

<p><b>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</b></p> <p>Court Address: City and County Building 1437 Bannock Street Denver, CO 80202</p>	<p>DATE FILED: December 12, 2018 2:09 PM CASE NUMBER: 2018CV31286</p>
<p><b>Plaintiffs:</b> RF ELATI 4125 Ltd., <i>et al.</i></p> <p><b>v.</b></p> <p><b>Defendants:</b> ANTHONY SAURO, <i>et al.</i></p>	<p>^ COURT USE ONLY ^</p> <p>Case Number: <b>18CV31286</b></p> <p>Division: <b>368</b></p>
<p><b>ORDER AND ENTRY OF FINAL JUDGMENT UNDER C.R.C.P. 58(a)</b></p>	

**I. Issue**

By stipulation of the parties, the November 1, 2018 bench trial of this case was vacated and judgment entered in favor of Plaintiffs (the “Landlords”), and against Defendants (the “Guarantors”), jointly and severally, in the amount of \$1,960,439.68 as damages for unpaid rent, late fees, and interest from breaches of four (4) commercial leases. By entering this stipulation, Guarantors waived their failure to mitigate defense against the Plaintiffs.

One outstanding issue for determination remained.

In each of the four (4) leases, the parties agreed that the tenants would obtain a surety bond in the amount of \$2,200,000.00 per lease to guaranty payments due under the leases. The parties stipulated that the tenants and the Guarantors failed to comply with these lease provisions and failed to obtain any of the four required surety bonds.

The parties agreed that the following issue of law remained outstanding for the Court’s determination: as a matter of law, did the failure of the tenants and the Guarantors to obtain the required surety bonds subject the Guarantors to liability for the unprocured surety bonds?

The Court has reviewed the Plaintiffs’ Brief in Support of Damages (filed November 15, 2018) and Defendants’/Guarantors’ Briefing Regarding Plaintiffs’ Requested Damages in Connection with Unobtained Surety Bonds (filed

November 15, 2018), and considered the pleadings and case file, and enters the following findings and Orders.

**II. Background**

**A. Leases**

Plaintiff RF Elati<sup>1</sup> owns real property located at 4125 Elati St. (“Elati Property”) in Denver. On January 5, 2017, an entity known as DGP Elati, LLC (“DGP Elati”) signed two leases for buildings and space located on the Elati Property. DGP Elati is an LLC that is wholly owned by the Guarantors (Messrs. Aiken, Johnson and Sauro), each of whom personally guaranteed DGP Elati’s performance under the leases. (Exs. 2 and 3 to original Complaint.)

The Elati Property leases contained the following schedules specifying the agreed-to payments under the leases:

**□ Elati Property: 8,475 square feet (Ex. 1 to original Complaint):**

**5. Rent:**

**a. Rent.** Rental for the Term (not including any extensions or renewals thereof) equals Two Million, Five Hundred Twenty-Eight Thousand, Eight Hundred Seventy-Two and 56/100 Dollars (\$2,528,872.56) and shall be paid in advance to Landlord beginning on the Lease Commencement Date and thereafter on or before the day of each month that corresponds to the day of the month on which the Lease Commencement Date, occurs for the period from such date until the corresponding day of the following month, without notice (the “Rent”) at the rates set forth on the following schedule:

Period	Annual Rent	Monthly Rent
x/xx/2017 - x/xx/2018	\$362,340.72	\$30,195.06
x/xx/2018 - x/xx/2019	\$434,054.28	\$36,171.19
x/xx/2019 - x/xx/2020	\$505,775.28	\$42,147.94
x/xx/2020 - x/xx/2021	\$577,492.56	\$48,124.38
x/xx/2021 - x/xx/2022	\$649,209.72	\$54,100.81

Total rent due to Elati under this five (5) year lease = **\$2,528,872.56.**

**□ Elati Property: 1,802 square feet (Ex. 3 to original Complaint):**

**5. Rent:**

**a. Rent.** Rental for the Term (not including any extensions or renewals thereof) equals One Million, Nine Hundred Ninety-Two Thousand, Seven Hundred Thirteen and 62/100 Dollars (\$1,992,713.62) and shall be paid in advance to Landlord beginning on the Lease Commencement Date and thereafter on or before the day of each month that corresponds to the day of the month on which the Lease Commencement Date, occurs for the period from such date until the corresponding day of the following month, without notice (the “Rent”) at the rates set forth on the following schedule:

Period	Annual Rent	Monthly Rent
x/xx/2017 - x/xx/2018	\$265,117.75	\$22,093.15
x/xx/2018 - x/xx/2019	\$331,830.12	\$27,652.52
x/xx/2019 - x/xx/2020	\$398,542.75	\$33,211.90
x/xx/2020 - x/xx/2021	\$465,255.25	\$38,771.27
x/xx/2021 - x/xx/2022	\$531,967.75	\$44,330.65

Total rent due to RF Elati under this five (5) year lease = **\$1,992,713.62.**

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<sup>1</sup> The “RF” in the names of each of the Plaintiff LLCs refers to Ryan Fox, the owner of the LLCs.

Total rent due to RF Elati under both Elati Property leases = **\$4,521,586.18.**

**□ Colorado Property: 37,044 square feet (Ex. 5 to original Complaint):**

Plaintiff RF Colorado 4175, LLC (“RF Colorado”) owns real property located at 4175 Colorado Blvd. (“Colorado Property”) in Denver. On January 5, 2017, DGP Elati signed a lease for a building and space located on the Colorado Property. Messrs. Aiken, Johnson and Sauro each personally guaranteed DGP Elati’s performance under the leases. (Ex. 6 to original Complaint.)

The Colorado Property lease contained the following schedule specifying the agreed-to payments to RF Colorado under this five (5) year lease:

**5. Rent:**

**a. Rent.** Rental for the Term (not including any extensions or renewals thereof) equals One Million, Nine Hundred Ninety-Two Thousand, Seven Hundred Thirteen and 62/100 Dollars (\$1,992,713.62) and shall be paid in advance to Landlord beginning on the Lease Commencement Date and thereafter on or before the day of each month that corresponds to the day of the month on which the Lease Commencement Date, occurs for the period from such date until the corresponding day of the following month, without notice (the “Rent”) at the rates set forth on the following schedule:

Period	Annual Rent	Monthly Rent
x/xx/2017 - x/xx/2018	\$265,117.75	\$22,093.15
x/xx/2018 - x/xx/2019	\$331,830.12	\$27,652.52
x/xx/2019 - x/xx/2020	\$398,542.75	\$33,211.90
x/xx/2020 - x/xx/2021	\$465,255.25	\$38,771.27
x/xx/2021 - x/xx/2022	\$531,967.75	\$44,330.65

Total rent due to RF Colorado under the Colorado Property five (5) year lease = **\$5,171,508.60.**

**□ Smith Property: 4,087 square feet (Ex. 7 to original Complaint):**

Plaintiff RF Smith 7200, LLC (“RF Smith”) was the lessee of real property located at 7200 E. Smith Road (“Smith Property”) in Denver. On January 5, 2017, DGP Smith entered a sublease with RF Smith for a building and space located on the Smith Property. DGP Smith is an LLC that is wholly owned by the Guarantors (Messrs. Aiken, Johnson and Sauro), who personally guaranteed DGP Elati’s performance under the sublease. (Ex. 8 to original Complaint.)

The Smith Property sublease contained the following schedule specifying the agreed-to payments due to RF Smith under the sublease:

**5. Rent:**

**a. Rent.** Rental for the Term (not including any extensions or renewals thereof) equals Two Million, Three Hundred Six Thousand, Nine Hundred One and 24/100 Dollars (\$2,306,901.24) and shall be paid monthly, in advance, to Sublandlord with the first such payment due on or before the Rent Commencement Date and thereafter on or before the day of each month that corresponds to the day of the month on which the Rent Commencement Date occurs, for the period from such date until the corresponding day of the following month, without notice (the "Rent") pursuant to the following schedule:

Period	Annual Rent	Monthly Rent
x/xx/2017 - x/xx/2018	\$324,527.76	\$27,043.98
x/xx/2018 - x/xx/2019	\$392,954.04	\$32,746.17
x/xx/2019 - x/xx/2020	\$461,380.20	\$38,448.35
x/xx/2020 - x/xx/20	\$529,806.48	\$44,150.54
x/xx/2021 - x/xx/2022	\$598,232.76	\$49,852.73

The total rent due to RF Smith under this five (5) year sublease = **\$2,306,901.24.**

In this Order, Plaintiffs RF Elati, RF Colorado, and RF Smith collectively will be referred to as the "Landlords." DGP Elati and DGP Smith collectively will be referred to as the "Tenants." Messrs. Aiken, Johnson, and Sauro collectively will be referred to as the "Guarantors." Collectively, the three leases and one sublease will be referred to as the "Leases."

The total due to the Landlords under all four (4) leases, and guaranteed by the Guarantors, was **\$11,999,996.00.**

**B. Surety Bonds Required Under Leases**

Each of the four Leases contained the following requirement:

**Guaranty**

**25. Surety Bond.** Prior to the Lease Commencement Date, Tenant shall have obtained and shall maintain in full force and effect a surety bond in the amount of Two Million Two Hundred Thousand and no/100 Dollars (\$2,200,000.00) to protect the Landlord, or an affiliate of Landlord designated by Landlord in its sole discretion, in the event that Tenant is in Default under this Lease (the "Bond"). Tenant and Landlord shall each be responsible for one half of the costs necessary to obtain and maintain the Bond. Notwithstanding anything herein to the contrary, Tenant shall maintain the Bond in full force and effect at all times during the term of any such lease or any extension or renewal thereof.

(Exs. 1, 3 and 5 to Original Complaint) and

**25. Surety Bond.** Prior to the Sublease Commencement Date, Subtenant shall have obtained and shall maintain in full force and effect a surety bond in the amount of Two Million Two Hundred Thousand and no/100 Dollars (\$2,200,000.00) to protect the Sublandlord, or an affiliate of Sublandlord designated by Sublandlord in its sole discretion, in the event that Subtenant is in Default under this Lease (the "Bond"). Subtenant and Sublandlord shall each be responsible for one half of the costs necessary to obtain and maintain the Bond. Notwithstanding anything herein to the contrary, Subtenant shall maintain the Bond in full force and effect at all times during the term of any such lease or any extension or renewal thereof.

(Ex. 7 to Original Complaint). This will be referred to as the "Surety Bond Requirement."

It is undisputed that none of the Tenants (or Subtenant, in the case of the Smith Property), and none of the Guarantors, complied with the Surety Bond Requirement. Both the Tenants and Guarantors failed to obtain the surety bonds required by the Surety Bond Requirement before or at the commencement of the Leases. Nor did Landlords make any payments for their half of the costs associated to obtain or maintain the surety bonds as required by the Surety Bond Requirement.

In their First Amended Complaint, filed on May 8, 2018, Landlords alleged that, as of January 1, 2018, Tenants and Guarantors failed to pay rent due under the Leases and that Landlords were suffering ongoing and increasing damages due to the failure to pay:

22. Further, Plaintiffs' damages are increasing every month that rent is not paid. After June 5, 2018 total rent with late fees and accrued interest will equal \$1,147,940.41; after July 5, total rent with late fees and accrued interest will equal \$1,375,767.71; after August 5, total rent with late fees and accrued interest will equal \$1,610,171.54; after September 5, total rent with late fees and accrued interest will equal \$1,851,297.94; after October 5, total rent with late fees and accrued interest will equal \$2,099,295.85; after November 5, total rent with late fees and accrued interest will equal \$2,354,317.15 and after December 5, total rent with late fees and accrued interest will equal \$2,616,516.74.

(First Amended Complaint, ¶ 22). As noted above, the parties stipulated that the damages arising from the unpaid rent, late fees and accrued interest was \$1,960,439.68.

In the First Amended Complaint, Landlords also sought damages relating to the breach of the Surety Bond Requirement, alleging:

23. Also, pursuant to paragraph 25 of Business Leases 1 through 4, DGP Elati and DGP Smith are required to post a \$2,200,000 surety bond to secure their performance of the terms of each Business Lease. None of the required surety bonds were ever posted. As such, the DGP Elati and DGP Smith are additionally in default of their Business Leases in the aggregate amount of \$8,800,000 representing the amount of the surety bonds described herein.

(First Amended Complaint, ¶ 23), and seeking:

**WHEREFORE** Plaintiffs request this Honorable Court for the following relief:

- A. An award of all direct, compensatory and consequential damages in an amount to be determined at trial, to include all past due rent, interest and late fees in an amount not less than \$926,546.45;
- B. An award of \$8,800,000.00 representing the amount of the required surety bond;

(*Id.*, *Ad Damnum* Clause).

### III. Applicable Law and Analysis

#### A. Breach of Leases

The measure of damages for breach of a commercial lease “is the amount it takes to place the landlord in the position [it] would have occupied had the breach not occurred, taking into account the landlord's duty to mitigate . . . . However, if the landlord is unable to secure a substitute tenant after making reasonable efforts to do so or if the premises have been rendered unmarketable, the landlord is entitled to an amount equal to the full amount of rent reserved in the lease, plus any other consequential damages.” *Schneiker v. Gordon*, 732 P.2d 603, 612 (Colo. 1987). In *La Casa Nino, Inc. v. Plaza Esteban*, 762 P.2d 669, 672 (Colo. 1988), the Colorado Supreme Court held:

We acknowledged in *Schneiker* the dual nature of a commercial lease as both a contract and a conveyance, but recognized the necessity of applying contract principles to determine the correct measure of damages due to a lessor upon default by a lessee. We described a commercial lease as “predominantly an exchange of promises,” and characterized a covenant to pay rent as representing “one such promise.”

Drawing on the general principle that the goal of contract law is to place a nondefaulting party in the position it would have occupied if no default had occurred, and relying also on the contract principle of “avoidable consequences” or “duty to mitigate,” we held that a lessee's default under a commercial lease entitled the lessor to an amount of damages which would place the lessor in the position the lessor would have occupied if the lessee had not defaulted, taking into account the lessor's duty to mitigate.

(internal citations omitted).

Colorado thus uses the ‘benefit of the bargain’ rule to measure damages for breach of a commercial lease. “Under the ‘benefit of the bargain’ rule, an innocent landlord is entitled to recover only the amount of damages required to place it in the same position it would have occupied had the tenant performed according to the terms of the lease.” *Highlands Ranch Univ. Park, LLC v. Uno of Highlands Ranch, Inc.*, 129 P.3d 1020, 1026 (Colo. App. 2005).

Tenants and Guarantors originally raised a failure to mitigate defense but abandoned that defense when they vacated the trial and stipulated to the \$1,960,439.68 judgment.

Here, the Guarantors argue that the breach of the Surety Bond Requirement, standing alone, does not entitle the Landlords to damages. Rather, they contend:

had [lessees] simply failed to obtain the surety bonds, but otherwise performed their obligations under the [Leases], Plaintiffs would not have received any money

related to the bonds. The [Leases] plainly intended the bonds only “to protect the Landlord . . . in the event that Tenant is in Default under this Lease.” [Leases, ¶ 25 (each [Lease]). No provision in the [Leases] allows [Plaintiffs] to recover money in connection with the surety bonds absent a default by [lessees].

(Guarantors’ Brief, at 3). The Court agrees. The Surety Bond Requirement only came into play if there was a breach of non-payment of one or more of the Leases. The Surety Bond Requirement effectively operated as ‘insurance’ to the Landlords, guaranteeing payment (up to an aggregate of \$8,800,000.00 on all four Leases) if the Tenants and Guarantors defaulted and failed to pay the amounts due and owing under the Leases.

A special relationship exists between a commercial surety and an obligee that is nearly identical to that involving an insurer and an insured. When an obligee requests that a principal obtain a commercial surety bond to guarantee the principal's performance, the obligee is essentially insuring itself from the potentially catastrophic losses that would result in the event the principal defaults on its original obligation. When the principal actually defaults, the commercial surety must assume or correct any flaws in performance pursuant to the terms of the original contract, thereby eliminating the obligee's risk of loss in the venture.

*Transamerica Premier Ins. Co. v. Brighton Sch. Dist.* 27J, 940 P.2d 348, 352 (Colo. 1997)(internal citations and footnote omitted).

The Guarantors, however, also argue that Landlords never would have received \$8.8 million under the Leases (Guarantors’ Brief, at 3) and that Landlords should not recover anything more than the \$1,960,439.68 to which the parties have already stipulated as damages for unpaid rent, late fees, and interest. The Court disagrees.

Although liability under the Surety Bond Requirement would be triggered by non-payment of one or more of the Leases, once there was such a default, the parties’ intent was for Landlords to be protected from financial loss by the surety bonds insuring performance of each Lease up to the amount of \$2,200,000.00. The Court thus concludes the loss of the value of \$2,200,000.00 surety bond per Lease was the parties’ bargain regarding damages to be recovered in the event of a breach by non-payment.

While Landlords bargained for payments (over the five-year terms of the Leases) totaling \$11,999,996.00, they also agreed, in the event of non-payment, to accept the aggregate \$8,800,000.00 guaranteed by the surety bonds. Because of the breaches by the Tenants and the Guarantors in making the required Lease payments, Landlords are deprived of that bargain. That the Landlords recovered a judgment of \$1,960,439.68 as compensation for loss of rent, late fees, and interest going from January 1, 2018 up to the date of the judgment does not make the Landlords whole or otherwise put them in the same position they would

have occupied had the Tenants and Guarantors complied with the Surety Bond Requirement.

Therefore, the Court concludes that the failure of the Tenants and Guarantors to comply with the Surety Bond Requirement represents part of the Landlords' actual damages. Had the Tenants and Guarantors complied with the Surety Bond Requirement, Landlords would have been able to make an aggregate claim against the surety for \$8,800,000.00. That amount, less the stipulated judgment, represents the actual damages to Landlords and the amount of damages necessary to put Landlords back in the position they would have occupied but for the Guarantors' failure to secure the surety bonds.

### **B. Breach of Guaranty**

As with contracts generally, in construing a guaranty, the court is required to give effect to the intentions of the parties, which must be deduced from the instrument as a whole. Liability of a guarantor is to be strictly construed and reasonably interpreted according to the parties' intentions as disclosed by the surrounding circumstances. Unless expressly agreed otherwise, a guarantor's liability is generally coextensive with that of the principal.

*Highlands Ranch Univ. Park, LLC v. Uno of Highlands Ranch, Inc.*, 129 P.3d 1020, 1024–25 (Colo. App. 2005)(internal citations omitted).

The intent of the parties in entering the Leases was that the Landlords would be protected for non-payment of the Leases, but up to the amount of \$2,200,000.00 per lease (totaling \$8,800,000.00). This was less than the full amounts due under the Leases, but represented the financial allocation and 'insurance' to which the parties agreed. The Guarantors are liable for Tenants' nonperformance and are obligated to make the Landlords whole – up to the aggregate amount of \$2,200,000.00 per Lease that would have been collectable by Landlords if the Tenants and Guarantors breached the Leases because of non-payment but had complied with the Surety Bond Requirement.

Therefore, the Court concludes that in addition to the \$1,960,439.68 judgment already entered, the Guarantors are liable for an additional amount - \$6,839,560.32<sup>2</sup> – the amount which, along with the stipulated judgment, will put Landlords in the same position they would have occupied but for the breach of the Surety Bond Requirement.

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<sup>2</sup> This is the difference between the total amount (\$8,800,000.00) which Landlords could have recovered from the surety under the Surety Bond Requirement and the \$1,960,439.68 judgment already entered.



The Court therefore rejects the Guarantors' argument that their liability is limited to only the \$1,960,439.68 already stipulated, representing damages for non-payment up to November 2018. Such a reading of the Leases and Surety Bond Requirement would unjustifiably excuse non-performance of the Surety Bond Requirement by the Tenants and Guarantors, and unfairly reward Tenants and Guarantors.

The Court also rejects Landlords' position that they are entitled to an *additional* judgment of \$8,800,000 (the aggregate of the Surety Bond Requirement) on top of the \$1,960,439.68 to which the parties have already stipulated. Such an approach would unjustifiably enrich the Landlords by nearly \$2 million above what Landlords agreed to accept and would have received but for the breach of the Surety Bond Requirement. While Landlords would have received just under \$12 million in rent if Tenants had fully paid all four (4) Leases over the course of the leaseholds, the parties clearly contemplated that might not occur and, as a result, included the Surety Bond Requirement in each of the Leases as the measure of damages to which they agreed. Had the parties intended to 'insure' the total amount of the Leases (\$11,999,996.00), they would have required surety bonds in that amount and not the lesser amount of \$8,800,000.00.

#### **IV. Conclusion and Entry of Final Judgment**

The Court therefore enters final judgment under C.R.C.P. 58(a) as follows:

A. In favor of RF Elati and against Messrs. Aiken, Johnson and Sauro, jointly and severally, for:

\$ 980,219.84	(one-half of stipulated judgment for 2 Leases)
<b>\$ 3,419,780.16</b>	(\$4,400,000 amount of two surety bonds under Surety Bond Requirement minus one-half stipulated judgment for 2 Leases)
= <b>\$4,400,000.00</b>	Total that would have been paid under two surety bonds under Surety Bond Requirement)

B. In favor of RF Colorado and against Messrs. Aiken, Johnson and Sauro, jointly and severally, for:

\$ 490,109.92	(one-quarter of stipulated judgment for 1 Lease)
<u>\$ 1,709,890.08</u>	(\$2,200,000 amount of two surety bonds under Surety Bond Requirement minus one-half stipulated judgment for 1 Leases)
= <b>\$2,200,000.00</b>	Total that would have been paid under one surety bond under Surety Bond Requirement)

C. In favor of RF Smith and against Messrs. Aiken, Johnson and Sauro, jointly and severally, for:

\$ 490,109.92	(one-quarter of stipulated judgment for 1 Lease)
<u>\$ 1,709,890.08</u>	(\$2,200,000 amount of two surety bonds under Surety Bond Requirement minus one-half stipulated judgment for 1 Leases)
= <b>\$2,200,000.00</b>	Total that would have been paid under one surety bond under Surety Bond Requirement

Thus, in addition to the stipulated judgment of \$1,960,439.68 in favor of Plaintiffs and against Defendants (jointly and severally), the Court enters the additional judgments above, totaling \$6,839,560.32 plus statutory interest, against the Defendants (jointly and severally). The combination of the two equals \$8,800,000.00, which is the benefit of the bargain and the amount Plaintiffs RF Elati, RF Colorado, and RF Smith would have received from the surety but for the breach of the Surety Bond Requirement. The Court also notes that nothing has been deducted from the aggregate \$8,800,000.00 judgment required by the Surety Bond Requirement for mitigation because that defense was raised by Guarantors but abandoned.

Any post-judgment Motions shall be filed within fourteen (14) days. Any Response shall be filed within twenty-eight (28) days. The Court dispenses with any Replies.

Dated December 12, 2018.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Edward D. Bronfin". The signature is stylized and cursive.

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Edward D. Bronfin  
District Court Judge

cc: all counsel