expressly denied and not intended  
11 to be affected." Which means that the loan amount  
12 always remained at thirteen million.

13 JUDGE STEIN: Isn't there some ambiguity  
14 here because if you read the documents together, the  
15 guarantee says that the guarantors are responsible  
16 for the guaranteed obligations, and then that's  
17 defined under the loan documents - - - loan  
18 documents, and that is defined as something including  
19 notes and other things, including modifications. So  
20 if you follow that - - - that trajectory, you could  
21 conclude that that's the obligation; that's the  
22 guarantee obligation, is whatever it is - - -  
23 whatever those documents are, as modified.

24 MR. CHARRON: Judge Stein, that is only  
25 with respect to the borrower's rights, because

1 article 2 in section 2.1 specifically - - - and this  
2 is at page 51 of the record - - - specifically says  
3 that any modification of all or any part of the  
4 guaranteed obligations or the note does not matter to  
5 the guarantor because the guarantor has lock - - -  
6 the absolute and unconditional guarantor has locked  
7 in at the loan amount of thirteen million. So while  
8 the definition of "note", with respect to the  
9 borrower's rights, includes modifications - - -

10 JUDGE STEIN: Yes, but that's where the  
11 guarantee itself leads you; that's how it - - -  
12 that's - - - if you follow the guarantee, it leads  
13 you to that definition, so why does that not apply to  
14 the guarantors?

15 MR. CHARRON: So I - - - I do agree that  
16 there's a little bit of a Rube Goldberg element to  
17 the way these documents are structured - - -

18 JUDGE STEIN: But my question is is that -  
19 - - if that - - - if there is some ambiguity there,  
20 why - - - why isn't it interpreted against - - -  
21 against you?

22 MR. CHARRON: So two answers to that; first  
23 of all, with respect, the definition of guaranteed  
24 obligations does not change with - - - when you  
25 follow the documents all the way through in the

1 definitions, the definition of guaranteed obligations  
2 leads you to the definition of the loan amount. And  
3 the loan amount is never changed from thirteen  
4 million and there is an expressed rejection of any  
5 novation. So that is fixed, regardless of any  
6 language. But - - -

7 JUDGE RIVERA: I'm sorry, where does it say  
8 loan amount? I'm looking at definition; it says loan  
9 documents.

10 MR. CHARRON: Loan amount you can find,  
11 Judge Rivera, at multiple pages including page R65  
12 and R88. They are, again, throughout the document,  
13 but the loan amount, for instance at - - -

14 JUDGE RIVERA: Give me the section number,  
15 if you would, please.

16 MR. CHARRON: It's in the first whereas  
17 clause of the modification agreement on page 65 and  
18 it is also in the first recital of the promissory  
19 note on page 88.

20 JUDGE ABDUS-SALAAM: And, counsel, can I -  
21 - -

22 MR. CHARRON: The other - - -

23 JUDGE RIVERA: I'm sorry, but - - - I'm  
24 sorry Judge Abdus-Salaam, I just want to be clear.  
25 But I'm asking you about the guarantee, and you're

1           saying that's an independent document that the  
2           guarantor is bound by? That's the one I need to look  
3           at, isn't that what I need to understand, to figure  
4           out what, if anything, they owe.

5                     MR. CHARRON: So to follow it through, if  
6           you turn to page 48 of the record - - -

7                     JUDGE RIVERA: Okay.

8                     MR. CHARRON: - - - which is the guarantee  
9           - - -

10                    JUDGE RIVERA: Yes.

11                    MR. CHARRON: - - - that defines guaranteed  
12           obligations, and that makes reference to all of the  
13           borrower's obligations under the loan documents,  
14           which is a defined term. Loan documents is defined  
15           in the security agreement, not in the guarantee; this  
16           was my Rube Goldberg comment before. But the  
17           security agreement at page 124 defines all loan doc -  
18           - - the loan documents to be - - - all loan  
19           documents in connection with the Loan, capitalized  
20           term.

21                    Loan is defined to mean the loan amount, which  
22           is defined in multiple places, as I indicated, as thirteen  
23           million dollars, and never changing. And the borrower  
24           modification expressly rejects any novation of the loan or  
25           the loan amount.

1           And if I can just briefly address Your Honor's  
2 question about interpretation; there is a non contra  
3 proferentem clause in this agreement; that is section - -  
4 - excuse me, that is section 2 - - - sorry, 5.7 of the  
5 guarantee is a non contra proferentem clause. So again,  
6 as - - - as we maintain that the respondents are doing  
7 throughout, they are repeatedly trying to use common law  
8 principles in lieu of express language.

9           This is another instance, the - - - the  
10 agreements specifically say, ambiguity shall not be  
11 interpreted against the drafter, precisely because the  
12 respondents are sophisticated and they were represented.  
13 That's - - -

14           JUDGE FAHEY: I - - - I want to focus on  
15 just a different area for a second, if you would, as  
16 your time is kind of limited. You had - - - as I  
17 understand, you had sent out a notice of default to  
18 the borrowers; is that correct?

19           MR. CHARRON: That is correct, that is  
20 found at pages 62 and 63, Judge Fahey.

21           JUDGE FAHEY: But nothing else happened  
22 with that notice of default; that default wasn't  
23 executed, there was no action brought on the default,  
24 there was no judgment of default ever sought; is that  
25 correct?

1 MR. CHARRON: The - - - the default exists  
2 but nothing was done - - -

3 JUDGE FAHEY: Well, on notice of a default  
4 - - - of a pending default existed but, in point of  
5 fact - - - and the reason I ask is because obviously  
6 that's the court - - - the Appellate Division's  
7 decision on the finding, and so I'm asking you,  
8 beyond the notice, was anything else done that I  
9 should look at?

10 MR. CHARRON: With respect to the default?

11 JUDGE FAHEY: Yes.

12 MR. CHARRON: I mean, what was done was the  
13 workout - - -

14 JUDGE FAHEY: Right.

15 MR. CHARRON: - - - that's exactly what  
16 that - - -

17 JUDGE FAHEY: And so some people call that  
18 a modification and some don't. But - - - but my  
19 point was, was anything done with the default?  
20 Beyond a notice - - -

21 MR. CHARRON: Yes. When - - -

22 JUDGE FAHEY: - - - am I correct in saying  
23 beyond the notice, that there was nothing else done  
24 legally with this default?

25 MR. CHARRON: No, when Paf-Par moved for

1 summary judgment in lieu of complaint against the  
2 guarantors - - -

3 JUDGE FAHEY: Uh-huh.

4 MR. CHARRON: - - - we were affecting Paf-  
5 Par's rights pursuant to the gua - - -

6 JUDGE FAHEY: That's against the  
7 guarantors; I asked you against the borrowers.

8 MR. CHARRON: No, the borrowers - - -

9 JUDGE FAHEY: I see.

10 MR. CHARRON: We entered into the workout -  
11 - - in the modification with the borrowers.

12 JUDGE FAHEY: I see.

13 CHIEF JUDGE DIFIORE: Counsel, to your  
14 point about the parties being sophisticated, if the  
15 guarantors had understood that the modification of  
16 the loan only applied to the LLCs and not personally,  
17 why would they have signed?

18 MR. CHARRON: So the - - - the business  
19 reason for them was, again, they wanted that  
20 collateral released because they wanted to refinance  
21 it and get proceeds for their companies and we held  
22 the collateral. So this benefited them because they  
23 could get that collateral back, but without touching  
24 the guarantors.

25 And the guarantors, they not only knew it,

1 they must, as a matter of law, be deemed to have  
2 known it in multiple places. They - - - they knew  
3 that - - - that they needed to get a written  
4 modification of their note. They also knew they had  
5 the guarantee, they signed both documents in  
6 different capacities; these are not the same people,  
7 as they - - - as they now argue, and they did not get  
8 any modification of the guarantee agreement, as  
9 section 5.5 requires be done. And to the contrary,  
10 they actually specifically acknowledged that their  
11 guarantee is continuing in effect; and that  
12 guarantee, because of its unique character here, is  
13 locked in at the thirteen million.

14 CHIEF JUDGE DIFIORE: Thank you, sir.

15 MR. CHARRON: Thank you, Your Honor.

16 CHIEF JUDGE DIFIORE: Counsel.

17 MR. SYRACUSE: Good afternoon, Your Honors.

18 May it please the court. Vincent Syracuse and  
19 Maryann Stallone for the respondents.

20 Where do I begin? I think there are eleven  
21 million reasons why this court should affirm.

22 JUDGE GARCIA: Counsel, before we get to  
23 the eleven million reasons. The guarantee section  
24 2.1 - - -

25 MR. SYRACUSE: Yeah.

1                   JUDGE GARCIA: - - - which I think is on  
2                   50, 51 of the record, what does that mean, if it  
3                   doesn't mean clearly what it says, which is, "The  
4                   guarantor's obligations shall not be released or  
5                   diminished by any renewal, extension, increase, or  
6                   modification of the obligations including the note."

7                   MR. SYRACUSE: That's designed to combat a  
8                   situation that has existed in the state for many  
9                   years. Someone tinkers with an underlying  
10                  obligation, the guarantor tries to get off the hook.  
11                  In this case, the guaranteed obligation was not of a  
12                  specific amount of money; there's no guarantee of  
13                  thirteen million dollars.

14                  The guaranteed obligation is for the loan  
15                  amount; the loan amount is the amount due under the  
16                  mortgage and under the note. And that loan amount  
17                  that's conceded by - - - by opposing counsel, that  
18                  loan amount was modified pursuant to the loan  
19                  modification agreement; and that loan modification  
20                  agreement stated that the note would change and that  
21                  the obligation to pay would be reduced down to - - -  
22                  by two million dollars, so down to eight million  
23                  dollars, if certain things would happen. Namely, a  
24                  payment of a million dollars on account when the  
25                  document was signed, another million dollars when the

1           condition - - - when the extension of the payment  
2           date was done. And that triggers a change in the  
3           amount due on the guarantee. The guarantors, don't  
4           forget - - -

5                        JUDGE GARCIA: But that's not what the  
6           guarantee says; I mean, I understand why you would  
7           want that, and you could have written that, but  
8           that's not what the provision says, right?

9                        MR. SYRACUSE: Well, it - - - it  
10          contemplates a situation where the loan has not been  
11          satisfied. Here, the loan was satisfied, Judge. The  
12          loan was satisfied because - - - because pursuant to  
13          the payoff letter, and that's another thing that  
14          doesn't exist in these cases, the payoff letter  
15          states the amount that's due. And the Second Circuit  
16          case, by the way, that was cited against - - - in  
17          support of this appeal, in that case - - -

18                      JUDGE RIVERA: But isn't his point that's  
19          the amount that's due for the borrower, and it's not  
20          about the guarantor's liability?

21                      MR. SYRACUSE: Well, it's both - - - it's  
22          both because the guarantor's obligation is for the  
23          guaranteed amount.

24                      JUDGE RIVERA: And it's triggered only by  
25          what's due.

1                   MR. SYRACUSE: And the guaranteed amount is  
2 the amount - - - the indebtedness due under the  
3 notes, and that gets changed.

4                   JUDGE STEIN: What does it mean when it  
5 says that it's a primary obligation, in the  
6 guarantee; what does that mean?

7                   MR. SYRACUSE: You've already crossed that  
8 bridge; that's the Chemical Bank case, where there  
9 was a - - - which we cite in our brief, where there  
10 was a primary obligation, a language in the  
11 guarantee, and this court said you had to look to  
12 what this was all about, what the substance of this  
13 was. This is a promise to answer for the debt of  
14 another.

15                   JUDGE RIVERA: But let - - - let me ask  
16 you, could - - - could the parties - - - the  
17 guarantor and the - - - could you have entered the  
18 kind of agreement he is describing? I understand you  
19 say that's not this agreement, but could you have  
20 entered that agreement, is there any lawful reason  
21 you could not have entered the agreement he is  
22 describing?

23                   MR. SYRACUSE: If he wanted to preserve his  
24 rights to go against the guarantor, he should have -  
25 - -

1 JUDGE RIVERA: Regardless of any change.

2 MR. SYRACUSE: - - - we should've done what  
3 was done in the Second Circuit case - - -

4 JUDGE RIVERA: In Compagnie?

5 MR. SYRACUSE: - - - where there was a  
6 specific reservation of rights against the guarantor.

7 Here, the guarantors are consenting to the  
8 modification of the loan, and the loan - - - the loan  
9 modification, and if you'll go down a few pegs, you see  
10 that they were consenting to a change in the amount due on  
11 the loan. And in none of the cases that were cited in  
12 this brief, none of the cases I'm aware of, are situations  
13 where there's been a payoff pursuant to the payoff letter.

14 JUDGE RIVERA: So you're saying that - - -  
15 so you're saying that although the parties could  
16 enter an arrangement, and the guarantors could sign a  
17 guarantee whereby they guarantee a fixed amount up  
18 front, doesn't matter what the borrower pays or  
19 doesn't pay - - - let me finish - - -

20 MR. SYRACUSE: Sorry.

21 JUDGE RIVERA: - - - till the future, but  
22 they could agree to that fixed amount - - - I  
23 understand your position is that's not what happened  
24 here, right - - - your position is that this  
25 guarantee reflects this possibility of future

1 changes, and that that's what the guarantors agree  
2 to; whatever the future changes are - - -

3 MR. SYRACUSE: Right.

4 JUDGE RIVERA: - - - is what we will use to  
5 measure the guarantor's liability; is that what your  
6 position is?

7 MR. SYRACUSE: That's - - - that's  
8 essentially it, yeah.

9 JUDGE RIVERA: Okay. So now, now that you  
10 have agreed to that, so then let me go over to the  
11 question I asked him before.

12 MR. SYRACUSE: Go ahead.

13 JUDGE RIVERA: So if instead of the  
14 borrower's payment having been reduced by being  
15 forgiven two million, for some reason, the borrowers'  
16 payment had been increased, are you then subject to  
17 this increase?

18 MR. SYRACUSE: The guarantor would have to  
19 pay on the increase obligation; but that's not - - -

20 JUDGE RIVERA: I'm sorry, so you agree  
21 that's the fallout.

22 MR. SYRACUSE: I would - - - I would agree  
23 that the interest rate - - -

24 JUDGE RIVERA: Either way.

25 MR. SYRACUSE: If the interest rate - - -

1 no, if the interest rate changed and the obligations  
2 when up - - -

3 JUDGE RIVERA: Yeah.

4 MR. SYRACUSE: - - - and you would then be  
5 changing the dollar amount of the guaranteed  
6 obligation. So for example, let's say the interest  
7 rate was nine percent, and you made a loan  
8 modification where you said the rate is going to be  
9 now fifteen percent, the guarantor would be  
10 responsible for that.

11 JUDGE RIVERA: But why - - - why should we  
12 countenance an agreement where the guarantor never  
13 knows what - - - really what their obligation is, at  
14 the end of the day - - -

15 MR. SYRACUSE: But we do know, we do - - -

16 JUDGE RIVERA: - - - and has no control  
17 over it if they've released every - - - every  
18 defense.

19 MR. SYRACUSE: We do - - - we do know what  
20 the obligation is - - -

21 JUDGE RIVERA: Uh-huh.

22 MR. SYRACUSE: Because our guarantor is  
23 guaranteeing the guaranteed amount under the loan - -  
24 - on the loan documents. And that's not a fixed  
25 number; that's the amount due under the note.

1                   JUDGE RIVERA: But that's what I'm saying,  
2 when the guarantor signs off and at - - - let's say  
3 on the day they sign off, it's thirteen million - - -

4                   MR. SYRACUSE: Yeah.

5                   JUDGE RIVERA: - - - but in six months, all  
6 of a sudden, for whatever reason, just go with me on  
7 the hypothetical, it's twenty-six million; you say  
8 that's lawful, those are the - - - you can enter the  
9 kind of agreement, there's no reason against - - -

10                  MR. SYRACUSE: That's going - - - that's  
11 going maybe beyond what I would go, but what I'm  
12 saying - - - what I am saying to you here, the  
13 guarantor signs a loan modification agreement that  
14 states, if certain condition precedents were  
15 fulfilled, and there's no doubt they were fulfilled,  
16 the answer would be the loan would be reduced by two  
17 - - - by two million dollars. And the - - - they  
18 say, well, the ship stops when the - - - with the  
19 borrower. And I say, no, because in this situation,  
20 the guarantor signed the loan modification - - -

21                  JUDGE GARCIA: But that modification is  
22 after the default notice goes out, right?

23                  MR. SYRACUSE: That - - - that default is,  
24 in my opinion, Judge, is an - - - is a document that  
25 crossed in the night with the negotiations for the

1 loan modification agreement, and it was never acted  
2 on, and it's no longer a viable thing.

3 JUDGE GARCIA: In the record, is the record  
4 that this evidence that that crossed with these  
5 negotiations?

6 MR. SYRACUSE: You could look at the dates,  
7 and - - - and also, there's an document in our page  
8 232 of the record, which is from the lender stating  
9 that we're going to take ten million dollars to  
10 satisfy this; so I don't - - - I can't account for  
11 the fact of why a default notice was sent, but I can  
12 tell you that that default - - -

13 JUDGE STEIN: But do you agree that there  
14 was technically a default and you just say that it  
15 was cured by this modification agreement?

16 MR. SYRACUSE: I - - - Judge, I don't know  
17 what it was, it was something in the depart - - - if  
18 there was a default, why in your right mind would  
19 agree to forgive and indebtedness - - - why would  
20 you, in your right mind, issue a payoff letter that  
21 says eight million dollars are due; we're talking  
22 about a default of the borrower. Why would you do  
23 that?

24 JUDGE RIVERA: They figure they're going  
25 after the guarantor.

1 MR. SYRACUSE: I'm sorry.

2 JUDGE RIVERA: They're going to go after  
3 the guarantor for the rest of it.

4 MR. SYRACUSE: Under their - - - under  
5 their theory, Judge, you know, you can have two ships  
6 flying in the sea - - - in the air, and that  
7 thirteen-million-dollar obligation would continue.

8 The other point I want to make - - -  
9 before my time may be getting up so - - - it's not  
10 just a standing issue, it's an issue that, as part of  
11 this transaction, the notes were signed. And it's  
12 not just the notes that were signed; the notes were  
13 signed to Syracuse Retail, which is an independent  
14 party, no relation to me, and the - - - the notes  
15 were signed; and we argue that the guarantee was part  
16 of that assignment. They say it wasn't.

17 The guarantee - - - but they do concede  
18 that the note was assigned. The guarantee runs to  
19 the owner of the note. The owner of the note is not  
20 this appellant, the owner of the note is Syracuse  
21 Retail; that's number one.

22 JUDGE STEIN: Can I take you back a little  
23 further than that? What about the original  
24 assignment to - - - to the plaintiff here?

25 MR. SYRACUSE: Well, that's another issue,

1 Judge.

2 JUDGE STEIN: Well, no, I know, but it that  
3 an issue in this case?

4 MR. SYRACUSE: I think it's certainly an  
5 issue in the case - - -

6 JUDGE STEIN: Oh, okay.

7 MR. SYRACUSE: - - - because they never  
8 made an evidentiary showing that they owned the note  
9 in the first place.

10 JUDGE STEIN: You moved to dismiss based on  
11 - - -

12 MR. SYRACUSE: Correct.

13 JUDGE STEIN: - - - lack of standing.

14 MR. SYRACUSE: Right, that's right.

15 JUDGE STEIN: And - - - and was there ever  
16 anything offered in opposition to that?

17 MR. SYRACUSE: No, no. And - - - and so -  
18 - - to finish the point that I'd like to finish, the  
19 - - - it's the - - - the obligation under the  
20 guarantor runs to the holder of the note. And the  
21 holder of the note is Syracuse Retail. And, I hate  
22 to cite a case that I didn't cite below, on my brief,  
23 but in preparing for the argument, I found an 1888  
24 decision of this court, in a case called Stillman v.  
25 Northrup, which is reported in 109 N.Y. 473, and

1           that's a case that states, "It's well settled that  
2           the assignment of a bond and mortgage carries with it  
3           the guaranty of payment or collection, although not  
4           mentioned in the assignment. The transfer of the  
5           debt to the plaintiff carried with it, as incident  
6           thereto, all the securities for its payment."

7                        So aside from the interpretation of the  
8           documents, which this court has to do, which I say  
9           leads to the conclusion that when they reduced the  
10          amount due under the note, they reduced the amount  
11          due under the guarantee. This plaintiff doesn't - -  
12          - doesn't - - - doesn't own this note.

13                       They cite, and I have to say this before I  
14          sit down, I don't know how much time I have left, but  
15          they cite a case called Laba ~~against~~ Carey, for the  
16          proposition that you reading documents - - - you read  
17          one part of a document in isolation of the other, and  
18          you make the document meaningless; you have to read  
19          everything together. And they say that supports what  
20          they say, and I say it supports what I do, what we  
21          do. And I - - -

22                       JUDGE ABDUS-SALAAM: Mr. Syracuse, do you  
23          agree with them that there are two separate documents  
24          here, one is the guarantee and then one is the loan  
25          document - - -

1 MR. SYRACUSE: There all - - - yeah, but  
2 they're related.

3 JUDGE ABDUS-SALAAM: They're all related.

4 MR. SYRACUSE: They're all related.  
5 Because you have to look - - - the guarantee says, I  
6 guarantee the guaranteed obligations; that's a  
7 defined term. The defined term is what the amount is  
8 in the loan documents, the loan documents get you to  
9 the note. When you modify the note, you modify the  
10 amount due on the - - -

11 JUDGE ABDUS-SALAAM: Even if they're - - -  
12 they are separate documents, your position is - - -

13 MR. SYRACUSE: They're all related.

14 JUDGE ABDUS-SALAAM: - - - they have to be  
15 read together.

16 MR. SYRACUSE: I - - - I think the  
17 principle of Laba v. Carey, which I have to confess  
18 is a case I'm very, very familiar with, because I was  
19 Scileppi's clerk, means you read everything together  
20 to determine the intention of the parties. And if  
21 you read everything together here, the trial - - -  
22 the trial Judge Owen (ph.) got it right, the  
23 Appellate Division got it right, that this - - - this  
24 obligation was paid - - - was paid.

25 JUDGE RIVERA: So let's read everything

1 together. Section 1.3 of the guarantee, maybe you  
2 can help me understand this, it's the penultimate  
3 sentence in that paragraph. "The fact that at any  
4 time, or from time to time, the guaranteed  
5 obligations may be increased or reduced, shall not  
6 release or discharge the obligation of guarantor to  
7 lender with respect to the guarantee obligations";  
8 what does that mean?

9 MR. SYRACUSE: And the guaranteed obl - - -  
10 I'm sorry - - - I'm sorry, Judge.

11 JUDGE RIVERA: No, what does that mean?

12 MR. SYRACUSE: The guaranteed obligation is  
13 the amount due under the note. The amount due under  
14 the note was modified, and that's the guaranteed - -  
15 - and again, the guarantors signed this loan  
16 modification agreement.

17 JUDGE RIVERA: But okay. So maybe I'm  
18 misunderstanding here, so - - - so the fact that this  
19 sentence says that that guaranteed obligation, which  
20 you say is the note, correct?

21 MR. SYRACUSE: Right.

22 JUDGE RIVERA: May be reduced; I'm sorry,  
23 is that not what went on here?

24 MR. SYRACUSE: It was paid; it was paid - -  
25 -

1 JUDGE RIVERA: Did I misunderstand?

2 MR. SYRACUSE: It was paid, it was paid, it  
3 was paid, it was paid, it was paid.

4 JUDGE RIVERA: So you're saying that the  
5 two million difference is not a reduction?

6 MR. SYRACUSE: What I'm saying - - -  
7 certainly, it's a reduction in the amount due, but  
8 its satisfaction - - -

9 JUDGE RIVERA: But if it is, then why - - -

10 MR. SYRACUSE: - - - it's limit - - -

11 JUDGE RIVERA: I understand, but if it is,  
12 then why doesn't this sentence hold, "shall not  
13 release or discharge" - - - the rest of sentence,  
14 "the obligation of the guarantor to lender with  
15 respect to the guaranteed obligation".

16 MR. SYRACUSE: That's - - - that's - - -  
17 that's not intended, and I believe - - -

18 JUDGE RIVERA: Uh-huh.

19 MR. SYRACUSE: - - - to cover a situation  
20 where the parties agree to a reduction of the debt -  
21 - -

22 JUDGE RIVERA: Okay.

23 MR. SYRACUSE: - - - and the debt is not  
24 satisfied; that's to protect a lender when the debt  
25 still remains - - - remains unpaid. And on that

1 situation, and that's - - - that's the 4 USS case in  
2 the Appellate Division, and that's I think, the  
3 Second Circuit case. The debt has to be - - - the  
4 debt is not paid, we win. The debt is paid with - -  
5 -

6 JUDGE ABDUS-SALAAM: Your adversary - - -  
7 your adversary says that - - - you mentioned that the  
8 guarantors signed the loan modification documents.

9 MR. SYRACUSE: Right.

10 JUDGE ABDUS-SALAAM: And your adversary  
11 said, well, they should have also negotiated some - -  
12 - you know, some kind of release or provision of the  
13 guarantee. And what's your position on that?

14 MR. SYRACUSE: I say that's not necessary  
15 because by consenting to the loan modification  
16 agreement, they consented to - - - to the forgiveness  
17 of the indebtedness under the note; which was said -  
18 - - was said several times. They consented to the  
19 reduction of the note, and guess what, the borrower  
20 can make the same consent. And in addition to that,  
21 they also consented, and that's - - - that's the so-  
22 called standing point, or at least part of it, they  
23 also consented to - - - to an assignment of the note  
24 to Syracuse Retail.

25 JUDGE FAHEY: Let me ask you a little - - -

1 just a little bit more esoteric question; is an  
2 absolute guarantee secondary to the borrower's  
3 position?

4 MR. SYRACUSE: I believe it does - - - I  
5 believe it is, I think that's the Chemical Bank case;  
6 the guarantor stands in the shoes of the primary  
7 obligor. If the primary obligor was - - - was - - -  
8 paid everything.

9 JUDGE PIGOTT: If we - - - if we agreed  
10 with the - - - with the appellants here, and the two  
11 million dollars is a debt that has to be paid, can -  
12 - - can you proceed against the original borrowers?  
13 Can the guarantee - - - guarantor go after the  
14 original bowers - - - borrowers?

15 MR. SYRACUSE: The original borrowers are a  
16 related entity to the guarantor.

17 JUDGE PIGOTT: Excuse me.

18 MR. SYRACUSE: The original - - - it's a  
19 single purpose entity. The orig - - -

20 JUDGE PIGOTT: I understand that in this  
21 case, but we're talking about, you know, guarantees  
22 in the State of New York.

23 MR. SYRACUSE: I some other - - - in some  
24 other case, I don't know, frankly, Judge, that's  
25 something I never really thought about - - -

1 JUDGE PIGOTT: Okay.

2 MR. SYRACUSE: - - - and that's the  
3 truthful answer. The - - - the whole purpose of the  
4 doing the transaction like this is to determine how  
5 much was owed, the guarantor - - - the borrower paid  
6 it in full, the guarantor paid it in full. You know,  
7 we talked about - - - my adversary talked about in  
8 his brief about opening the floodgates; could you  
9 imagine the floodgates that get opened if now - - -  
10 they filed this action three years later - - - and by  
11 the way, I forgot to mention something else, when the  
12 - - - when the - - - when the loan was paid off  
13 pursuant to the eight point - - - the eight million  
14 dollar payoff letter, guess what they did, they  
15 released 300 dollar escrow - - - 300,000 dollar  
16 escrow, and they released the lien on the guarantor's  
17 house. Now, if the - - - if that doesn't speak to -  
18 - - to the correctness of what I'm saying, I don't  
19 know what does. And so we ask that you affirm.

20 Thank you.

21 CHIEF JUDGE DIFIORE: Thank you, sir.  
22 Counsel.

23 JUDGE STEIN: Would you - - - would you  
24 address that - - - the initial standing issue?

25 MR. CHARRON: Yes, one of my points I was

1           eager to, Judge Stein. Initial standing was - - -  
2           first of all, Paf-Par did introduce evidence of the  
3           assignment; it was done through an affidavit - - -

4                    JUDGE STEIN: Yeah, it was - - - it was  
5           very general, there was no documentation - - - so are  
6           you saying that that's what we should base it on now?

7                    MR. CHARRON: Well, yes, because there - -

8           -

9                    JUDGE STEIN: Is that enough to establish  
10          standing?

11                   MR. CHARRON: Well, that was enough to  
12          establish standing at the trial court level, but to  
13          the extent that a question of fact was found to  
14          exist, which the trial court never addressed it but  
15          the Appellate Division did, what that means, under  
16          32.13, is that we go back and we - - - we will  
17          produce the evidence - - - the written evidence.  
18          Frankly, I don't know why trial - - -

19                    JUDGE STEIN: Why is this different from  
20          any other - - - you - - - you bring - - - you bring  
21          an action by motion for summary judgment, right, and  
22          they say, that doesn't establish standing, you  
23          haven't proved standing, and you don't come back with  
24          anything; why isn't - - - why do you get another  
25          chance to do that? I don't understand.

1                   MR. CHARRON: So summary judgment in lieu  
2 of complaint, I don't believe permits a reply right  
3 to begin with; I don't - - - and I do not know the  
4 answer why trial counsel relied on a affidavit  
5 without the documentation. What I can say is that it  
6 would be manifestly unfair to bounce this case where  
7 documentation exists simply because it wasn't  
8 presented at that stage. That's not really why, I  
9 don't - - - I don't think that's the rule that is of  
10 significance to this case, and it shouldn't be a  
11 forfeiture on Paf-Par.

12                   I wanted to address a few things. "Absolute and  
13 unconditional" does not mean "nearly absolute and nearly  
14 unconditional". And that is every bit of what the  
15 respondents have argued here. Primary - - -

16                   JUDGE STEIN: "Absolute and unconditional"  
17 could be eleven million or thirteen million or  
18 twenty-five million; it's still an absolute and  
19 unconditional guarantee.

20                   MR. CHARRON: It is - - -

21                   JUDGE STEIN: But I don't think that  
22 answers the question.

23                   MR. CHARRON: Well, but it - - - what - - -  
24 the question is, what is it absolutely and  
25 unconditionally guaranteeing.

1                   JUDGE STEIN: That is - - - that is the  
2 question.

3                   MR. CHARRON: And - - - and in this case,  
4 my - - - my friend Mr. Syracuse says that the loan  
5 amount that's - - - apparently, I made a statement  
6 saying the loan amount itself was modified; I made no  
7 such statement, I certainly didn't intend to. I  
8 thought I said, quite clearly, that the loan amount -  
9 - - the definition of the loan amount was never  
10 changed in any of these documents. It always  
11 remained thirteen million.

12                  JUDGE RIVERA: So what - - - what does that  
13 sentence that I read from section 1.3 mean; do you  
14 agree with his explanation?

15                  MR. CHARRON: So I believe, Judge Rivera,  
16 that this - - - what this sentence means, Your Honor  
17 had asked about what if the amount had gone up, and I  
18 don't think I agree with Mr. Syracuse that the  
19 guarantor would necessarily be on the hook if it went  
20 up. I think that this language, in section 2.1 of  
21 the guarantee, made clear that this absolute and  
22 unconditional guarantee was for a loan amount of  
23 thirteen million; and if that went down or that went  
24 up - - -

25                  JUDGE RIVERA: Uh-huh.

1 MR. CHARRON: - - - the guarantor was  
2 locked in.

3 And it is not right for them to turn around  
4 - - - and the Appellate Division, I respectfully  
5 submit, erred in eviscerating all of article 2.  
6 Article 2 is not just about waving defenses, as the  
7 Appellate Division held; article 2 defines the metes  
8 and bounds of what the benefit of their bargain was.  
9 And primary obligation does not mean, as the Chemical  
10 Bank case discussed - - - has nothing to do with  
11 Chemical Bank.

12 JUDGE ABDUS-SALAAM: So let me - - - let me  
13 understand this, counsel, if you're saying that the  
14 loan amount was fixed at thirteen million and somehow  
15 the loan was modified to increase that amount, and  
16 then the borrowers defaulted in some amount, you  
17 would only be going after the guarantors for thirteen  
18 million - - - whatever the - - - or thirteen million  
19 or whatever the balance was?

20 MR. CHARRON: I believe in the absence - -  
21 - sorry, I didn't mean to - - -

22 JUDGE ABDUS-SALAAM: No, that's okay.

23 MR. CHARRON: I - - - I believe - - -

24 JUDGE ABDUS-SALAAM: I forgot my question.

25 MR. CHARRON: I believe in the absence of a

1 novation and in the face of section 1.3 and 2.1,  
2 which says that no increase will affect the  
3 guarantor's obligations under this guarantee, I  
4 believe that the guarantor was locked in to what the  
5 guaranteed obligations were actually defined as,  
6 which was the loan amount of thirteen million  
7 dollars.

8 And now, obviously an increase is not at  
9 issue in this case, but a decrease certainly is, and  
10 it was not a change in the loan amount; all that was  
11 done was that two million dollars remained doable as  
12 a loan amount, it was unpaid, but it was "forgiven";  
13 that's all that happen with respect - - -

14 JUDGE RIVERA: I just have - - - when you  
15 say it's - - - it's thirteen million, is that because  
16 it says thirteen million on the first page of the  
17 guarantee, or when you go to the documents - - - on  
18 the day you signed this it was thirteen million?

19 MR. CHARRON: On the - - - on the - - - it  
20 says it throughout the - - - not just on the  
21 guarantee, throughout all of the documents, I agree  
22 that - - - with Mr. Syracuse, you read the documents  
23 together in that regard; but at that point, this is  
24 an independent contract and their obligate - - - the  
25 guarantor's obligation is vested at the moment they

1 sign their contract; it vested at the moment of  
2 default, that was an actual default - - -

3 JUDGE RIVERA: Yeah, but I'm saying it's -  
4 - - it's because that's the amount, if anyone looked  
5 at these documents when you signed this, it was  
6 thirteen million at that day, and that's what you're  
7 talking about.

8 MR. CHARRON: That's right, because they  
9 bargained away - - -

10 JUDGE RIVERA: So the fact that it's  
11 thirteen million on page 1 doesn't necessarily mean  
12 anything because you have to go look at these  
13 underlying documents?

14 MR. CHARRON: Well, no, the fact that it  
15 says thirteen million on page 1 of the guarantee is a  
16 reference to the fact that it says thirteen million  
17 on the note itself.

18 JUDGE RIVERA: I know, but it says  
19 "together with" - - - "together with all renewals,  
20 modifications, increases, and extensions thereof  
21 collectively, the note."

22 MR. CHARRON: Yes, that's the debt - - -

23 JUDGE RIVERA: So doesn't that suggest that  
24 at a minimum, putting aside whether or not  
25 modification means what you are arguing or he's

1           arguing for the moment, I have to go beyond this  
2           first page because it says "together with".

3                       MR. CHARRON: No, because article 2, and  
4           the specific of course always - - - always trumps the  
5           general - - -

6                       JUDGE RIVERA: Yes.

7                       MR. CHARRON: - - - but in this case,  
8           article 2 specifically makes clear that no amendment,  
9           no for - - - no modification, no forbearance,  
10          nothing. The benefit of their bargain was struck at  
11          that moment, and they cannot claim reliance on  
12          anything to discharge their obligation short of  
13          actual payment, which did not occur to the extent of  
14          two million dollars.

15                      CHIEF JUDGE DIFIORE: Thank you, counsel.

16                      MR. CHARRON: Thank you.

17                      (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of PAF-PAR LLC v. Silberberg, No. 42 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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