

1 The movant has the burden of showing the absence of genuine disputes of material
2 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, once the movant shows
3 an absence of evidence to support the nonmoving party’s case, the burden shifts to the party
4 resisting the motion. The party opposing summary judgment must then “set forth specific
5 facts showing that there is a genuine issue for trial” and may not rest upon the pleadings.
6 *Anderson*, 477 U.S. at 256. To carry this burden, the nonmoving party must do more than
7 simply show there is “some metaphysical doubt as to the material facts.” *Matsushita Elec.*
8 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

9 In deciding a motion for summary judgment, the Court must view the evidence in the
10 light most favorable to the nonmoving party, must not weigh the evidence or assess its
11 credibility, and must draw all justifiable inferences in favor of the nonmoving party. *Reeves*
12 *v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 255.
13 Where the record, taken as a whole, could not lead a rational trier of fact to find for the
14 nonmoving party, there is no genuine issue for trial. *Matsushita*, 475 U.S. at 587.

16 **II. MATERIAL FACTS**

17 **A. Loans, guaranty, and default**

18 GE Franchise’s Statement of Facts (Doc. 37) recounts as follows:

19 On July 16, 2008, GE Franchise made two loans to Little Giant Enterprises, LLC.¹
20 The first loan was documented in an agreement labeled “Contract No. 15341001,” which
21 the parties refer to as the “1001 Loan Agreement.” (Doc. 37-2 at 2–51.) That loan was
22 for \$2,324,595, plus interest. The second loan was documented in an agreement labeled
23 “Contract No. 15341002,” which the parties refer to as the “1002 Loan Agreement.” (*Id.*
24 at 52–86.) That loan was for \$2,223,405, plus interest.

25 ¹ More precisely, General Electric Capital Corporation made the loans and later
26 assigned its rights in the loans to GE Franchise. The Wormsbys do not challenge this
27 assignment. For all practical purposes, GE Franchise is the lender and will be referred to
28 as such.

1 The Wormsbys are members of Little Giant Enterprises. On the day the loans
2 were made, they signed a written guaranty. At the bottom of each page were the words
3 “Contract No. 15341001.” (Doc. 37-3 at 2–8.) The second paragraph referred to a loan
4 of \$2,324,595. (*Id.* at 2.) This guaranty will be hereafter referred to as the “1001
5 Guaranty.” This is the only guaranty attached to GE Franchise’s Statement of Facts.

6 On May 1, 2015, GE Franchise notified Little Giant Enterprises and the
7 Wormsbys that the loans were in default. Later that month, Little Giant Enterprises filed
8 for bankruptcy. In October 2015, the bankruptcy court auctioned off substantially all of
9 Little Giant Enterprises’ assets for \$1,000,000. That amount (minus the costs of sale)
10 was applied to the debt owed to GE Franchise. In December 2015, additional collateral
11 was sold for \$15,500, which was also applied to the debt owed to GE Franchise.

12 **B. Lawsuit and revelation of a second guaranty**

13 GE Franchise filed this action against the Wormsbys on September 24, 2015.
14 (Doc. 1.) It claims the Wormsbys guaranteed the 1001 Loan Agreement and the 1002
15 Loan Agreement. It further claims that as of January 31, 2016, the Wormsbys owed
16 \$495,356.24 pursuant to those agreements, consisting of: (1) \$334,011.40 of principal,
17 (2) \$52,529.98 of interest, (3) \$13,236.06 in late charges, and (4) \$95,578.80 in fees
18 incurred in the bankruptcy case. Accordingly, it moves for summary judgment in this
19 amount, plus further interest accrued and fees and costs incurred in this matter. (Doc.
20 36.)

21 In their response, the Wormsbys raise only one objection. (Doc. 40.) They say
22 the 1001 Guaranty applies only to the 1001 Loan Agreement, not the 1002 Loan
23 Agreement. They point out that the guaranty identifies only one loan—\$2,324,595—and
24 refers to only one loan agreement—Contract No. 15341001. In addition, Sidney
25 Wormsby says he had a discussion with the lender about the different purposes and
26 interest rates of the two loans. Based on this discussion and the language of the guaranty,
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1 the Wormsbys claim they reasonably believed the 1001 Guaranty applied only to the
2 1001 Loan Agreement.

3 In reply, GE Franchise presents a copy of a second guaranty, signed by the
4 Wormsbys on the same day as the 1001 Guaranty. (Doc. 45-1.) At the bottom of each
5 page of this second guaranty are the words “Contract No. 15341002.” (*Id.* at 2–8.) The
6 second paragraph refers to a loan of \$2,223,405. (*Id.* at 2.) This guaranty will be
7 hereafter referred to as the “1002 Guaranty.” GE Franchise says the 1002 Guaranty
8 debunks the Wormsbys’ claim that they did not guarantee the 1002 Loan Agreement.²

9 In light of this revelation, the Court allowed GE Franchise to amend its complaint
10 to include a reference to, and copy of, the 1002 Guaranty. (Doc. 48.) The Court also
11 allowed the Wormsbys to file a sur-reply, “limited to addressing” the amended complaint.
12 (*Id.*)

13 In sur-reply, the Wormsbys make three arguments. (Doc. 50.) First, they object to
14 the timeliness of GE Franchise’s introduction of the 1002 Guaranty. They say GE
15 Franchise should have produced this guaranty along with the 1001 Guaranty during
16 discovery, not in its reply brief on a summary judgment motion.

17 Second, the Wormsbys object to the authenticity of the 1002 Guaranty.
18 Specifically, Sidney Wormsby swears in a declaration that he “do[es] not recall signing”
19 the 1002 Guaranty and that he “ha[s] concerns about the authenticity of the signature.”
20 (Doc. 51-3 at 3.) His “concerns” are that three of the letters in his signature on the 1002
21 Guaranty are “different” from his signature in other loan documents and that “the
22 signature in general is not how [he] signs [his] name.” (*Id.*) Hollis Wormsby, however,
23 has not contested the authenticity of his signature on the 1002 Guaranty.

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26 ² GE Franchise also argues, in the alternative, that the 1001 Guaranty
27 unambiguously applies to both loan agreements. The Court does not address this
28 argument.

1 Third, the Wormsbys criticize GE Franchise’s previous behavior toward Little
2 Giant Enterprises. They claim that (1) in 2012 GE Franchise refused to allow Little Giant
3 Enterprises to refinance one of its loans at a lower interest rate, and (2) in 2014 GE
4 Franchise applied one of Little Giant Enterprises’ payments to the loan with the lower
5 interest rate, contrary to Little Giant Enterprises’ instruction, thereby contributing to
6 Little Giant Enterprises’ ultimate bankruptcy.

7 Oral argument was held on July 26, 2016. At oral argument, it became clear that
8 Sidney Wormsby was not affirmatively *denying* that he signed the 1002 Guaranty, but
9 was simply requiring GE Franchise to *prove* authenticity. Accordingly, the Court
10 allowed GE Franchise to file proof of authenticity and allowed the Wormsbys to
11 respond. GE Franchise has filed a sworn declaration of its Vice President, stating that the
12 signed copy of the 1002 Guaranty had been kept in the ordinary course of business and
13 that the Wormsbys’ signatures on that document appear to match their signatures on other
14 loan documents. (Doc. 55-1.) In response, Sidney Wormsby has filed another sworn
15 declaration, criticizing GE Franchise’s declaration and reiterating that he “recall[s]”
16 signing only one guaranty. (Doc. 56-1.)

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18 **III. ANALYSIS**

19 **A. Consideration of the second guaranty is proper, despite the Wormsbys’**
20 **objections to timeliness and authenticity.**

21 **1. Timeliness**

22 GE Franchise’s failure to produce a copy of the 1002 Guaranty during discovery
23 does not prevent the Court from considering it now. Discovery deadlines are not
24 sacrosanct. *See* 6A Charles Alan Wright, Arthur R. Miller, et al., *Federal Practice and*
25 *Procedure* § 1522.2 (3d ed., Apr. 2016 update) (noting “courts have allowed scheduling
26 orders to be amended” to “extend discovery deadlines”).

27 Here, there is good reason to consider the 1002 Guaranty even though it was
28 introduced after discovery. First, there is no indication that GE Franchise’s delay was

1 intentional. Omission of the 1002 Guaranty from the record does not benefit GE
2 Franchise. Indeed, GE Franchise appears not to have known of this omission until the
3 Wormsbys pointed it out in response to GE Franchise's summary judgment motion.
4 Once GE Franchise learned of this oversight, it promptly produced a copy.

5 Second, consideration of the 1002 Guaranty does not unfairly prejudice the
6 Wormsbys. The Court gave the Wormsbys plenty of time for a sur-reply, as well as oral
7 argument on the matter. *Cf., e.g., Sanden v. Mayo Clinic*, 495 F.2d 221, 228 (8th Cir.
8 1974) (trial court did not abuse discretion in scheduling deposition of defendant two days
9 before civil trial).

10 Third, the 1002 Guaranty is an important document in this case. It directly refutes
11 the Wormsbys' argument that they did not guarantee the 1002 Loan Agreement, which is
12 the only argument they made in response to GE Franchise's summary judgment motion.
13 The Court should not ignore an essential document based on a technicality.

14 **2. Authenticity**

15 The Wormsbys' objection to the authenticity of the 1002 Guaranty also fails. In
16 an ordinary case, disagreement as to the genuineness of a signature might well prevent
17 summary judgment. But this is not an ordinary case.

18 Sidney Wormsby does not actually *deny* signing the 1002 Guaranty. This was
19 made clear during questioning of the Wormsbys' counsel at oral argument:

20 COURT: I take it you have nothing more than what
21 you -- your client has said so far in his affidavit, which is "I
22 don't remember this --"

23 COUNSEL: Correct.

24 COURT: "-- something's different from some of my
25 other" -- as I said, that does not look to me like a denial. That
26 doesn't look -- tell me how that would be sufficient to create
a disputable -- disputed question of fact as to the authenticity
of the signature.

27 COUNSEL: Well, it has to be authenticated to be
28 admitted. That's the first step.

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COURT: That's a different point, though, and I understand your point on that. Your point is [opposing counsel] hasn't carried his burden. But suppose I get to the next question. How -- how would it be a contradiction, if he had carried his burden, for [your client] to say "I don't remember and this isn't exactly the same as some of my other signatures." Doesn't look like that's an issue of fact, either.

COUNSEL: No.

COURT: So -- all right. Go ahead. Whatever you'd like to say.

COUNSEL: There's really nothing else to say, Your Honor. It's all in the brief. No, that's it, Your Honor. Thank you.

Sidney Wormsby says he does not "recall" signing the 1002 Guaranty, but one would not expect him to recall signing each of several documents in a loan transaction six years ago. He also says he "ha[s] concerns about the authenticity of the signature," but the concerns are based on minor variations between that signature and his signature on other loan documents. Such variations are entirely normal. Indeed, even among his signatures on other loan documents, there are variations. (*Compare* Doc. 37-2 at 27 *with id.* at 44, *id.* at 50, *id.* at 77, *id.* at 85, Doc. 37-3 at 8, *and* Doc. 51-3 at 5.) Having compared those signatures with the signature on the 1002 Guaranty (Doc. 45-1 at 8), the Court finds that they are remarkably similar and the signature on the 1002 Guaranty does not stand out in a suspicious way. If anything, the slight variation between that signature and the other signatures shows that it was *not* traced from a nearby document.

In addition, the circumstances surrounding the 1002 Guaranty confirm the signature's authenticity. It is undisputed that on July 16, 2008, GE Franchise agreed to make two substantial loans to Little Giant Enterprises, of which the Wormsbys were members. It is also undisputed that on that same day, the Wormsbys signed a guaranty for the first loan. In this context, it is reasonable to infer that the Wormsbys also signed a guaranty for the second loan. This is especially so because only Sidney Wormsby is

1 demanding further proof of authenticity. The other signer, Hollis Wormsby, has not
2 objected to the authenticity of his signature on the 1002 Guaranty.

3 Now that GE Franchise has offered credible evidence of the 1002 Guaranty's
4 authenticity, the Wormsbys cannot defeat summary judgment simply by pointing to the
5 absence of a specific memory and the presence of normal variations in signatures. *See*
6 *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1252 (3d Cir. 1987) (affirming
7 summary judgment despite plaintiff's forgery claim, where district court found the
8 signature "remarkably similar to the signatures of the plaintiff that appear on numerous
9 exhibits attached to his opposition to the motion for summary judgment"); *accord*
10 *Jackson v. Allstate Ins. Co.*, 441 F. Supp. 2d 728, 735 (E.D. Pa. 2006) (granting summary
11 judgment where plaintiff alleging forgery "only testified that she does not remember
12 whether she signed" and not "that she distinctly remembers *not* signing"). To allow the
13 Wormsbys to avoid summary judgment without actually denying authenticity would
14 effectively allow any loan guarantor to avoid summary judgment despite a signed
15 agreement. That cannot be right. Defeating summary judgment does not require much,
16 but it requires more than "some metaphysical doubt as to the material facts." *Matsushita*
17 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

18 Thus, the Court considers the 1002 Guaranty for purposes of summary judgment.
19 By its terms, the 1002 Guaranty obliges the Wormsbys to repay the second loan and its
20 associated debts. Therefore, summary judgment will be granted against the Wormsbys as
21 to the remaining \$495,356.24 owed to GE Franchise, plus further accrued interest.

22 **B. Consideration of the Wormsbys' claims against GE Franchise raised in**
23 **their sur-reply is improper.**

24 The Court authorized the Wormsbys to file a sur-reply "limited to addressing" GE
25 Franchise's amended complaint. GE Franchise amended its complaint in only one
26 respect: adding a reference to, and copy of, the 1002 Guaranty. Nevertheless, the
27 Wormsbys used the sur-reply as an opportunity to criticize GE Franchise's past behavior
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1 toward Little Giant Enterprises. Specifically, the Wormsbys claim that (1) in 2012 GE
2 Franchise did not allow Little Giant Enterprises to refinance one of its loans, and (2) in
3 2014 GE Franchise applied one of Little Giant Enterprises' payments to the loan with the
4 lower interest rate, contrary to Little Giant Enterprises' instruction.

5 These claims exceed the scope of the sur-reply. Moreover, the Wormsbys do not
6 explain how these claims refute GE Franchise's summary judgment motion, nor do they
7 identify any other purpose for which the Court may consider claims introduced in a final
8 brief on a summary judgment motion.

9 **C. GE Franchise is not entitled to full attorney fees and costs.**

10 GE Franchise seeks not only the repayment of the \$495,356.24 debt and interest,
11 but also attorney fees and costs pursuant to its contracts with the Wormsbys and A.R.S.
12 § 12-341.01. GE Franchise anticipates filing "a separate application for fees and costs
13 detailing the amount of attorneys' fees and costs that it has incurred in this matter up to
14 the date of entry of the judgment." (Doc. 36 at 7-8.)

15 Under the loan agreements and guaranties, GE Franchise is entitled to
16 reimbursement for "reasonable" attorney fees and costs. (Doc. 37-2 at 22, 77; *see also*
17 Doc. 37-3 at 2; Doc. 45-1 at 2.) Likewise, A.R.S. § 12-341.01 authorizes an award of
18 "reasonable" attorney fees. The statute gives the Court discretion whether to award fees,
19 but the contractual provisions are mandatory. *Chase Bank of Arizona v. Acosta*, 179
20 Ariz. 563, 575, 880 P.2d 1109, 1121 (Ct. App. 1994). Thus, the Court will award GE
21 Franchise reasonable fees and costs.

22 Various factors bear on the reasonableness of a requested attorney fee award,
23 including the time and labor required of counsel, novelty and difficulty of the questions
24 presented, and any other matters deemed appropriate under the circumstances. LRCiv
25 54.2(c)(3). In this case, GE Franchise failed to produce a copy of the 1002 Guaranty
26 during discovery. The absence of this guaranty was the basis of the Wormsbys'
27 opposition to summary judgment as well as subsequent filings and oral argument. GE
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1 Franchise should not be rewarded for its mistake. Therefore, attorney fees incurred after
2 the filing of GE Franchise's summary judgment motion are not reasonable and will not be
3 awarded.
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5 IT IS THEREFORE ORDERED that GE Franchise's Motion for Summary
6 Judgment (Doc. 36) is granted.

7 IT IS FURTHER ORDERED that GE Franchise submit proof or stipulation as to
8 the commencement date, rate, and amount of pre-judgment interest not included in the
9 \$495,356.24 debt identified in its motion. Post-judgment interest will accrue at the
10 applicable federal rate.

11 IT IS FURTHER ORDERED that GE Franchise may submit a separate application
12 for specific fees and costs in compliance with LRCiv 54.1 and 54.2.
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14 Dated this 8th day of August, 2016.

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17 _____
18 Neil V. Wake
19 Senior United States District
20 Judge
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