



**IT IS ORDERED as set forth below:**

**Date: September 28, 2015**

**James R. Sacca  
U.S. Bankruptcy Court Judge**

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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE: } Chapter 11  
MICHAEL J. BLONDER }  
Debtor. } Case no.: 13-76658-JRS

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MICHAEL J. BLONDER }  
Movant, } Contested Matter  
v. }  
AGC GROUP, INC. a/k/a }  
ALLIANCE G.C. GROUP, INC. }  
Respondent. }

**ORDER**

This matter is before the Court on cross-motions for summary judgment filed by the Debtor and AGC Group, Inc. ("AGC") on the Debtor's objection to AGC's claim (Claim No.19-1) (Docs. 123 & 124), which claim arises out of AGC's \$955,880.22 default judgment from a

Tennessee state court against Focus Development, Inc. (“Focus Development”) and the Debtor’s execution of a guaranty of certain debts of Focus Development to which guaranty AGC contends it was a third party beneficiary.

In addition to the typical exercises of statutory construction and contract interpretation, resolution of the motions involves issues of civil procedure fitting for a law school exam. First, the Court must determine whether it should apply federal or state choice of law rules. If state choice of law rules apply, the parties dispute whether the Court should apply the rules of Tennessee or Georgia. After deciding which state’s choice of law rules apply, the Court must then determine whether that state’s rules would apply Tennessee or Georgia substantive law. Another issue is whether a default judgment against the principal is binding on a guarantor, but the parties’ dispute which state’s law should be utilized to make that determination, the laws of the forum state or the state in which the judgment was issued. It is only after those procedural issues are addressed can the Court get to the merits of the underlying dispute and the business of statutory construction and contract interpretation.

### **Facts and Procedural History**

This conflict stems from a development project in Knoxville, Tennessee known as Cityview at Riverwalk (the “Cityview Project”). During the Cityview Project, the Debtor was the president of Focus Development and a co-manager for Focus Camden, Inc. (“Focus Camden”). (AGC’s Statement of Material Facts (“AGC’s SMF”) ¶ 14; Debtor’s Response to AGC’s SMF (“Debtor’s Response”) ¶ 14; J. Ford Little Aff. Ex. I, at 6-7). AGC performed work as a subcontractor on the Cityview Project pursuant to written contracts with Focus Camden.<sup>1</sup>

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<sup>1</sup> AGC is a Texas corporation that never obtained a certificate of authority allowing a foreign corporation to transact business in Tennessee. (Debtor’s Statement of Material Facts (“Debtor’s SMF”) ¶ 14; AGC’s Response to Debtor’s SMF (“AFC’s Response”) ¶ 14).

(AGC's SMF ¶ 4; Debtor's Response ¶ 4). Focus Camden was clearly involved in the Cityview Project as a contractor, but whether and to what extent Focus Development was involved is disputed. AGC claims Focus Development acted as a contractor on the Cityview Project, while the Debtor disputes Focus Development had any involvement other than holding the contractor's license.

This claim objection revolves around a guaranty agreement signed by Debtor in conjunction with Focus Development renewing its Tennessee contractor's license. Focus Development initially obtained a contractor's license from the Tennessee Board for Licensing Contractors (the "Board") in 2005. (AGC's SMF ¶ 9; Debtor's Response ¶ 9). In 2007, Focus Development sought to renew its license with an unlimited monetary limit<sup>2</sup> which required a showing of a certain minimum working capital and net worth. (Debtor's Statement of Material Facts ("Debtor's SMF") ¶ 16; AGC's Response to Debtor's SMF ("AGC's Response") ¶ 16). Because Focus Development was unable to show it had sufficient working capital and net worth, the Board required that a guaranty agreement be signed or the monetary limit would need to be lowered to \$1,286,000. (Debtor's SMF ¶ 17; AGC's Response ¶ 17). Consequently, in order to obtain the license with the unlimited monetary limit, the Debtor executed a guaranty agreement in conjunction with Focus Development's license renewal (the "Guaranty"). (AGC's SMF ¶ 6; Debtor's SMF ¶ 18). The Guaranty is a single page form provided by the Board (Debtor's SMF ¶ 18; AGC's Response ¶ 18), which states in pertinent part that

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<sup>2</sup> The Board places monetary limits on the licenses it issues to contractors. *See* Tenn. Comp. R. & Regs. 0680-01-.13. A contractor cannot engage in, or offer to engage in, any project when the cost would exceed the monetary limit of their license, with the exception of a ten percent allowed tolerance on most licenses. *Id.* The monetary limit placed on applicants is determined based on the amount of an applicant's prior experience, net worth, and working capital. *Id.* A contractor can obtain a license with an unlimited monetary amount per project if the contractor can show a sufficient amount of both working capital and net worth, as well as prior experience. A contractor can supplement its working capital and net worth with a guaranty agreement in order to obtain a higher or unlimited monetary limit.

[the Debtor agrees] to guarantee the debts and obligations of [Focus Development] for all debts and obligations arising out of the contracting activities of [Focus Development] as defined by TENNESSEE CODE ANNOTATED, section 62-6-101.

(Debtor's Mot. for Summ. J., Ex. A [Doc. 129-3]). AGC was not a party to or named in the Guaranty. (Debtor's Mot. for Summ. J., Ex. A [Doc. 129-3]). The Debtor did not execute a Guaranty on behalf of Focus Camden. (Debtor's SMF ¶ 20; AGC's Response ¶ 20). The Debtor contends that the Guaranty was intended by both parties only to create a right of enforcement in the Board, not third parties; in particular, he asserts the intent was only to guaranty Focus Development's debts to the Board for "penalties and fines, judgments from the Board following formal hearing, and other such obligations to the Board." (Debtor's SMF ¶¶ 26-28). AGC contends that the purpose of the Guaranty was to benefit third parties to whom Focus Development had obligations or owed debt arising out of its activities as a contractor in Tennessee.

Between 2007 and 2008, AGC and Focus Camden entered into three written contracts whereby AGC was to provide work as a subcontractor on the Cityview Project. (Debtor's Mot. for Summ. J., Ex. D [Doc. 129-10]). Focus Development did not sign any of the agreements between Focus Camden and AGC. (Debtor's SMF ¶ 6; AGC's Response ¶ 6). AGC asserts that although Focus Development did not sign the contracts, it was involved in and served as the contractor for the Cityview Project, and because of its position as contractor, AGC had a working relationship with Focus Development during its time as a subcontractor on the Cityview Project. (AGC's SMF ¶ 13; Debtor's Response ¶ 13; AGC's Response ¶¶ 1, 5). The Debtor asserts that Focus Camden was the contractor of the Cityview Project; he disputes that Focus Development was a contractor of the Cityview project and contends that Focus Development held the contractor's license for it, but was otherwise not involved. (Debtor's Response ¶¶ 5, 13).

Sometime around August 2008, disputes arose regarding the quality and nonpayment of AGC's work on the Cityview Project. (Debtor's SMF ¶ 7; AGC's Response ¶ 7). On December 18, 2008, AGC filed suit against, among others, Focus Camden and Focus Development in the Chancery Court for Knox County, Tennessee (the "First Tennessee Proceeding"). (Debtor's SMF ¶ 8; AGC's Response ¶ 8). The Debtor was not a defendant in the First Tennessee Proceeding. (Debtor's SMF ¶ 12; AGC's Response ¶ 12). The parties agreed to and participated in mediation, but they did not come to a resolution or agreement; the Debtor attended the mediation for the defendants in a representative capacity. (AGC's SMF ¶¶ 18-21; Debtor's Response ¶¶ 17-20). Thereafter, an Amended Complaint was filed in which AGC defined Focus Camden as the "Contractor" and one of the "Owners" and defined Focus Development as the "Contractor's Affiliate." (Debtor's Mot. for Summ. J., Ex. C [Doc. 129-5]; AGC's SMF ¶ 22; Debtor's Response ¶ 21; Debtor's SMF ¶ 9; AGC's Response ¶ 9). The only claim against Focus Development in the Amended Complaint was one for unjust enrichment. (AGC's SMF ¶ 16; Debtor's Response ¶ 15).

On June 29, 2009, a default judgment for \$955,880.22 was entered in the First Tennessee Proceeding in favor of AGC and against the defendants, including Focus Development and Focus Camden. (Debtor's Mot. for Summ. J., Ex. B [Doc. 129-4]; Debtor's SMF ¶ 11; AGC's Response ¶ 11). Along with appearing at the mediation, the Debtor, in a representative capacity, received on behalf of the defendants, the Amended Complaint, motion for default judgment, notice of hearing, and default judgment. (AGC's SMF ¶¶ 23, 25, 28; Debtor's Response ¶¶ 22, 24, 27). To date, Focus Development has not satisfied the default judgment. (AGC's SMF ¶ 30; Debtor's Response ¶ 29).

Almost four years later, on March 25, 2013, AGC filed suit against Debtor in a Tennessee state court on the grounds that Debtor is liable to it for the judgment against Focus Development by way of the Guaranty (the “Second Tennessee Proceeding”). (Debtor’s SMF ¶ 29; AGC’s Response ¶ 29). The Second Tennessee Proceeding was still pending when the Debtor filed for Chapter 11 relief in this Court on December 9, 2013. AGC timely filed Proof of Claim No. 19-1, claiming \$955,880.22 plus interest based upon the default judgment against Focus Development and the Guaranty. (Debtor’s SMF ¶ 30; AGC’s Response ¶ 30). The Debtor filed an objection to AGC’s claim. (Doc. 95). Subsequently, AGC filed a motion for relief from stay to allow the Second Tennessee Proceeding to go forward. (Doc. 101). The Court denied the motion for relief from stay and determined that it would decide the objection to claim. (Doc. 110). The parties have now filed cross-motions for summary judgment on Debtor’s objection to AGC’s claim which are presently before the Court. (Docs. 123 & 124).

### **Summary Judgment Standard**

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The substantive law applicable to the case determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party. *Id.* The Court “should resolve all reasonable doubts about the facts in favor of the non-movant, and draw all justifiable inferences in his favor.” *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437 (11th Cir. 1991) (citations and punctuation omitted). The court may not weigh conflicting evidence or make credibility determinations. *Hairston v. Gainesville Sun Publ’g. Co.*, 9 F.3d 913, 919 (11th Cir. 1993), *reh’g denied*, 16 F.3d 1233 (1994) (en banc).

For issues upon which the moving party bears the burden of proof at trial, he must affirmatively demonstrate the absence of a genuine issue of material fact as to each element of his claim on that legal issue. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). He must support his motion with credible evidence that would entitle him to a directed verdict if not controverted at trial. *Id.* If the moving party makes such a showing, he is entitled to summary judgment unless the non-moving party comes forward with significant, probative evidence demonstrating the existence of an issue of material fact. *Id.*

For issues upon which the non-moving party bears the burden of proof at trial, he “must make a showing sufficient to establish the existence of [each] element essential to that party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Failure to make such a showing on any essential element “renders all other facts immaterial” and precludes a finding that a genuine issue of material fact exists. *Id.* at 323. Accordingly, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial,” and summary judgment in favor of the moving party is appropriate. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, (1986) (internal quotes omitted).

## **Discussion**

### **A. What Choice of Law Rules Apply**

The parties dispute whether Georgia or Tennessee law applies in this case. Before the Court can determine which state’s law to apply, it must determine what choice of law rules to apply: federal or state and, if the latter, the rules of which state.

A federal court applies the choice of law rules of the forum state when a case is before it on diversity jurisdiction. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941). However, a federal bankruptcy court’s jurisdiction does not arise from diversity

jurisdiction, but instead by way of federal bankruptcy law. In *Vanston Bondholders Protective Committee v. Green*, the Supreme Court clarified that a bankruptcy court should not blindly follow the principles laid out in *Erie v. Tompkins*<sup>3</sup> for federal courts sitting in diversity jurisdiction. 67 S. Ct. 237, 240 (1946). In *Vanston*, the issue was whether to allow a claim for interest on interest to which subordinate claimholders were objecting. *Id.* at 238. The Supreme Court explained that “[w]hat claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed, is a question, which in the absence of overruling federal law, is to be determined by reference to state law.” *Id.* at 239. Even if a transaction is valid under state law, a court still must decide “whether allowance of [a] claim would be compatible with the policy of the Bankruptcy Act.” *Id.* at 239-40. It concluded that allowance of interest on interest would not be in accord “with the equitable principles governing bankruptcy distributions.” *Id.*

After *Vanston*, a split in authority arose as to whether a bankruptcy court applies federal choice of law rules or the forum state’s choice of law rules. *In re Gaston & Snow*, 243 F.3d 599, 605 (2d. Cir. 2001) (collecting cases). One view is that the choice of law principles of the forum state should apply unless a sufficient or compelling interest exists such that federal law should be applied. *See In re Gaston & Snow*, 243 F.3d 599, 605 (2d. Cir. 2001); *In re Merritt Dredging Co.*, 839 F.2d 203, 205-06 (4th Cir. 1988). Another line of cases holds that federal choice of law principles should apply in bankruptcy because of the need for national uniformity. *See In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995). The Eleventh Circuit has not directly ruled on this issue in a published opinion, but has provided some guidance in an unpublished opinion in *Mukamal v. Bakes*, wherein it stated “[f]ederal courts have adopted this principle [of applying the

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<sup>3</sup> In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the U.S. Supreme Court held that a federal court sitting in diversity jurisdiction must apply the law of the forum state, overruling the prior use of federal general common law in such cases.

forum state's choice of law rules] in cases arising under 28 U.S.C. § 1334 [bankruptcy cases and proceedings], when the underlying rights and obligations of the parties are defined by state law.” 378 F. App'x 890, 896 (11th Cir. 2010) (unpublished). In *Mukamal*, an action alleging the defendants breached fiduciary duties they owed to the debtor was filed during the bankruptcy case in a district court in Florida, invoking jurisdiction pursuant to 28 U.S.C. § 1334, and as such the court applied Florida choice of law rules. *Id.*; see also *In re International Management Associates, LLC*, 495 B.R. 96 (Bankr. N.D. Ga.) (“To the extent that a bankruptcy court has discretion to choose whether to apply the forum state's or federal choice of law rules in a bankruptcy proceeding in which state law determines the rights of the parties, this Court concludes that it can exercise its discretion to apply the federal rule only if it identifies an appropriate federal interest that justifies the use of the federal rule.”).

Accordingly, whether a claim is valid and whether a claim is allowable are different inquiries for choice of law purposes. Absent a compelling federal interest, state law applies to determine whether a creditor's claim against a debtor is *valid*—whether a claim, created by state law, even exists. If a claim is valid under state law, the Court must then apply federal equitable and bankruptcy principles to determine whether or not the claim is *allowable* in the bankruptcy case. A claim would not be allowed under § 502(b)(1) if (a) the claim is not valid under state law or (b) if a compelling federal interest exists to apply federal law and the claim is not valid under federal law.

In this case, the Debtor objected to AGC's claim on the basis that the claim is not valid under state contract law. No compelling federal interests have been presented by either party and it appears to the Court that there are no compelling federal interests in whether AGC can collect from the Debtor under the Guaranty. In essence, the Court is determining whether a state law

claim that otherwise would be brought - and, in fact, was brought - in state court is valid. If the Court is applying state contract law to determine the interests of the parties, absent a compelling federal interest, it seems appropriate to apply state choice of law rules to determine which state's contract rules to apply. The question thus becomes which state's choice of law rules will apply, those of Tennessee or Georgia?

This matter is further complicated because we have a Tennessee state court proceeding that was stayed by a Georgia bankruptcy case and the matter is now being litigated in the bankruptcy case. Some courts have held that when a defendant in a state law action subsequently files bankruptcy in a different state than where the action was pending, and if that action is litigated in the bankruptcy court, or under bankruptcy jurisdiction, the choice of law rules of the state in which the state law action was originally pending still apply. These courts reach this conclusion by analogizing the situation to when a defendant obtains a change of venue in district court. *In re Coudert Bros. LLP*, 673 F.3d 180, 184 (2d Cir. 2012).

In *In re Coudert Bros, LLP*, an action was originally initiated in Connecticut. Sometime after the action was filed, and while it was still pending, the defendant in the Connecticut action filed bankruptcy in New York and the plaintiff in the Connecticut action filed its claim in the bankruptcy case. *Id.* The Second Circuit, noting the Supreme Court's efforts to ensure plaintiffs have the ability to forum shop and defendants' do not, stated "it would be fundamentally unfair to allow [the defendant's] bankruptcy, coming as it did in the midst of the Connecticut action, to deprive [the plaintiff] of the state-law advantages adhering to the exercise of its venue privilege." *Id.* at 190. "To hold otherwise would be to allow the defendant . . . to use a device of federal law (the bankruptcy code) to choose the forum and accompanying choice of law—a practice forbidden by *Klaxon*." *Id.* at 190-91. It concluded that the filing of a proof of claim was

“functionally an extension of its prepetition claim pending in a lawsuit against [the defendant]” and held that bankruptcy courts should look to the choice of law rules of the state where the underlying prepetition complaint was filed when: “(1) the claim before the bankruptcy court is wholly derived from another legal claim already pending in a parallel, out-of-state, non-bankruptcy proceeding; and (2) the pending original, or ‘source,’ claim was filed in a court prior to the commencement of the bankruptcy case.” *Id.* at 182, 191.

Relying on *Coudert Bros.*, the Sixth Circuit adopted a similar rule. In *In re Dow Corning Corp.*, the plaintiff brought suit against the defendant prepetition in North Carolina, and sometime thereafter the defendant filed bankruptcy in Michigan. *In re Dow Corning Corp.*, 778 F.3d 545, 548 (6th Cir. 2015). After the defendant filed bankruptcy, the plaintiff’s claim was transferred to the Michigan district court pursuant to 28 U.S.C. § 157(b)(5). *Id.* at 549. The Sixth Circuit noted that the district court’s jurisdiction was bankruptcy “related to” jurisdiction, not diversity jurisdiction, and had to determine whether to apply North Carolina or Michigan choice of law rules. *Id.* at 549-50. Like the Second Circuit, it concluded that the laws of the state where the action was originally pending should be applied, again analogizing it to a venue transfer in diversity cases. *Id.* at 550.

The Eleventh Circuit, following the Supreme Court’s decision, has concluded that the choice of law rules do not change when an action is transferred pursuant to 28 U.S.C. § 1404(a) because of venue, and absent any jurisdictional defects. *See Leasing Service Corp. v. River City Constr., Inc.*, 743 F.2d 871, 874 (11th Cir. 1984); *Van Dusen v. Barrack*, 376 U.S. 612, 640 (1964) (“We conclude, therefore, that in cases . . . where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404(a) generally should be, with

respect to state law, but a change of courtrooms.”). In other words, choice of law rules to be applied will be those of the state from which the action was transferred.

The procedural facts in *Coudert Bros.* are almost identical to the case at hand. AGC originally filed suit against the Debtor in Tennessee, then sometime after that suit was filed, but while it was still pending, the Debtor filed bankruptcy in Georgia. Thereafter, AGC filed its claim in bankruptcy court. Filing that claim was “functionally an extension of [AGC’s] prepetition claim” that was pending in a Tennessee state court. When a defendant seeks to transfer a case to another district court under § 1404(a), it is only “a change in courtrooms,” not a change to the law to be applied in the case.<sup>4</sup> One of the rationales for this rule is the concern that to rule otherwise would “deprive plaintiffs of ‘whatever advantages may flow from the state laws of the forum they have initially selected’” and essentially allow defendants to forum shop. *Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 991 (11th Cir. 1982). The same issue and concern arises in a case such as this. Therefore, the Court agrees with the reasoning in *Coudert Bros.* and will apply the choice of law rules of Tennessee to determine which state’s law should apply.

## **B. Whether the guaranty is enforceable**

### *1. Whether Tennessee or Georgia law applies*

Tennessee follows the First Restatement choice of law rules for contract disputes, *lex loci contractus*. *In re Estate of Davis*, 84 S.W.3d 231, 234-35 (Tenn. Ct. App. 2004). As a general rule, this means the law of the state in which the contract was executed, or made, governs

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<sup>4</sup> An exception to this rule exists if the state in which the action was originally pending lacked personal jurisdiction or another procedural defect such that the claim could not have been brought in the originating court. AGC is a Texas corporation that never obtained a certificate of authority allowing a foreign corporation to transact business in Tennessee and, therefore, lacked standing pursuant to T.C.A. § 48-25-102(a). However, T.C.A. § 48-25-102(c) allows a court to stay the proceeding until the foreign corporation or its successor obtains the certificate. If the action continued in Tennessee and the Debtor raised this issue, AGC would have been able to obtain a certificate of authority and continue with its cause of action. Therefore, the Court does not find this issue to change the choice of law rules that should be applied.

contractual disputes. *Id.* at 234. An exception to this general rule exists when a contract is to be performed in another state and “the parties envision performance in accordance with that state’s laws.” *Id.* at 234-35. “The primary consideration to be made in determining whether the exception applies is whether the contract was made in good faith with reference to the law of some other state or with a view to the other state.” *Id.* at 235. “The intent of the parties in this regard is to be gathered from the terms of the instrument and all of the attending circumstances.” *Id.*

In this case, the Debtor executed the Guaranty in Georgia. However, it was relied upon in Tennessee when the Tennessee Board issued an unlimited license to Focus Development. Pursuant to the First Restatement, when the contract is a guaranty, the last act essential to the completion is where the guaranty is relied upon. But regardless of where the contract was made, the Court believes that the Guaranty was to be performed in Tennessee. While the Debtor lives in Georgia, and the Debtor claims that it is to be performed in Georgia because that is where payment would be collected under the Guaranty, the Court disagrees. When the Debtor signed the Guaranty Agreement, he was entering into a contract with a Tennessee state agency to guarantee debts arising from contracting activities solely in Tennessee. It appears to the Court that the contract was to be performed in Tennessee so Tennessee law should apply to determine whether it is enforceable.

2. *Whether the Guaranty is enforceable under Tennessee law*

“A guaranty is a contract and is to be construed according to the ordinary meaning of the language used and with the view to carry out the intent of the parties.” *SecurAmerica Business Credit v. Schledwitz*, 2011 WL 3808232, at \*9 (Tenn. Ct. App. 2011). Under Tennessee law, they are considered “special contracts” which courts construe against the guarantor “as strongly

as the language will permit.” *SecurAmerica Business Credit v. Schledwitz*, 2011 WL 3808232, at \*9 (Tenn. Ct. App. 2011). A guaranty requires consideration to be enforceable. *Galleria Associates, LP v. Mogk*, 34 S.W.3d 874, 876 (Tenn. Ct. App. 2000). Consideration may be either “a benefit to the promisor or a detriment to or obligation upon the promisee.” *Id.*

Debtor argues that the Guaranty is unenforceable because there was no meeting of the minds as to essential terms of the contract. In making this argument, he cites Georgia statutes and case law which the Court has determined do not apply here. The Court believes that the Guaranty is plain and unambiguous, and there was a meeting of the minds as to the essential terms. It was signed and dated by the Debtor, it states whose debt arising out of what activities he is obligated to pay, those being “contracting activities” as defined in the Contractor’s Licensing Act of 1994, T.C.A. § 62-6-101, et seq. Debtor claims that the phrase “contracting activities” is not certain enough to be enforceable. However, T.C.A. § 62-6-102 defines “contracting activities” as a list of certain activities performed by a contractor, which the Court finds to be sufficiently certain.

Although the Guaranty does not list a specific creditor that is benefitted by it, the Court does not believe that is fatal to its enforceability. The nature of the Guaranty is such that it seems to the Court it was meant to cover all parties to whom Focus Development owed or would owe a debt as a result of contracting activities in Tennessee because, at the time it was signed, the parties did not know to whom Focus Development would owe a debt or obligation.

The Debtor also argues that the purpose and consideration of the Guaranty are unclear. The Court thinks its purpose is clear—it states it is being executed “for the express purpose of providing additional financial security and stability to, and for, [Focus Development] in order that they may obtain a license to engage in contracting in the State of Tennessee.” (Debtor’s Mot. for Summ. J., Ex. A [Doc. 129-3]). It seems clear to the Court that the State of Tennessee wants

to protect people who do business with contractors from the risk of non-payment. Moreover, there was consideration because the Debtor signed the Guaranty in order for Focus Development to obtain an unlimited contractor's license and the State of Tennessee detrimentally relied upon the Guaranty in extending a license with an unlimited monetary limit to Focus Development.

3. *Whether the Guaranty is enforceable by AGC*

The Debtor also argues that even if the guaranty is enforceable under Tennessee law, it is not enforceable as to AGC because it is not an intended third party beneficiary and AGC did not rely on the guaranty when it entered into a contract with Focus Camden.

“A cardinal rule of contract interpretation is to ascertain and give effect to the intent of the parties.” *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006). Courts should look to the plain meaning of words to ascertain the intent of the parties. *Id.* A court first determines whether the language of a contract is ambiguous. *Id.* “If it is clear and unambiguous, the literal meaning controls the outcome of the dispute.” *Id.* “If, however, the words in a contract are susceptible to more than one reasonable interpretation, the parties’ intent cannot be determined by a literal interpretation of the language.” *Id.* Contractual language is ambiguous “only when it is of uncertain meaning and may fairly be understood in more ways than one.” *Id.* Both parties submitted evidence whether the Board intended the Guaranty to benefit third parties or only the Board itself. The Court finds that the Guaranty is unambiguous in that the Board intended to benefit third parties and, therefore, it does not need to consider other matters to determine the intent of the parties.

For example, if the Guaranty was only meant to cover obligations to the Board, it could have very simply and plainly just said something to the effect that “the guarantor guarantees all of the obligations of Focus Development to the Board.” Instead, the Guaranty Agreement uses the

following language: (a) Debtor guarantees “the debts and obligations of [Focus Development] for all debts and obligations arising out of the contracting activities of Focus Development]...” and (b) “any and all debts and obligations for, or arising out of work in process, upon the expiration, nullification, and/or cancellation of this agreement, shall be covered and the Guarantor(s) herein shall remain liable for same.” In particular, debts and obligations arising out of “work in process” clearly intend to benefit third parties other than the Board.

Under Tennessee law, a contract is presumed to be only for the benefit of the parties to the contract. *Smith v. Chattanooga Medical Investors, Inc.*, 62 S.W.3d 178, 185 (Tenn. Ct. App. 2011). This general rule is subject to an exception when a third party can show he is an intended beneficiary of the contract. *Id.* An intentional third-party beneficiary is one who may maintain an action on the contract, whereas an incidental beneficiary may not. *Id.* “The fact that a party may reap a substantial benefit from the performance of a contract does not, in and of itself, entitle him to the status of an intentional beneficiary.” *Id.* A party is an intended third-party beneficiary and can enforce the contract if:

“(1) [t]he parties to the contract have not otherwise agreed; (2) [r]ecognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties; and (3) [t]he terms of the contract or the circumstances surrounding performance indicate that either: (a) the performance of the promise will satisfy an obligation or discharge a duty owed by the promisee to the beneficiary; or (b) the promisee intends to give the beneficiary the benefit of the promised performance.”

*Owner-Operator Independent Drivers Ass’n, Inc. v. Concord EFS, Inc.*, 59 S.W.3d 63, 70 (Tenn. 2001). In applying this test, the primary focus is the intent of the contracting parties. *Id.*

“When one of the parties to a contract is a governmental entity, the person attempting to establish rights as a third party must show that he or she is specifically intended to have the benefit of the contract and not merely be an ordinary citizen.” *Smith*, 62 S.W.3d at 185.

A contract entered into by a governmental entity requires a showing that the contract was intended by the parties to confer a direct obligation to identifiable third-party entities. Every contract into which a governmental entity enters is made for the benefit of all its citizens. Only when such a contract manifests a specific intent to grant individual citizens enforceable rights thereunder may a citizen claim such rights as a third party beneficiary.

*Id.* (citing *Coburn v. City of Dyersburg*, 774 S.W.2d 610, 612 (Tenn. Ct. App. 1989).

In *Smith*, the court determined that the plaintiff was an intended third party beneficiary of a contract between the State of Tennessee Department of Health and a nursing home. The crux of the contract was “to provide room and board, and medical care in the form of Level II services to Title XIX patients” in exchange for the state to pay for those eligible for its assistance. *Id.* at 182. The court reasoned that the purpose of the contract was to furnish medical assistance and rehabilitation to families with dependent children and to aged, blind, or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services. *Id.* The contract the plaintiff was attempting to enforce was specifically for the benefit of qualified recipients under Title XIX who received or would receive nursing care at the facility. *Id.* at 185-86. The court found it didn’t benefit all citizens, but specifically expressed the intent to benefit eligible Medicaid patients. *Id.* at 186.

In contrast, in *Citizens for Safety & Clean Air v. City of Clinton*, an agreement was entered into by the city, county, and a company that owned certain land that allowed the city to annex that land as long as certain minimum conditions were met. 434 S.W.3d 122, 124 (Tenn. Ct. App. 2013). The city rezoned the property and planned to develop a quarry and asphalt plant. *Id.* The plaintiffs, a non-profit corporation and concerned citizens of the community, opposed the development and claimed, among other things, that they were intended third-party beneficiaries of the agreement because certain restrictions on operations were contained in the agreement that

would benefit members of the community. *Id.* at 124-26. The Court concluded that the plaintiffs were not intended third party beneficiaries of the agreement, reasoning that the plaintiffs were not parties to the agreement, no right of enforcement was mentioned in the agreement, and it was clear that the community did not have the right to enforce the agreement. *Id.* 130-31.

AGC cites two Tennessee state court cases from the Chancery Court for Williamson County, Tennessee in support of its position that the Guaranty is enforceable by third parties. (AGC's Brief in Opposition to Debtor's Mot. for Summ. J. ("AGC's Opposition Brief"), Exs. A-C [Doc. 136-2]). In both cases, guaranties identical to or very similar to the Guaranty were provided to the Board. *Id.* Third parties in state court sought to enforce the guaranty agreement. *Id.* The trial court granted summary judgment in favor of the third parties on the issues of whether the guaranties were enforceable, concluding the guaranty agreements were unambiguous and that the guarantors were liable for any of the debts and obligations owed by the principal obligor. *Id.* Although the courts did not provide a detailed analysis of why they determined the guarantees to be enforceable, this Court can only assume that they did in fact conduct an appropriate analysis of the enforceability by a third party. In addition, the state of Tennessee, through the attorney general, submitted a brief in one of the cases arguing mainly that the guaranties are constitutional, but also arguing that they are unambiguous and should be enforceable. (AGC's Opposition Brief, Ex. D [Doc. 136-3]).

The Guaranty, like the guaranties discussed above, is enforceable by AGC. The Guaranty is clear that the Debtor was guaranteeing "all debts and obligations" of Focus Development arising from defined "contracting activities" in Tennessee. If the parties intended the Guaranty to be limited to debts and obligations Focus Development owed to the Board as Debtor argues, it would say that in the agreement. Instead, it was very broad in order for specific third parties -

those to whom Focus Development owed debts and obligations arising from defined contracting activities in Tennessee - to enforce it against the Debtor. Like the *Smith* case discussed above, the Guaranty did not benefit all members of the community, but only those to whom Focus Development had obligations or owed debts arising out of its contracting activities in Tennessee, if any. Not any citizen can enforce the Guaranty because it is specifically limited to these identifiable third parties. Here, Debtor did not agree with the Board to benefit all citizens, but only those to whom Focus Development owed money on account of contracting activities. For example, if a project was not completed, citizens of the community could not bring suit against the Debtor under the Guaranty arguing they are third party beneficiaries and the agreement was meant to ensure the contractor did not leave an uncompleted project that becomes a hazard and eyesore. Instead, the Debtor only guaranteed all debts and obligations of Focus Development arising out of contracting activities in Tennessee, a small group of intended beneficiaries to that agreement.

Accordingly, the Court finds that the Guaranty does extend to third parties such as AGC to the extent Focus Development owed money to those third parties arising out of contracting activities in Tennessee, subject to any other defenses the Debtor may have.

**C. Whether the default judgment is conclusively binding on the Debtor**

AGC claims that the judgment is binding on the Debtor such that he cannot relitigate whether Focus Development is obligated to AGC. The Debtor asserts the judgment is not binding because he did not have a full opportunity to defend the litigation in the First Tennessee Proceeding.

*1. Whether Georgia, Tennessee, or federal law applies*

The issue here is what effect a default judgment against Focus Development has on the Debtor. In essence it is a collateral estoppel and *res judicata* issue. The preclusive effect of a

state court judgment in a federal proceeding is governed by state law. *In re St. Laurent*, 991 F.2d 672, 675-76 (11th Cir. 1993); *see also* 28 U.S.C. § 1738. “The effect of a judgment against a principal in a later suit against the surety is a substantive matter to be determined by state law” including its choice of law rules. *Rouse Constr., Inc. v. Transamerica Ins. Co.*, 750 F.2d 1492, 1493 (11th Cir. 1985). The Supreme Court has noted that 28 U.S.C. § 1738 directs a federal court to refer to the preclusion law of the State in which judgment was rendered. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). “It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments.” *Id.* “Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.” *Id.* (citations omitted). Accordingly, the Court will apply Tennessee law to determine the effect of that judgment on the Debtor.<sup>5</sup>

2. *Whether the default judgment against Focus Development is conclusively binding on the Debtor*

The doctrine of collateral estoppel “bars the same parties or their privies from relitigating in a later proceeding legal or factual issues that were actually raised and necessarily determined in an earlier proceeding.” *Mullins v. State*, 294 S.W.3d 529, 534 (Tenn. 2009). The party invoking it has the burden of proof. *Id.* at 535. To prevail on collateral estoppel, the party must

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<sup>5</sup> Even assuming the Court applied Georgia law, the judgment would not be conclusively binding on the Debtor. Under Georgia law, a default judgment in favor of a creditor and against a principal debtor is not conclusively binding on a guarantor. *Noorani v. Sugarloaf Mills Ltd. Partnership of Ga.*, 708 S.E.2d 685, 691-92 (Ga. Ct. App. 2011). Such a judgment is prima facie evidence of liability, but a guarantor can present evidence rebutting liability or the amount of the judgment. *Id.* However, a guarantor cannot raise defenses which were not available to the principal debtor if it had been timely presented or defenses that are personal to the principal debtor. *Id.* A judgment may be rebutted by the guarantor regardless of whether it had notice and an opportunity to be heard in the action against the principal debtor. *Id.* Moreover, even if a guarantor could only rebut a judgment if it did not have notice and an opportunity to be heard, the Court would allow the Debtor to rebut the judgment because he was not a named defendant in the First Tennessee Proceeding, there was no mention of the Guaranty Agreement, and to the extent he participated he only participated in a representative capacity. There is no evidence that he appeared in an individual capacity or had the opportunity to be heard on behalf of himself individually.

demonstrate: “(1) that the issue to be precluded is identical to an issue decided in an earlier proceeding, (2) that the issue to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding, (3) that the judgment in the earlier proceeding has become final, (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding, and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded.” The issue must have also been necessary to the judgment. *Id.*

“The doctrine of *res judicata* or claim preclusion bars a second suit between the same parties or their privies on the same claim with respect to all issues which were, or could have been, litigated in the former suit.” *Boyce v. LPP Mortgage, Ltd.*, 435 S.W.3d 758, 764 (Tenn. Ct. App. 2013). To assert *res judicata* a party must show “(1) that the underlying judgment was rendered by a court of competent jurisdiction, (2) that the same parties or their privies were involved in both suits, (3) that the same claim or cause of action was asserted in both suits, and (4) that the underlying judgment was final and on the merits.” *Id.* It requires that there be a full and fair opportunity to litigate all issues arising out of the claim. *Gerber v. Holcomb*, 219 S.W.3d 912, 918 (Tenn. Ct. App. 2006). A default judgment is a judgment on the merits for purposes of collateral estoppel and *res judicata*. *Roberts v. Vaughn*, 2009 WL 1608981, at \*4 (Tenn. Ct. App. 2009).

In a similar situation, in *Jones v. Bozeman*, 321 S.W.2d 832, 45 Tenn. App. 141 (1958), seven judgments were entered against a sheriff for the negligent conduct of two of his deputy sheriffs. The sheriff filed suit against the deputies and their surety to collect on an indemnity bond, and argued that the judgment against the sheriff was conclusive as to the liability of the deputies and their surety. The defendants argued that although they had notice of the case and

were fully apprised of the developments in the case, the judgment was not binding because at all times the sheriff's attorney was in full charge of the litigation, they were never asked to defend the suit, and no notice was given that any judgments rendered against the sheriff would be conclusive as against them. Moreover, the attorneys for the deputies argued that defenses were available to the sheriff which could have been, but were not, raised in the case. The court held that the judgment was not conclusively binding on the deputies and their surety, stating:

It is an elementary principle of justice, that no one ought to be bound, as to matter of private right, by a judgment or verdict to which he was not a party, where he could make no defense, from which he could not appeal, and which may have resulted from the negligence of another, or may have even been obtained by means of fraud and collusion.

*Id.* An indemnitor must be given an opportunity to appear and to participate in the defense of the suit and it is not enough to be advised of the facts. *Id.* “The effect of the omission of such notice and opportunity is that the judgment is not binding on the person liable over, who has a right to litigate again every essential fact necessary to support the judgment.” *Id.* The court determined that the deputies and their surety had notice of the pendency of the suits in which judgment was entered against the sheriff. *Id.* But because they were never asked to defend the suits, were never offered permission to defend the suits, and were not given notice that a judgment against the sheriff would be binding on them, the court held they were not bound by the judgment. *Id.*

Relying on *Bozeman*, the court in *In re Pro Page Partners, LLC* reached a contrary result on different facts. *In re Pro Page Partners, LLC*, 2007 WL 1557207 (Bankr. E.D. Tenn. May 25, 2007). In *Pro Page Partners*, the trustee brought suit against a party and obtained a judgment and an indemnification agreement being assigned to the trustee. *Id.* at \*1. The trustee then sued the indemnitor under the indemnification agreement. *Id.* The court had to determine whether the indemnitor had full notice and opportunity to defend the prior suit such that the judgment was

conclusively binding on him. *Id.* The evidence, including multiple e-mails, showed that the indemnitor was represented by counsel during the pendency of the first lawsuit, his counsel worked with the indemnitee's counsel throughout the litigation and was involved in some ways in the defense of the suit, and the attorneys discussed the indemnification agreement. *Id.* at \*3-4. The court applied the law from *Bozeman* and determined that the indemnitor did have full notice and an opportunity to defend the prior suit and actually did help in defending the suit. *Id.* at \*5-8, 15-18. Perhaps most importantly to the case before this Court, the court in *Pro Page* stated the following:

Nonetheless, the opportunity to defend is meaningless without knowledge of the necessity of presenting a defense. Considering the entire tenor of the court's discussion regarding the fairness of binding a person to a judgment in which he had not been a party, "full opportunity to defend" appears to include the concept that the indemnitor be advised in some fashion that the indemnitee seeks to hold him liable under the indemnity agreement such that the indemnitor is placed on constructive notice that the failure to offer a full and complete defense may result in the finding of liability against him, the same as if he had been the original defendant.

*Id.* at 8.<sup>6</sup>

In this case, the judgment against Focus Development should not be conclusively binding on the Debtor. It is apparent to this Court that Debtor had no reason to know or think that AGC would seek to hold him personally liable for any judgment it obtained against Focus Development for unjust enrichment. If AGC did intend to hold the Debtor liable, it could have

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<sup>6</sup> *Pro Page* was before the court on remand from the District Court on the issue of the necessity of notice to the indemnitor. The District Court held: "Under Tennessee law, it would appear that reasonable notice to the indemnitor of an indemnity action is required before the action can be binding on the parties. Lack of notice does not bar a claim for indemnity, 'but simply changes the burden of proof and imposes on the indemnitee the necessity of again litigating and establishing all of the actionable facts.'" *Russell v. Jones (In re Pro Page Partners, LLC)*, No. 03-2042, 2006 WL 2136406, at \*13-14 (E.D. Tenn. July 28, 2006) (citing 41 *Am. Jur.2d Indemnity* § 53 (2d Ed. 2004)). Basically, this means the Debtor had to have notice that AGC's suit against Focus Development was an indemnity action, which he did not. Because Debtor did not have such notice, the prior judgment is not binding. AGC can still bring the action against the Debtor, but it must re-litigate and re-establish all of its actionable facts.

easily made him aware of that by, among other things, either adding Debtor as a party to the First Tennessee Proceeding or raising the issue in the mediation. If AGC intended to hold Debtor liable at the time of the entry of the judgment, it certainly would not have taken more than three years to pursue him individually on account of the Guaranty. Had Debtor been aware of such an intention of AGC, Debtor and Focus Development certainly could have raised *bona fide* defenses, the merits of which could have been determined in the First Tennessee Proceeding. Although the Debtor did participate in a pre-judgment mediation in the First Tennessee Proceeding, he did so only as a representative of the defendants and also received the pleadings and judgment only on behalf of the defendants. Clearly, at the time the First Tennessee Proceeding took place, the defendants may have had different interests than the Debtor's interests, including economic interests, such as whether a judgment would be collectible and, consequently, whether it was worth spending additional legal fees defending against a judgment. Debtor was not a named defendant in the First Tennessee Proceeding and there is no evidence that the Guaranty was mentioned or even a hint that Debtor could be held personally liable for a judgment against Focus Development. There is no evidence that the Debtor was represented by his own counsel in the First Tennessee Proceeding to discuss any potential consequences not defending the suit would have on him personally. It also appears that no counsel made an appearance on behalf of the Focus Camden and Focus Development in the First Tennessee Proceeding because neither the Amended Complaint nor the judgment was served on any attorney representing those entities. For all of these reasons, and because the Debtor was unaware of any reason why he should personally defend the First Tennessee Proceeding, he had no meaningful opportunity to defend and, therefore, the judgment should not be conclusively binding on him.

**D. Whether the terms of the Guaranty are enforceable against the Debtor based on the facts of this case**

*1. Whether the Guaranty Agreement expired*

The Debtor argues that the Guaranty expired prior to AGC obtaining a default judgment against Focus Development and, therefore, he is not liable under the Guaranty. The Guaranty states:

“[t]his document and the obligation undertaken shall expire and shall become null and void upon expiration of any license granted the Contractor by the Board . . . provided, however that any and all debts and obligations for, or arising out of work in process, upon the expiration, nullification, and/or cancellation of this agreement, shall be covered and the Guarantor(s) herein shall remain liable for same.”

(Debtor’s Mot. for Summ. J., Ex. A [Doc. 129-3]). AGC points out that while Focus Development’s contractor’s license was set to expire on May 31, 2009, Focus Development took steps to renew its contractor’s license prior to May 31, 2009, but later withdrew the application. AGC asserts that Focus Development withdrew its license because of the judgment entered against it in the First Tennessee Proceeding. However, whether Focus Development was seeking to renew its license and later decided to withdraw it does not change that the license expired on May 31, 2009. (Debtor’s Mot. for Summ. J., Ex. I [Doc. 129-9]).

However, even if the Guaranty expired prior to the June 2009 default judgment, that does not end the inquiry. An exception exists: the Debtor agreed to be liable for “any and all obligations for, or arising out of work in process” at the time of the expiration. (Debtor’s Mot. for Summ. J., Ex. A [Doc. 129-3]). Therefore, expiration is irrelevant if AGC obtained a judgment based upon work that had been performed at the time of the expiration, assuming that the judgment was for a debt owed by Focus Development to AGC arising out of Focus Development’s contracting activities in Tennessee.

The Debtor also argues that the Guaranty is not enforceable because the Board's current policy states that guaranties on file for more than two years are considered inactive. (Debtor's SMF ¶ 33; Debtor's Mot. for Summ. J. Ex., F, at 4 [Doc. 129-7]). AGC does not dispute what the current policy states, but asserts that policy did not exist prior to 2012 and was intended only as the policy going forward. (AGC's ¶ 33; Carolyn Lezenby Aff. ¶¶ 4-5). The Court agrees with AGC. Because the Guaranty is clear and unambiguous that it covers all work performed prior to the expiration of the license, any obligations of Focus Development to ACG arising out of any contracting activities in Tennessee will be covered, provided they were all incurred prior to that time.

*2. Whether liability under the Guaranty is limited by the Board's policies*

The Debtor argues that any liability he may have under the Guaranty is limited by the Board's policy such that it cannot be "more than ten percent (10%) of the shortfall between the contractor's working capital and net worth (\$128,600.00), and the amount required for an unlimited license (\$300,000)." (Debtor's SMF ¶ 39; Debtor's Mot. for Summ. J., Ex. F., at 4 [Doc. 129-7]). Thus, Debtor asserts his "liability under the Guaranty Agreement cannot be more than ten percent (10%) of the shortfall, or \$17,140.00." (*Id.*). AGC again argues that the policy the Board has today is irrelevant as it was implemented on a going forward basis and instead the Court should only look at the policy as it existed in 2007. (AGC's Response ¶ 39; Lazenby Aff. ¶¶ 4-5). The Guaranty does not limit the extent of the Debtor's liability under the Guaranty. It simply states that he guaranteed "all debts and obligations." Any policy limiting the liability of the Debtor to a certain amount would have to be in the Guaranty. Because there is no such limitation in the Guaranty, there is no limit to the monetary liability. The only limitation in the

Guaranty is with respect to the types of activities from which obligations arise, those being contracting activities in Tennessee.

3. *Whether unjust enrichment falls within the scope of liability of the Guaranty*

The Default Judgment does not specify the basis of liability against Focus Development, nor does it make any findings of fact, but the Amended Complaint only alleges a claim against Focus Development for unjust enrichment and similar types of claims, such as *quantum meruit* and quasi-contract, which are all essentially the same claim under Tennessee law,<sup>7</sup> the idea being that Focus Development allegedly received a benefit from the services provided by AGC for which it would be wrong if it was not obligated to compensate AGC. That is the extent of the factual allegation with respect to Focus Development in the Amended Complaint. The parties dispute whether unjust enrichment falls within the scope of “contracting activities” in the applicable Tennessee statute and, therefore, the Guaranty which incorporates that statute.

Tennessee Code Annotated § 62-6-101 is the section cited in the Guaranty that defines a contractor’s contracting activities. However, that section is simply the short title of the statute, known as The Contractors Licensing Act of 1994. The definition of contracting activities in The Contractors Licensing Act of 1994 is in the very next section, § 62-6-102,<sup>8</sup> which states the following:

(3) “Contracting” means any person or entity that performs or causes to be performed any of the activities defined in subdivision (4)(A) or (7);

(4)

(A)(i) “Contractor” means any person or entity that undertakes to, attempts to or submits a price or bid or offers to construct, supervise, superintend, oversee, schedule, direct or in any manner assume charge

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<sup>7</sup> See *Metropolitan Gov. of Nashville & Davidson Cnty. v. Cigna Healthcare of Tenn., Inc.*, 195 S.W.3d 28, 32 (Tenn. Ct. App. 2005) (“An action brought under the theory of unjust enrichment is essentially the same as quasi-contract, quantum meruit and contract ‘implied in law.’”).

<sup>8</sup> Debtor argues that the Guaranty is too vague to be enforceable because it cites to the wrong section. The Guaranty cites to the section that contains the name of the Act, which adequately incorporates the entire Act into the Guaranty, including the definitions in the very next section of the Act.

of the construction, alteration, repair, improvement, movement, demolition, putting up, tearing down or furnishing labor to install material or equipment for any building, highway, road, railroad, sewer, grading, excavation, pipeline, public utility structure, project development, housing, housing development, improvement or any other construction undertaking for which the total cost is twenty-five thousand dollars (\$25,000) or more; provided, however, with respect to a licensed masonry contractor, such term means and includes the masonry portion of the construction project, the total cost of which exceeds one hundred thousand dollars (\$100,000), materials and labor;

(ii) “Contractor” includes, but is not limited to, a prime contractor, electrical contractor, electrical subcontractor, mechanical contractor, mechanical subcontractor, plumbing contractor and plumbing subcontractor, masonry contractor, and roofing subcontractor where the total cost of the roofing portion of the construction project is twenty-five thousand dollars (\$25,000) or more;

(iii) If the cost of a project exceeds twenty-five thousand dollars (\$25,000), “contractor” also includes a construction manager of any kind, including, but not limited to, a residential construction manager, construction consultant, architect or engineer who conducts or provides any activity or service described in this subdivision (4) other than normal architectural and engineering services;

(7) “Prime contractor” is one who contracts directly with the owner;

Tenn. Code. Ann. § 62-6-102.

Under Tennessee law, unjust enrichment is “an equitable substitute for a contract claim in which a court may impose a contractual obligation where one does not exist.” *Metropolitan Gov. of Nashville & Davidson Cnty. v. Cigna Healthcare of Tenn., Inc.*, 195 S.W.3d 28, 32 (Tenn. Ct. App. 2005). Unjust enrichment requires: (a) a benefit conferred upon the defendant by the plaintiff, (b) appreciation by the defendant of such benefit, and (c) acceptance of such benefit under circumstances that would be inequitable for the defendant to retain the benefit without compensating the plaintiff. *Id.* at 33. The most important requirement is that the enrichment be unjust. *Paschall’s, Inc. v. Dozier*, 407 S.W.2d 150, 155 (Tenn. 1966).

“Unjust enrichment” in and of itself does not fall within the scope of a contracting activity under the Tennessee statute. To include within the scope of a contractor or contracting activity

anyone who justly or unjustly benefitted financially from a contracting activity would certainly expand the scope of the definition in the statute beyond its intent. The scope of the statute is focused on the person or entity that basically provides management or supervision of or direction to a construction project or a portion of a project, not simply anyone who may benefit from the project. A contractor under the Act will likely receive a benefit from the services performed by a subcontractor on the project, but liability under the Guaranty is based on the contracting activities, not unjust enrichment. Because the statute does not contemplate unjust enrichment as a contracting activity, neither does the Guaranty.

Similarly, let us assume Focus Development executed a written guaranty of Focus Camden's obligations to AGC and that AGC obtained a judgment against Focus Development based on the hypothetical guaranty. Under the facts of this case as asserted by AGC, would Debtor be liable to AGC under the Guaranty for the amount of that judgment against Focus Development on account of a separate guaranty? Certainly not. Just like unjust enrichment is not included within the scope of a contracting activity, neither would the execution of a guaranty even if the guarantor was a contractor. The focus of the Guaranty is whether the debt was incurred on account of a contracting activity, not simply whether the applicable contractor owes a debt.

Accordingly, in order to establish liability against the Debtor under the Guaranty, AGC must show more than mere unjust enrichment, but instead must show that Focus Development had an obligation to AGC arising from the activities performed by Focus Development described in Tenn. Code. Ann. § 62-6-102(4)(A)(i), even though it chose to contract directly with Focus Camden instead of with Focus Development. Without limiting AGC's legal theories, this may require a claim under an alter ego or veil-piercing theory, subject to any and all defenses the Debtor may have to those types of theories, both substantive and procedural. AGC has asserted

certain facts in its Motion for Summary Judgment, as opposed to in the Amended Complaint, which facts Debtor may dispute, that sound in the nature of such legal theories, but it asserted those facts to suggest that Focus Development was engaged in contracting activities to support an argument that the unjust enrichment arose from a contracting activity. However, there is no connection between the alleged unjust enrichment and the alleged contracting activities, nor does there need to be to support a claim for unjust enrichment. The purpose of the Guaranty is to provide a remedy to subcontractors who provide services to a contractor who does not pay. It is not designed to expand a guarantor's liability to cover the liability of an owner, shareholder, affiliate or co-debtor who also happens to be a licensed contractor in a situation where the services were provided for a different entity. To recover under the Guaranty, AGC will have to show that the debt it is allegedly owed arose from Focus Development's contracting activities and not the contracting activities of another entity which may have also been a contractor in the project.

### **Conclusion**

In order to determine whether the Debtor is liable to AGC by way of the Guaranty, the following issues must be resolved. Was Focus Development engaged in contracting activities with respect to the Cityview Project? If not, the inquiry is over and the claim is disallowed. If the answer is yes, the validity and amount of the AGC claim, if any, must be determined after consideration of the defenses to the claim. If there is a claim, it must be determined whether it is on account of the contracting activities of Focus Development or did it arise solely from the contracting activities of Focus Camden with whom AGC formally contracted. If Focus Camden was merely a vehicle used improperly to shield Focus Development and the Debtor from liability, this Court can fashion relief and impose liability if the circumstances warrant. Those

facts have not been established. Because questions of material facts exist with respect to these issues, and the Debtor can assert the substantive defenses which Focus Development could have timely asserted, as well as any procedural defenses to other legal theories which AGC may assert, summary judgment cannot be granted to either party.

Accordingly, for the reasons stated herein, it is hereby

ORDERED that AGC's motion for summary judgment is GRANTED to the extent that the Court concludes the Guaranty is enforceable by AGC against Debtor with respect to debts and obligations of Focus Development arising out of any contracting activities Focus Development may have had in Tennessee during the applicable time, without any monetary limit, subject to any defenses the Debtor may have that have not been disposed of by this Order; it is further

ORDERED that the Debtor's motion for summary judgment is GRANTED to the extent the Court concludes that unjust enrichment is not a contracting activity within the meaning of the Tenn. Code. Ann. § 62-6-102 and, therefore, an obligation for unjust enrichment is not within the scope of the Guaranty and the default judgment for unjust enrichment entered against Focus Development in the First Tennessee Proceedings is not conclusively binding on the Debtor; it is further

ORDERED that both motions for summary judgment are DENIED because questions of fact remain with respect to (a) whether Focus Development was a contractor engaged in contracting activities on the Cityview Project and, if yes, (b) whether Debtor, on account of the Guaranty, is liable for any claim AGC may have against Focus Development arising out of those contracting activities, which claim is subject to any defenses Debtor may have not otherwise disposed of by the Order; and it is further

ORDERED that AGC shall have until October 20, 2015 to file an amended proof of claim setting forth any claims it contends it has against Debtor other than on account of its claim against Focus Development for unjust enrichment. Debtor shall thereafter have 21 days from the filing of the amended proof of claim to object to the amended claim. If no amended claim is timely filed, the Court will enter an order disallowing the claim. If an amended claim is filed, but no objection is timely filed, the Court will enter an order allowing the claim, as amended.

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