CASE NO. 13-2045

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TED GATZAROS and MARIA GATZAROS

Plaintiffs-Appellants

v.

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS and THE KEWADIN CASINO GAMING AUTHORITY

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT FOR THE EASTERN DISTRICT OF MICHIGAN

HON. PAUL D. BORMAN
2:13-cv-10291

BRIEF FOR APPELLANTS

Thomas L. Stroble
Mitchell H. Boardman
The Stroble Law Firm, P.C.
2525 S. Telegraph Rd. Ste. 100
Bloomfield Hills, MI 48302
(248) 454-0800

October 8, 2013

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-2045 Case Name: Gatzaros v. Sault Ste. Marie Tribe, et al.

Name of counsel: Thomas L. Stroble

Pursuant to 6th Cir. R. 26.1, Ted Gatzaros and Maria Gatzaros
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on October 8, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Thomas L. Stroble

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request that this Court of Appeals hear oral argument in this case. Fed.R.App.P. 34(a). Oral argument would give the Appellants an opportunity to answer any questions this Court of Appeals may have concerning the relevant issues and arguments. Due to the importance and enormity of the rights and amount in dispute, Appellants would like every opportunity to explain their position. Thus, oral argument would be beneficial for the Appellants and the Court.

JURISDICTIONAL STATEMENT

The United States District Court has jurisdiction in this case pursuant to 28 USC § 1334. District Courts in the United States have original jurisdiction over all bankruptcy cases and all civil proceedings arising under or related to cases under 8 USC § 1334. Appellees removed this case from the Wayne County Circuit Court to the United States Bankruptcy Court for the Eastern District of Michigan. Thereafter, the reference to Bankruptcy Court was withdrawn to the District Court pursuant to 28 USC § 157(d).

Pursuant to FRAP 3 and 4, the Court of Appeals has jurisdiction over Appellant's appeal as of right of the District Court's July 9, 2013 Opinion and Order Granting (1) Defendants' Motion to Dismiss for Failure to State a Claim and (2) Denying Motion to Hold Plaintiffs in Contempt of Court. The Order and Opinion dismissed the case and constitutes a final order of the District Court. Appellants timely filed their Notice of Appeal on August 2, 2013. Further, pursuant to the Court of Appeals' Scheduling Order, Appellants timely filed their Brief on October 8, 2013.

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STATEMENT OF FACTS

I. Description of the Agreements.

Plaintiff Ted Gatzaros was a long time business leader in Michigan. Ted with his wife Maria (together referred to as "Appellants") engaged in numerous business ventures in Detroit, including restaurants, gaming and real estate. Prior to July 28, 2000, Appellants owned a substantial interest in Monroe Partners, LLC ("Monroe"). Monroe owned 50% of Greektown Casino, LLC which had been licensed by the Michigan Gaming Control Board to own and operate the Greektown Casino in Detroit, Michigan. The Sault Ste. Marie Tribe of Chippewa Indians ("Tribe") is a federally recognized tribe. The Kewadin Casinos Gaming Authority ("Authority") is the political subdivision of the Tribe which manages and controls the Tribe's vast gaming, hospitality and business ventures (Together referred to as "Appellees").

In July of 2000, Appellants were interested in selling their membership interests in Monroe. On July 28, 2000, Appellants and Monroe executed Amended and Restated Limited Liability Company Redemption Agreements ("Redemption Agreements") (RE 14.1, Response page ID Nos. 144-183). Appellants each agreed to redeem their membership interests in Monroe in exchange for compensation. Contemporaneously with the execution of the Redemption Agreements, Monroe sold and transferred Appellants' redeemed membership interests in Monroe to Kewadin Greektown Casino LLC ("Kewadin") pursuant to the July 28, 2000

Amended and Restated Limited Liability Company Subscription Agreement ("Subscription Agreement") (RE 14.2, Response Page Nos. 184-211). Under the Subscription Agreement, the funds paid by Kewadin to Monroe were to be transferred directly to Appellants as compensation for their redeemed membership interests. (RE 14.2, Response Page No. 190). The Subscription Agreement expressly states that Appellants are intended third party beneficiaries. (RE 14.2, Response Page ID No204).

On July 28, 2000, Appellees executed the Guaranty. (RE 14.3, Response Page Nos. 213-221). Under the terms of the Guaranty, Appellees agreed to guaranty payment of the Subscription Amount owed to Monroe upon the default of Kewadin. Under Section 13 of the Guaranty, entitled "Third Party Beneficiaries", expressly states that each and every representation, warranty, agreement, covenant and guaranty made by Appellees is for the express benefit of Appellants, as Retiring Members, as if made directly to them. [1] The following sections of the Guaranty are critical to this case:

> 2. **Funding Obligations. Subject to the limitations**, terms and conditions set forth in this Guaranty Agreement, the Sault Tribe and the

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[1] MCL 600.1405 provides that intended third party beneficiaries, such as Appellants, have the right to enforce the promises made to Monroe under the Guaranty as if those promises were made directly to the Appellants. A third party beneficiary of a promise stands in the shoes of the promisee and is afforded the right under the common law and MCL 600.1405 to enforce the promise against the promisor. *Koppers Co., Inc. v. Garling & Langlois* 594 F.2d 1094, 1098 (6th Cir. 1979). Appellants are standing in Monroe's shoes and enforcing all promises and waivers under the Guaranty as if those promises and waivers were made directly for them.

Authority, for value received, jointly and severally, unconditionally and absolutely guaranty to fund the Subscription Amount, as when due from the Subscriber under the Subscription Agreement, upon the event of default by the Subscriber in making payments of the Subscription Amount, as when due, and receipt by the Guarantors of notice and demand from Monroe.

3. **Limitation.** The aggregate **Funding Obligations are limited** to the sum of the following amounts:

(a) The amount by which the Greektown Distributions exceed any portion of the Greektown Distributions which is restricted from use for these purposes or similarly sequestered from time to time ("Restriction"), if such Restriction is required by National City in connection with the replacement letter of credit facility for the existing Greektown $75 Million LaSalle Bank letter of credit facility, contemplated by the commitment from National City Bank commitment letter dated as of June 22, 2000, and any renewals thereof ("Replacement Credit Facility") provided however, that (i) the Subscriber and the Guarantors shall use commercially reasonable best efforts in negotiating the terms of the Replacement Credit Facility, so as to eliminate such a Restriction and/or cause such a Restriction to be as limited as possible so as to make as much of the Greektown Distributions available for purposes of payment of the Funding Obligations as possible, (ii) as and when the pledge and/or restrictions on Greektown Distributions shall be released, the corresponding Greektown Distributions shall be available for funding on account of the Subscription Amount, and (iii) Subscriber and Guarantors shall not grant any new or further pledge or otherwise agree to sequester or restrict the Greektown Distributions; and

(b) The amount of the Tribal Tax Receipts, to the extent, and only to the extent not included in calculating the Greektown Distributions. (Hereinafter referred to as "Limitation").

8. **Waivers.** **...The Sault Tribe and the Authority waive notice of acceptance of this Guaranty Agreement and presentment, demand, protest, notice of protest, dishonor, notice of dishonor, notice of default, notice of intent to accelerate or demand payment of any Funding Obligations, any and all other notices to which the Sault Tribe and the Authority might otherwise be entitled, and diligence in collecting any Funding Obligations, and agree that Monroe may, once or any number of times, modify the terms of any Funding Obligations, compromise,**

> **extend, increase, accelerate renew or forbear to enforce payment of any or all Funding Obligations, all without notice to the Sault Tribe and the Authority** and without affecting in any manner the unconditional obligation of the Sault Tribe and the Authority under this Guaranty Agreement.
>
> **The Sault Tribe and the Authority unconditionally and irrevocably waive each and every defense and setoff of any nature which, under principles of guaranty or suretyship, would operate to impair or diminish in any way the obligation of the Sault Tribe and the Authority under this Guaranty Agreement, ... and acknowledge that as of the date of this Guaranty Agreement no such defense or setoff exists**. (Hereinafter referred to as "Waivers"). (RE 14-3, Response Page Nos. 213-216, Emphasis added).

The Guaranty included only one "Funding Obligation" which is set forth in Section 2 (RE 14.3 Response Page No. 214). In the event of Kewadin's default, Appellees were obligated to "fund" the "Subscription Amount" that remained due and owing. Under the "Limitation", the Guaranty restricted Appellees' "Funding Obligations" to the amount of Tribal Tax Receipts, to the extent not included in calculating Greektown Distributions (RE 14.3 Response Page No. 214). Greektown Distributions constituted any and all distributions and payments of whatever nature made by Greektown Casino, LLC, Kewadin, and/or Monroe to Appellees on account of their ownership interest in, affiliation with or lending arrangements with Kewadin, Greektown Casino, LLC and/or Monroe (RE 14.3 Response Page Nos. 214-215).

Appellees' Guaranty was intended to protect Appellants' investment and in order to induce Appellants to agree to the redemption of their membership interests in Monroe, and thus the Greektown Casino ("Casino"). In reliance upon the

Guaranty, Appellants did in fact agree to the redemption of their membership interests, which were valued at $132,500,000.00. Under the "Limitation", the Guaranty is subject to conditions that must occur in order to cause Appellees' repayment of the debt to Appellants in the event of Kewadin's default. In anticipation that these conditions may never occur or that the limitations might be too restrictive to actually result in repayment, the Guaranty was drafted with the "Waivers" Provision. The "Waivers" granted Appellants the right to modify the terms of the Appellees' "Funding Obligation", including the limitation term that restricted funding and thus repayment of the debt.

On November 10, 2004, Monroe and Appellees agreed that Appellants were owed $107,200,000.00. On a number of occasions, Appellants delayed acceptance of payment in an effort to assist Kewadin and the Casino with their finances (RE 14.4 Response Page Nos. 224-241). Due specifically to financial problems involving Kewadin and Casino, Appellants agreed to forbear in seeking full payment under the November 10, 2004 Confidentiality and Standstill Agreement ("Standstill Agreement") (RE 14.4 Response Page Nos. 224-241). Appellants agreed to forbear from accepting payment based upon Appellees' written reaffirmation of their Guaranty obligations, including the acknowledgment that the Appellees have no defenses (RE 14.4 Response Page No. 225). This modification of the underlying

debt was agreed to by Kewadin as well as the Appellees (RE 14.4 Response Page Nos. 230-231).

By May 29, 2008, Kewadin breached its payment obligations under the Subscription Agreement. Without receipt of the Subscription Amount from Kewadin, Monroe breached the terms of the Redemption Agreement. On May 29, 2008, Monroe and Kewadin each filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court for the Eastern District of Michigan to discharge their obligations under the Subscription and Redemption Agreements.

II. Modifications to Appellees' "Funding Obligation"

Following Kewadin's default, the limitations in the Guaranty prevented Appellees from making any payments toward the debt. The conditions in the "Limitation" which would have allowed funding, and thus repayment, never occurred. Appellants exercised their rights under the "Waivers' Provision to modify, extend and increase Appellees' "Funding Obligations" without notice so that the "Funding Obligations" were no longer subject to the restrictive funding limitations. On October 18, 2012, Appellants advised Appellees that their "Funding Obligations" had been modified, extended and increased as follows:

> 2. **Funding Obligation.** The Sault Tribe and Authority, for value received, jointly and severally, unconditionally and absolutely, guaranty to fund the Subscription Amount upon the event of default by the Subscriber in making payment of the Subscription Amount upon receipt by the Guarantors of notice and demand from Monroe and/or any other Retiring Members. As of October 17, 2012, the Guaranty is no longer subject to the Section 3 hereunder, entitled

> "Limitation". The Tribe and/or Authority shall immediately pay to Ted Gatzaros and Maria Gatzaros, as Retiring Members, upon delivery of written demand, all sums due them, including all principal and interest, arising from the Subscriber's default of the Subscription Agreement…

(RE 14.5 Response Page Nos. 243-245)

In accordance with the above "Funding Obligation", Appellants demanded Appellees immediately pay the sum of $73,903,863.00 pursuant to the amended "Funding Obligation" (RE 14.5 Response Page Nos. 243-245). Appellees refused to pay Appellants and have denied all liability under the Guaranty. Appellees claim that Appellants have no right to modify or amend the Guaranty.

STATEMENT OF ISSUES PRESENTED

I. Whether the Guaranty Granted Appellants the right to modify, without notice, the Appellees' Funding Obligations so that they were no longer subject to limitations?

II. Whether the District Court erred when it held that Appellees only waived those defenses set forth in the *Restatement 3rd of Suretyship and Guaranty*?

STATEMENT OF THE CASE

On November 14, 2012, Appellants' exercised their contractual right to seek declaratory relief. On that date, Appellants filed a Complaint for Declaratory Relief against Appellees in the Wayne County Circuit Court (Case No. 12-015185-CK). In part, Appellants sought an Order declaring that Appellants have the right under the

Guaranty to modify, increase, extend and accelerate the "Funding Obligations" to require the Appellees to immediately fund and pay all sums due and owing including $73,903,863.00 as well as accrued interest.

This action was removed to District Court by Appellees. On February 6, 2013, Appellants filed an Amended Complaint for Declaratory Relief (RE 14.6 Response Page Nos. 247-256). Appellants sought to have the District Court declare that they had the right to modify the Appellees' "Funding Obligation" so that they were no longer subject to restrictive limitations that precluded funding of the debt. Further, Appellants sought to have the District Court declare that they properly modified the "Funding Obligation." Appellees subsequently brought a Motion to Dismiss pursuant to Fed.R.Civ.P. Rule 12(b)(6). On July 9, 2013, the District Court issued its Order and Opinion (1) Granting the Defendants' Motion to Dismiss for Failure to State a Claim and (2) Denying the Motion to Hold Plaintiffs in Contempt (RE 20, Opinion and Order Page Nos. 758-786). Appellants are appealing only the portion of the District Court's Order that dismissed their case for failure to state a claim.

SUMMARY OF ARGUMENT

The District Court erred in granting Appellees' Motion to Dismiss. Appellants' Amended Complaint for Declaratory Relief stated claims upon which relief can be granted. Appellants were authorized by the Guaranty's "Waivers" to once or any number of times modify the terms of Appellees' "Funding Obligations"

without notice. One of those modifiable terms provides that Appellees' "Funding Obligations" are subject to limitations. Thus, Appellants had the right to modify the "Funding Obligation" in Section 2 so that it was no longer subject to limitations which were precluding Appellees' funding of the debt. Further, under the "Waivers", Appellees' waived their defenses, including contract defenses, to Appellants' right to modify the terms of the "Funding Obligation".

In granting Appellees' Motion to Dismiss, the District Court failed to enforce the Guaranty's language as written and further added language to the Guaranty to reach its conclusions. Despite Appellees' waiver of defenses, the District Court erroneously held that they did not waive their contractual defenses. Appellants request that this Court of Appeals reverse the District Court's Opinion and Order as they have stated a claim for declaratory relief upon which relief can be granted.

ARGUMENT

I. THE GUARANTY GRANTED THE APPELLANTS THE RIGHT TO MODIFY THE APPELLEES' FUNDING OBLIGATION SO THAT IT WAS NO LONGER SUBJECT TO LIMITATIONS.

Standard of Review:

Determining whether the District Court properly dismissed a claim is a question of law subject to *de novo* review. *Mertik v. Blalock,* 983 F.2d 1353, 1356 (6th Cir.1993). In conducting this review, the Court of Appeals must "construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations

and permissible inferences therein." *Gazette v. City of Pontiac,* 41 F.3d 1061, 1064 (6th Cir.1994). A motion to dismiss may be granted under Fed.R.Civ.P. 12(b)(6) "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984).

A guaranty agreement involves three parties: the obligor, obligee and the guarantor. In this case, Kewadin is the obligor that is liable to Appellants (obligee) for the underlying debt. In the event of default, Appellees guaranteed to "fund" the underlying debt. In this Guaranty, Kewadin's "underlying debt" and Appellees' "Funding Obligations" are separately defined terms. The Guaranty included a "Waivers" provision where Appellees agreed Appellants could modify the terms their "Funding Obligations" without notice. The "Waivers" never stated that Appellants can waive Kewadin's underlying debt without notice. This distinction is important because only Appellees' "Funding Obligation" is subject to limitation terms that prohibit funding.

In their declaratory action, Appellants only sought to modify the restrictive limitation terms to which the "Funding Obligation" was subject. The District Court was required by Michigan law to enforce the "Waivers" as written. Contrary to written language, the District Court wrongfully held that the "Funding Obligations" in the "Waivers" was meant as Kewadin's underlying debt. (RE 20 Opinion and

Order Page ID Nos. 774-776). Therefore, the District Court erroneously held Appellants' efforts to modify the limitation terms to Appellees' "Funding Obligation" was an impermissible modification of the terms of the Guaranty.

To support its erroneous holding, the District Court wrongfully added general waiver language to this Guaranty that actually contradicted the express terms of the "Waivers" (RE 20 Opinion and Order Page ID No. 774). Michigan law states that any material alteration of the underlying debt operates to completely discharge any guaranty of that debt. *Wilson Leasing Co. v. Seaway Pharmacal Corp.*, 53 Mich.App. 359, 369, 220 N.W.2d 83 (1974). Guaranty agreements may include a waiver by the guarantor of notice of any modifications to the underlying debt in order to prevent an unwanted discharge of the guaranty. *Harvard Drug Group, LLC v. Linehan*, 684 F.Supp.2d 921, 927 (E.D. Mich. 2010). Contrary to the District Court, Appellants have never claimed a right to modify Kewadin's underlying debt without notice (RE 20, Opinion and Order Page No. 776). In this case, the parties did not draft such a general waiver authorizing any modifications to Kewadin's underlying debt without notice. Instead, the "Waivers" expressly state Appellants may "once or any number of times, modify the terms of any Funding Obligations" (RE 14.3 Response Page No. 216). Therefore, the District Court's ruling must be reversed.

A. The Funding Obligations Are Not Kewadin's Underlying Indebtedness.

Courts, when interpreting any contract under Michigan law, must look for the intent of the parties in the words used in the instrument. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367,372 (6th Cir. 1998). It is not the function of the court under the guise of construction to add words to a contract which are not found in it. *Standard Oil Co. v. Ogden Moffett Co.*, 242 F.2d 287,292 (6th Cir. 1957). The District Court did not want Appellants to have the right to modify the limitation term to Appellees' "Funding Obligations", without notice. To achieve this result, the District Court violated Michigan law when it wrongfully changed the language of the "Waivers" to declare that the phrase "Funding Obligations" in the "Waivers" means Kewadin's underlying debt (RE 20 Opinion and Order Page ID Nos. 776).

Under the Guaranty, there is no way to confuse Kewadin's underlying debt with Appellees' "Funding Obligations". The Subscription Agreement defines the "Subscription Amount" as the original underlying debt of $265,000,000.00 that Kewadin owed Appellants (RE 14.1, Response Page No. 152 & RE 14.2 Response Page No.189). Further, the Guaranty expressly states that;

> WHEREAS, the Subscriber's ("Kewadin's) obligation to pay the Subscription Amount… (RE 14.3 Response Page No. 213).

It is clear that words "Subscription Amount" is defined as the underlying indebtedness owed by Kewadin.

The Guaranty contains only one funding obligation which it defines in Section 2 as follows:

> 2. **Funding Obligations. Subject to the limitations**, terms and conditions set forth in this Guaranty Agreement, **the Sault Tribe and the Authority**, for value received, jointly and severally, unconditionally and absolutely **guaranty to fund** the Subscription Amount, as when due from the Subscriber under the Subscription Agreement, upon the event of default by the Subscriber in making payments of the Subscription Amount, as when due, and receipt by the Guarantors of notice and demand from Monroe. (RE 14.3 Response Page No. 214, Emphasis added).

The "Funding Obligation" is not defined as Kewadin's underlying debt or obligation. Unlike Kewadin, only Appellees have a "Funding Obligation" which is further subject to limitations upon funding. Rather than referring to Kewadin's underlying debt, the "Waivers" only state that terms of Appellees' "Funding Obligations" are modifiable without notice. If the parties had intended otherwise, they would have included the words "Kewadin's underlying debt" or "Subscription Amount" in the "Waivers". Due to the fact that they are separately defined terms, there is no support for the District Court's ruling that the 'Waivers" reference to "Funding Obligations" actually refers to Kewadin's underlying debt. Therefore, Appellants stated a proper declaratory claim for relief concerning their right to modify the terms of Appellees' "Funding Obligations".

B. The Guaranty's Security Provision Does Not Define The Funding Obligation As Kewadin's Underlying Debt.

The District Court erroneously held that the language in Section 6 of the Guaranty, entitled "Security", requires a finding that "Funding Obligations" be defined as Kewadin's underlying debt (RE 20, Opinion and Order Page Nos. 775). The District Court claims the following language from the Guaranty's "Security" provision requires that the "Funding Obligation" be defined as Kewadin's underlying debt:

> The Sault Tribe and the Authority agree that no security now or later held by Monroe for payment of the Funding Obligations, whether from the Subscriber ("Kewadin"), either Sault Tribe and/or Authority or otherwise....
>
> The Sault Tribe and the Authority acknowledge and agree that Monroe has no obligation to acquire of perfect any lien on any security interest in any assets, whether realty or personalty, to secure payment of the "Funding Obligations... (RE 20, Opinion and Order Page Nos. 774-775).

Based upon its reading of the above language, the District Court stated it failed to understand how the "Funding Obligations" could not be the underlying debt when the "Funding Obligations" "could be paid by the Subscriber, the Tribe or otherwise." (RE 20, Opinion and Order Page Nos. 775). The relevant language of the "Security" provision shows that Appellees' "Funding Obligations" were never intended to be defined as Kewadin's underlying debt.

Under "Security, the Appellees had an obligation to provide Appellants with security for its "Funding Obligations" under the Guaranty (RE 14.3 Response, Page Nos. 215-216). Since the District Court only cited part of the "Security" language, the remainder of the sentences it cites are as follows:

> As security for the Sault Tribe and Authority guaranty and obligations under this Guaranty Agreement, the Sault Tribe and Authority…assign to Monroe as collateral **for the Funding Obligations of the Sault Tribe and Authority**…The Sault Tribe and the Authority agree that no security now or later held by Monroe for payment of the Funding Obligations, whether from the Subscriber ("Kewadin"), either Sault Tribe and/or Authority or otherwise, and whether in the nature of a security interest, pledge, lien, assignment, setoff, guaranty, indemnity, insurance or otherwise, shall affect in any manner the unconditional obligation of the Sault Tribe and Authority under this Guaranty Agreement, and Monroe, in its sole discretion, without notice to the Sault Tribe and Authority, may release, exchange, enforce and otherwise deal with any security in accordance with the security documents pertaining to the same without affecting in any manner the unconditional obligation of the Sault Tribe and Authority under this Agreement. The Sault Tribe and the Authority acknowledge and agree that Monroe has no obligation to acquire of perfect any lien on any security interest in any assets, whether realty or personalty, to secure payment of the Funding Obligations, and the Sault Tribe and Authority are not relying upon any assets in which Monroe has or may have a lien or security interest for payment of the Funding Obligations (RE 14.3 Response, Page Nos. 215-216, emphasis added).

There is absolutely no language in the "Security" provision that defines Appellees' "Funding Obligations" as Kewadin's underlying debt. To the contrary, the "Security" provision declared that the "Funding Obligations" belonged to the Appellees. The language only states no matter where Appellees obtain their security for payment of their "Funding Obligations", whether from Kewadin or from anyone else on Earth, their obligations under the Guaranty shall not be affected. This language does not state security obtained from Kewadin or anyone else is actually payment for the underlying debt.

The District Court tried to support its Opinion and Order with Guaranty language in order to deny Appellants' the right to modify the limitation terms to

Appellees' "Funding Obligation." There is no doubt that the "Funding Obligation" is a defined term by the Guaranty owed only by Appellees and subject to limitation terms. The District Court cannot avoid this fact by redefining Appellees' "Funding Obligation" as Kewadin's underlying debt. As the District Court's Opinion and Order contradicts Michigan law and the Guaranty, it must be reversed. It is evident Appellants stated a proper and legal claim upon which relief can be granted for modification of Appellees' "Funding Obligation".

C. The District Court Erred When It Held That Limitations Were Not A Term Of The Funding Obligation.

Contrary to the Guaranty's actual language, the District Court erroneously held the Section 3 "Limitation" upon funding was not a "term" of Appellees' "Funding Obligation". (RE 20, Opinion and Order, Page No. 778). The "Waivers" expressly state that Appellants had the right to modify the terms of any "Funding Obligations" without notice. Section 2, entitled "Funding Obligation", clearly states Appellees' duty to fund is subject to limitations (RE 14.3 Response Page No. 214). This lone limitation term is found in the "Limitation" (RE 14.3 Response Page No. 214). The "Limitation" even states that its limitations are a term of the Appellees' "Funding Obligation" ("The aggregate Funding Obligations are limited to the sum of the following amounts…"). (RE 14.3 Response Page No. 214). It is clear, by virtue of the language used in Sections 2 and 3, any limitation is an actual modifiable term of the Appellees' "Funding Obligation". Only Section 2 is subject to limitation

terms. Contrary to the District Court, a modification of the limitation term is not a modification of the entire Guaranty, but only a permissible modification of Appellees' "Funding Obligation".

Further, the "Waivers" used of the word "terms" to define what Appellants actually had the right to modify. The word "terms" in a contract is defined as "limitations" to the nature and scope of an agreement. *Staebler-Kempf Oil Co. v. Mac's Auto Mart, Inc.*, 329 Mich. 351, 355; 45 N.W.2d 316 (1951); *Webster's Third New International Dictionary* (2002) at 2358. Under Michigan law, contract language will be given its ordinary and plain meaning, rather than technical or strained construction. *Comerica Bank v. Lexington Ins. Co.*, 3 F.3d 939, 943 (6th Cir, 1993). Section 2 states "limitations" are a term of the Appellees' "Funding Obligation". Section 3 states that it provides the actual limitation to which Appellees' "Funding Obligations" is subject. The "Limitation" may be a separate provision of the Guaranty. However, under the "Waivers", to the extent that Section 2 provides limitations as a term to Appellees' "Funding Obligation", those limitations are modifiable so that the "Funding Obligation" is no longer subject to them.

The District Court erroneously held Appellants' October 18, 2012 letter wrongfully attempted to change non-modifiable terms of the Guaranty. (RE 20, Opinion and Order Page No. 776). The October 18, 2012 modification of

Appellees' "Funding Obligation" states that the "Guaranty was no longer subject to the limitations in Section 3" (RE 14.5 Response Page No. 244). Again, the "Limitation" in Section 3 only limited Appellees' "Funding Obligation" in Section 2 and not any other Guaranty section (RE 14.3 Response Page No. 214). Consistent with the "Waivers", Appellants' October 18, 2012 letter correctly modified the limitation terms so they no longer applied to Appellees' "Funding Obligation". Therefore, the District Court's Opinion and Order must be reversed because Appellants stated a proper and legal claim for modification to the terms of the Appellees' "Funding Obligation" in their Amended Complaint for Declaratory Relief.

D. The Appellant's Modification Of The Terms Of The "Funding Obligation" Was Consistent With The Terms Of The Guaranty, The Rules Of Contract Construction and Waiver.

The District Court wrongfully concluded that Appellants' attempted modification of the limitation term to Appellees' "Funding Obligations" violated the rules of contract construction. The District Court held that:

> It is a cardinal principle of construction of a contract is to be construed as whole; that all of its parts are to be harmonized so far as reasonably possible; that every word in it is to be given effect, if possible; and that no part is to be eliminated or stricken by some other **part unless such a result is fairly inescapable**. (RE 20, Opinion and Order Page No. 777, citing *Associated Truck Lines, Inc. v. Baer*, 346 Mich. 106, 110 (1956) (emphasis added).

The District Court the held that there was no showing of why the elimination of the limitations was fairly inescapable (RE 20, Opinion and Order Page No. 779).

Contrary to the District Court, the Guaranty's "Waivers" expressly authorized such modifications. Therefore, the resulting cancelation of the limitation term was fairly inescapable.

The District Court's failure to recognize the inescapable result of the modification is also a failure of the District Court to give effect to the very words of the "Waivers" which authorized the modification. The word "modification" is defined as a "change, alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and the effect of the subject-matter intact." *Black's Law Dictionary*, p. 1004. Through the use of the specific words in the "Waivers", Appellees agreed that it is fairly inescapable that the limitation terms to their "Funding Obligations" can be changed or cancelled. The very purpose of the Guaranty was to ensure funding and repayment of the debt. The modification of the limitation terms of the "Funding Obligation" maintained that purpose.

Under the Michigan law, contracts which are not ambiguous are not open to construction and must be enforced as written. *Pierson Sand & Gravel, Inc. v. Pierson Township*, 851 F.Supp 850, 858 (W.D. Mich. 1994). In this case, the Guaranty is not ambiguous and must be enforced as written. However, the District Court held that the result is absurd and not intended (RE 20, Opinion and Order Page No. 779). The very purpose of a guaranty is to ensure payment of an underlying

debt by a third party in the event the obligor defaults. In this case, the Appellees' "Funding Obligation" was subject to limitation terms that made the eventual funding of the debt impossible. If given the effect of the District Court, the Guaranty is illusory because it prohibited a guaranty for the funding of the debt.

The District Court ignored the fact the Appellants sold their interest in the Casino for over $200 million. In doing so, Appellants relinquished control over the Casino from which they could protect their substantial investment. The Guaranty was intended to protect the Appellants' substantial investment. The Guaranty was not drafted as a conventional security document. Instead, it contained language which allowed Appellants to modify, without notice, the Appellees' "Funding Obligations" to remove those limitation terms that prevented the actual guaranteed funding of the debt. It would have been absurd for the Appellants to give up so much money and control over their investment without assurance the Guaranty would result in an actual guarantee of funding. It is clear that Appellees could anticipate such a modification of their "Funding Obligation" based upon the clear and unambiguous terms used to define the "Waivers".

Further, the District Court also erroneously held that if the threshold described in the "Limitation" had been met, the entire indebtedness would have been funded (RE 20, Opinion and Order Page No. 775). In the event the threshold had been met, Appellees' "Funding Obligation" would have been limited to the sum of Greektown

Distributions and Tribal Tax Receipts. It is not clear whether Appellees received any Distributions or Tax Receipts. As this limitation could not guarantee that any part of the debt would be funded, Appellants included the modification language to remove the limitation terms that prohibited funding. Further, contrary to the District Court, any modification to Kewadin's underlying debt was done with the consent of all parties, including the Appellees (RE 20, Opinion and Order, Page No. 775 and RE 14.4, Response, Page Nos. 230-231)

Further, the District Court failed to note the relevance of the fact that Appellees agreed to Appellants' modification rights within the "Waivers". The law concerning waivers gives the parties broad powers to draft the relinquishment of rights that must be enforced by the courts. By unambiguously waiving notice to any modification of the terms of Appellees' "Funding Obligation", the law renders it fairly inescapable that modification of the limitation terms can occur.

A "waiver" is the intentional relinquishment or abandonment of a known right. *Thomas v. Miller*, 487 F.3d 293, 303 (6th Cir. 2007). Under Michigan law, a contract may waive constitutional rights or change established rules of law. *Hunt Construction Group, Inc. v. Construction Services, Inc.*, 375 F.Supp.2d 612, 616 (E.D. Mich. 2005). Enforcement of a contractual waiver clause is especially warranted when the contract was entered into at arms-length by sophisticated contracting parties. *Aetna Casualty and Surety Co. v. Aniero Concrete Co.*, 404 F.3d

566, 577 (C.A.2 N.Y. 2005). A party may waive any of its contractual rights. *Capital Mortgage Corporation v. Coopers Lybrand,* 142 Mich.App. 531, 535; 269 NW2d 922 (1985). According to the Michigan Supreme Court in *Wilkes v. Allegan Fruit & Produce Co.,* 233 Mich. 215, 218: 206 NW 483 (1925):

> **The courts must act with care in extending those rules which say that a given contract is void because against public policy, since, if there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred and shall be enforced by the courts. Because a contract may waive constitutional or statutory rights or may change an established rule of law does not necessarily render it void on the ground that it is against public policy**. (Emphasis added).

Based upon the broad waiver powers granted by Michigan law, the District Court was required to enforce the unambiguous "Waivers" in which Appellees waived notice of modifications to the terms of their "Funding Obligations". Rather than enforcing the "Waivers" as written, the District Court wrongfully challenged the efficacy of the intended waiver. Since the "Waivers" is unambiguous, it was not open to construction by the District Court to find a result other than one expressed by the clear language. *Pierson Sand & Gravel, Inc.*, supra. Appellees are comprised of sophisticated businesspersons. Appellees relied upon the best legal advice available in negotiating and drafting this Guaranty as well as relinquishing their rights as expressed therein. In Section 4 of the Guaranty, Appellees admitted that they delivered the Guaranty based upon their own independent investigations, and

that they accepted the full range of risk encompassed in the Guaranty (RE 14.3 Response, Page No. 215). The Guaranty evidences that Appellees were represented by legal counsel during the arms-length negotiations (RE 14.3 Response, Page No. 219).

The District Court erred in failing to enforce Appellees' waiver of notice to the modifications of the limitation term to their "Funding Obligation". It is clear that the District Court's Opinion and Order must be reversed because Appellants stated a proper and legal claim for declaratory relief concerning modification of the Appellees' "Funding Obligation".

II. THE DISTRICT COURT ERRED WHEN IT HELD THAT THE APPELLEES ONLY WAIVED THOSE DEFENSES SET FORTH IN THE RESTATMENT 3RD OF SURETYSHIP AND GUARANTY.

Standard of Review:

Determining whether the District Court properly dismissed a claim is a question of law subject to *de novo* review. *Mertik v. Blalock,* 983 F.2d 1353, 1356 (6th Cir.1993). In conducting this review, the Court of Appeals must "construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." *Gazette v. City of Pontiac,* 41 F.3d 1061, 1064 (6th Cir.1994). A motion to dismiss may be granted under Fed.R.Civ.P. 12(b)(6) "only if it is clear that no relief could be granted under any set of facts that could be

proved consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984)

In the "Waivers", Appellees unconditionally and irrevocably waived each and every defense of any nature which, under the principles of guaranty and suretyship, would operate to impair or diminish Appellees' obligations under the Guaranty. In this case, Appellees raised contractual defenses to Appellants' Amended Complaint for Declaratory Relief. Appellees' contractual defenses claimed the proposed modification of the "Funding Obligation" violated the implied covenant of good faith and rendered the Guaranty illusory. The law provides the principles of guaranty and suretyship are governed by the contract law. Therefore, the defenses which relate to guaranty and suretyship include contract defenses. However, the District Court erroneously held that Appellees did not waive any of their contract defenses because they only waived those defenses which are identified in the *Restatement 3rd of Surety and Guaranty* §§30-44. (RE 20, Opinion and Order Page No. 783). Therefore, this Court of Appeals must reverse the District Court's Opinion and Order because Appellants have stated a claim for declaratory relief upon which relief can be granted.

A. The Guaranty Does Not Include Any Language Which Limited the Waived Defenses To Only Those Found In The *Restatement.*

The Appellees' "Waivers" of defenses did not include any language which stated that they were only waiving those defenses listed in the *Restatement 3rd of*

Surety and Guaranty §§39-44. Instead, the "Waivers" expressly and broadly stated that Appellees had waived each and every defense, "of any nature" under the "principles" of guaranty and suretyship. The District Court refused to acknowledge that contract law, and thus contract defenses, is part of the principles of guaranty and suretyship. Instead of enforcing the Guaranty as written as required by Michigan law, the District Court ignored the plain meaning of the words used and wrongfully inserted the *Restatement* language to limit the defenses waived.

Courts do not write contracts for the parties nor do they read into an unambiguous contract words or provisions it does not contain. *Florida Canada Corp. v. Union Carbide & Carbon Corp.*, 280 F.2d 193, 196 (6th Cir. 1960). In interpreting a contract, courts should accord the words and phrases of the contract their plain meaning and should not rewrite unambiguous agreements. *Datron, Inc. v. CRA Holdings, Inc.*, 42 F.Supp.2d 736, 742 (W.D. Mich. 1999). In this case, the plain meaning of the word "principle" is defined as "the ultimate source, origin or cause of something." *Webster's New World College Dictionary* (2001) at 1141. Michigan law provides that the ultimate source or origin of a guaranty is contract law.

The *Restatement 3rd of Surety and Guaranty* expressly provides that all other "principles" of law and equity, including the law of contracts, is applicable to transactions resulting in suretyship status. *Restatement 3rd of Surety and Guaranty*

§5. The law of guaranty is part of general contract law and is construed as ordinary contracts. *31800 Wick Holdings, LLC v Future Lodging - Airport, Inc.,* 848 F.Supp.2d 757,765 (E.D. Mich 2012), *AAR Aircraft & Engine Group, Inc. v. Edwards*, 272 F.3d 468, 470 (7th Cir. 2001). One principle of a guaranty is that a guaranty is a contract. *Prestige Capital Corp. v. Michigan Gage & Mfg LLC*, 722 F.Supp.2d 837, 843 (E.D. Mich. 2010). As the "Waivers" included the defenses of "any nature" under the "principles" of guaranty and suretyship as part of the waived defenses, all of Appellees' contract defenses must be included as waived because contract law encompasses the principles of guaranty and suretyship. If the parties intended to limit the defenses to only those found in the *Restatement*, then language referencing the *Restatement* and its applicable sections would have been drafted into the Guaranty.

Further, under Michigan law, a guarantor may plead defenses available to the principal obligor on the principal obligation as well as assert "any" personal defenses that arise out of the guaranty obligation. *In re Allied Supermarkets, Inc.*, 951 F.2d 718, 728 (6th Cir. 1991). The word "any" is defined as "without limit". *Webster's New World College Dictionary* (2001) at 64. It is clear that the law of contracts, and thus contract defenses, that apply to guaranties include more than those defenses listed in *Restatement 3rd of Surety and Guaranty* §§39-44. Guaranty and suretyship law embraces contract law rather than replaces it. Further, as a guaranty must be

construed under the principles of contract law, defenses related to contract law are not inconsistent with the rules of the *Restatement*. The *Restatement* itself does not declare that all other contract defenses are unavailable to guarantors unless listed therein.

Appellees' contract defenses of breach of covenant of good faith and illusory agreements are included within the principles of guaranty. Therefore, these defenses were waived by the Appellees under the "Waivers". It is evident that this Court of Appeals must reverse the District Court's Order and Opinion as Appellants stated a declaratory action upon which relief could be granted. Further, it is clear that Appellants' action must stand as Appellees waived all contract defenses.

B. The Defense of Breach Of The Covenant Of Good Faith Is Not Applicable To This Case.

The District Court erroneously held that, even if the suretyship defenses related to this action, Appellants would not necessarily be relieved of their duties under the covenant of good faith and fair dealing (RE 20, Opinion and Order Page No. 783). However, case law shows that when a guaranty's waiver of defenses is broad enough to encompass contract defenses, the defenses related to the breach of the covenant of good faith are waived as well. *Morris v. Comerica Bank*, 2004 WL 1801034 at 4 (Mich.App. 2004) (RE 14.9, Response Page ID Nos. 270-274); *U.S. Bank, National Association v. Rosenberg*, 2013 WL 272061 at 5 (E.D.Pa. 2013) (RE 14.10, Response Page ID Nos. 276-283). In this case, the principles of guaranty

include contract law and thus contract defenses which can be waived. Therefore, when the Appellees waived all defenses of any nature under the principles of guaranty and suretyship, they also waived the contract defense of the breach of the covenant of good faith.

Further, based upon the fact that the parties unmistakability set forth Appellants' modification rights in the "Waivers", the breach of the covenant of good faith defense does not apply. As the District Court erred in by failing to hold that Appellees' defenses were waived, its Opinion and Order must be reversed because Appellants have stated a claim for declaratory relief upon which relief can be granted.

The Appellees' defense of an implied covenant of good faith does not apply. Michigan law does not recognize an implied contractual duty of good faith." *Aetna Cas. & Sur. Co. v. Dow Chem. Co.,* 883 F.Supp. 1101, 1111 (E.D.Mich.1995). Michigan law does not imply the good faith covenant where parties have "unmistakably expressed" their respective rights. *Hubbard Chevrolet Company v. General Motors Corporation*, 873 F.2d 873, 877 (5th Cir. 1989). In this case, the parties have unmistakably expressed the Appellants' rights to modify the terms of the Appellees' "Funding Obligation" without notice in order to alleviate the restrictive limitation term. Therefore, the District Court's reliance upon the breach

of covenant of good faith defense is misplaced and inapplicable to deny Appellants' relief.

This Court of Appeals must reverse the District Court's Opinion and Order because Appellants' have stated a claim for declaratory relief, concerning the modification of Appellees' "Funding Obligation", upon which relief can be granted.

RELIEF REQUESTED

The Appellants request that this Court grant this appeal and reverse the District Court's July 9, 2013 Order and Opinion Granting the Defendants' Motion to Dismiss for Failure to State a Claim. It is clear that by virtue of the Guaranty's language, Appellants have stated a claim for declaratory relief upon which relief can be granted. The Court of Appeals should remand this case to the District Court with instructions to enforce Appellants' right to modify Appellees' "Funding Obligation" so they are no longer subject to limitations.

Respectfully submitted,

/s/ Thomas L. Stroble

Thomas L. Stroble (P67836)
Mitchell H. Boardman (P47042)
Attorneys for Appellants
2525 Telegraph Road, Suite 100
Bloomfield Hills, MI 48302
(248) 454-0800

Dated: October 8, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(c), the undersigned hereby certifies that this Brief complies with the type volume limitation of Fed.R.App.P. 37(a)(7)(B).

1. Exclusive of the exempted portions of the Brief, as provided in Fed.R.App.P. 32(a)(7)(B), the Brief contains 7041 words.
2. The Brief had been prepared in proportional space type face using Microsoft Word in 14 point Times New Roman font. As permitted by Fed.R.App.P.32(c)(7)(C), the undersigned has relied upon the word count function of this word processing system in preparing this certificate.

s/Thomas L. Stroble
Thomas L. Stroble

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2013, I electronically filed the foregoing with the Clerk of the Court for United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF System. Counsel for all parties to this case are registered CM/ECF filers and will be served by the appellate CM/ECF system.

/sThomas L. Stroble
Thomas L. Stroble

ADDENDUM

ADDENDUM TABLE OF CONTENTS

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record of Entry	Date Filed	Page ID Range	Description
RE 14.1	03/25/2013	144-187	Redemption Agreements
RE 14.2	03/25/2013	188-211	Subscription Agreement
RE 14.3	03/25/2013	213-221	Guaranty Agreement to Fund Subscription Amount
RE 14.4	03/25/2013	224-241	Confidentiality and Standstill Agreement
RE 14.5	03/25/2013	243-245	October 18, 2012 Letter
RE 14.6	02/06/2013	247-256	First Amended Complaint
RE 20	07/10/2013	758-786	Opinion and Order (1) Granting Defendants' Motion to Dismiss for Failure to State a Claim and (2) Denying Motion to Hold Plaintiffs in Contempt of Court
RE 14.9	03/25/2013	270-274	*Morris v. Comerica Bank*, 2004 WL 1801034 (Mich. App.)

RE 14.10	03/25/2013	276-283	*U.S. National Bank Assoc. v. Rosenberg*, 2013 WL 27061 (E.D.PA)

Not Reported in N.W.2d, 2004 WL 1801034 (Mich.App.)
(Cite as: 2004 WL 1801034 (Mich.App.))

Court of Appeals of Michigan.
Peter R. MORRIS, Plaintiff/Counter Defendant-Appellant,
v.
COMERICA BANK, Defendant/Counter Plaintiff-Appellee.

No. 245563.
Aug. 12, 2004.

Before: CAVANAGH, P.J., and JANSEN and SAAD, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Plaintiff Peter Morris appeals as of right, challenging the trial court's orders granting defendant Comerica Bank's motions for summary disposition pursuant to MCR 2.116(C)(8) and (10) on all three counts of plaintiff's complaint, and the court's judgment awarding defendant $1,082,968.70 on its countercomplaint to enforce a personal guaranty. We affirm the trial court's orders granting defendant summary disposition of plaintiff's claims, and also affirm the judgment amount of $1,082,968.70 in favor of defendant on its counterclaim, but remand for recalculation of interest on the judgment as provided in MCL 600.6013(6) and (8).

This case arises out of loan agreements between Success Holdings L.L.C. ("Success") and Comerica Bank-Illinois ("Comerica-Illinois"), an Illinois banking corporation whose parent company was Comerica, Incorporated, a bank holding company chartered in Delaware. Defendant Comerica-Detroit ("Comerica Bank"), a Michigan banking company, is a separate wholly-owned subsidiary of Comerica, Incorporated. Plaintiff was a former officer and shareholder of Success.

In 1994, Success entered into three loan agreements with Comerica-Illinois totaling $7 million, comprised of two term loans of $3 million dollars each and one revolving loan of $1 million dollars. While Success had other shareholders, plaintiff was principally involved in dealing with Comerica Bank-Illinois. Shortly thereafter, Success defaulted on the loans. By March 1995, Comerica-Illinois became concerned about its ability to collect its debt from Success. After the defaults were declared, Comerica-Illinois and Success began workout negotiations regarding the loans. Eventually, on December 26, 1995, Comerica-Illinois and Success executed a "standstill agreement" to enable Success to raise capital within a six-month period and to satisfy its indebtedness to Comerica-Illinois.

As part of the workout, plaintiff agreed to personally guarantee Success' debt to Comerica-Illinois in the amount of $947,968.70. In exchange, Success was permitted to draw the same amount from its revolving line of credit with Comerica-Illinois.

Subsequently, on August 1, 1996, Comerica, Incorporated sold Comerica-Illinois to ABN Amro, Inc., the parent company of LaSalle Bank. As part of the transaction, LaSalle Bank refused to purchase poorly performing assets and loans, including the Success loans. As a result, the Success loans were assigned from Comerica-Illinois to Comerica, Incorporated, which, in turn, assigned them to defendant.

Eventually, Success filed for bankruptcy. After

Success filed for bankruptcy, defendant alleged that Success owed it over $5 million dollars and that plaintiff owed it nearly $1 million dollars under the guaranty that was assigned to defendant.

During this time, the parties attempted to negotiate a compromise of plaintiff's personal guaranty with defendant, exchanging several drafts of a proposed settlement agreement. On February 18, 2000, Robert Diehl, Jr., defendant's attorney, sent a draft of a proposed agreement to plaintiff's attorneys. The cover letter accompanying this draft agreement stated:

***2** Enclosed is a revised agreement. It is marked from the last draft (I think that Mr. Ehrens has an earlier draft). Also enclosed is a clean copy. The agreement remains subject to Comerica Bank's review and approval.

Diehl sent another letter and accompanying draft of a proposed agreement to plaintiff's attorneys on March 3, 2000, stating, in pertinent part:

Enclosed is a revised settlement agreement. The revisions are marked. Please note that a breach of Morris' indemnity responsibility, if not cured, will permit the Bank to collect the full guaranty amount. If the Bank is required to sue Mr. Morris, he does not get the $450,000 discount.

Also enclosed is an unmarked copy of the settlement agreement.

The Bank's deadline for Mr. Morris to execute the agreement and pay the $50,000 first installment is March 17, 2000.

This draft agreement contained a blank signature line for an employee of defendant to sign.

The parties' attorneys continued negotiations over the terminology of the agreement to compromise plaintiff's personal guaranty. In a letter dated March 21, 2000, Diehl stated:

I have revised the agreement to your letter dated March 18, 2000. The revisions are marked. The revised agreement is subject to review and approval of Comerica Bank. The deadline for execution and delivery of the agreement and payment on the initial installment is March 24, 2000.

Thereafter, in a letter dated March 22, 2000, plaintiff responded to Diehl's letter, stating:

As discussed, enclosed please find, as per our settlement agreement, the first payment of $50,000.00 dated Friday, March 24, 2000.

In addition, you will find two copies of the executed Warrant Authorizing Confession of Judgment and two copies of the executed Settlement Agreement.

Defendant subsequently returned both the settlement agreement and plaintiff's check without signing the settlement agreement.

On April 25, 2000, plaintiff filed a three-count complaint against defendant seeking damages and declaratory relief for "promissory fraud" (count I), "impairment of rights and breach of covenant of good faith and fair dealing" (count II), and "specific enforcement of settlement" (count III). Defendant filed its answer and a counterclaim seeking to enforce plaintiff's guaranty. Defendant subsequently amended its answer to add the affirmative defense of the statute of frauds.

Defendant thereafter filed separate motions for summary disposition on each of plaintiff's claims. After taking the motions under advisement, the trial court entered separate orders on July 31, 2002, granting each of defendant's motions.

Immediately thereafter, on August 1, 2002, defendant moved for summary disposition of its coun-

terclaim to enforce plaintiff's personal guaranty under MCR 2.116(C)(10). The motion was granted. The court thereafter awarded defendant a judgment in the amount of $947,968.70, plus costs and attorney fees in the amount of $135,000, for a total judgment amount of $1,082,968.70. The judgment specified that "[i]nterest shall accrue on the judgment from the date of filing of the Complaint until the judgment is satisfied at the statutory rate of 12% per annum, compounded annually." This appeal followed.

I. Dismissal of Plaintiff's Claims

*3 Plaintiff argues that the trial court erred in granting defendant summary disposition of each of his claims. We disagree.

A. Standard of Review

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v. Ameribank*, 468 Mich. 557, 561; 664 NW2d 151 (2003). Summary disposition against a claim may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8); *Horace v. Pontiac*, 456 Mich. 744, 749; 575 NW2d 762 (1998); *Morris & Doherty, PC v. Lockwood*, 259 Mich.App 38, 42; 672 NW2d 884 (2003). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Maiden v. Rozwood*, 461 Mich. 109, 119; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v. Dep't of Transportation*, 456 Mich. 331, 337; 572 NW2d 201 (1998); *Mino v. Clio School Dist*, 255 Mich.App 60, 67; 661 NW2d 586 (2003). When deciding a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Ritchie-Gamester v. Berkley*, 461 Mich. 73, 76; 597 NW2d 517 (1999).

B. Governing Law

Counts I and II of plaintiff's complaint arise out of the standstill agreement, which contains a choice of law provision that states:

This Agreement has been executed, issued, delivered and accepted in, and shall be deemed to have been made under and shall be governed by and construed in accordance with, the internal laws of the State of Illinois.

Because plaintiff's counts I and II arise under the standstill agreement, they are therefore governed by Illinois law. Conversely, plaintiff's count III arises out of the negotiations between plaintiff and defendant to compromise plaintiff's personal guaranty. This claim is not subject to a contractual choice of law provision and, therefore, is governed by Michigan law.

C. Plaintiff's Count I

The trial court properly granted defendant summary disposition on count I of plaintiff's complaint alleging promissory fraud. Defendant was not a party to the standstill agreement and had no obligations under that agreement, inasmuch as the Success loans were not assigned to defendant until after the standstill agreement expired, with Success in default for failing to make the required payments.

In *Cramer v. Ins Exchange Agency*, 174 Ill 2d 513; 675 N.E.2d 897, 905 (1996), the Illinois Supreme Court identified the elements of a fraud claim as follows:

(1) a false statement of material fact; (2) the party making the statement knew or believed it to be untrue; (3) the party to whom the statement was made had a right to rely on the statement; (4) the party to whom the statement was made did rely on the statement; (5) the statement was made for the purpose of inducing the other party to act; and (6) the reliance by the person to whom the statement was made led to that per-

son's injury.

***4** As noted in *Bower v. Jones*, 978 F.2d 1004, 1011-1012 (CA 7, 1992)

Promissory fraud is generally not actionable in Illinois, but there is an exception to this rule "where the false promise or representation of intention of future conduct is the scheme or device to accomplish the fraud." *Steinberg v. Chicago Medical School*, 69 Ill 2d 320; 371 N.E.2d 634, 641; 13 Ill Dec 699 (Ill, 1977).... The scheme exception applies where "a party makes a promise of performance, not intending to keep the promise but intending for another party to rely on it, and where the other party relies on it to his detriment." *Concord Industries, Inc v. Marvel Industries Corp*, 122 Ill App 3d 845; 462 N.E.2d 1252, 1255; 78 Ill Dec 898 (Ill App, 1984).

Although plaintiff contends that defendant or its employees were involved with the negotiations concerning the standstill agreement, there was no evidence that defendant made any representation to plaintiff regarding the standstill agreement. Moreover, plaintiff admitted in his deposition that he never had any substantive discussions with defendant's employees until after the standstill agreement was executed. Thus, plaintiff's promissory fraud claim must fail.

D. Plaintiff's Count II

Next, plaintiff argues that the trial court erred in granting defendant summary disposition of count II of plaintiff's complaint pursuant to MCR 2.116(C)(8). Plaintiff argues that he stated a viable cause of action for breach of a covenant of good faith under ¶ 10 of the standstill agreement. Plaintiff raises this particular argument for the first time on appeal. In the trial court, plaintiff alleged that count II was based upon an alleged breach of a duty of good faith and fair dealing under the Uniform Commercial Code, § 1-203, not the express terms of the standstill agreement. Because plaintiff never alleged a claim based on ¶ 10 of the standstill agreement below, this issue is waived. *Napier v. Jacobs*, 429 Mich. 222, 227; 414 NW2d 862 (1987); *Blake v. Consolidated Rail Corp*, 176 Mich.App 506, 520; 439 NW2d 914 (1989).

E. Plaintiff's Count III

Plaintiff also argues that the trial court erred in granting defendant summary disposition of count III of plaintiff's complaint under MCR 2.116(C)(8). Count III of plaintiff's complaint sought specific enforcement of a settlement agreement to compromise plaintiff's personal guaranty, which was part of a financial accommodation that Comerica-Illinois entered into with Success. The evidence demonstrates that the parties entered into negotiations to settle plaintiff's liability of $947,968.70, plus costs and expenses, for a reduced amount of $500,000, to be paid in installments. Although draft agreements were prepared and exchanged, a final agreement was never executed. The trial court granted defendant's motion for summary disposition on the basis that the alleged settlement agreement was unenforceable under the statute of frauds, MCL 566.132(2), because there was no signed, written agreement evidencing a compromise.

***5** Plaintiff contends that a letter written by defendant's attorney, dated March 3, 2000, was sufficient to satisfy the statute of frauds, thereby entitling him to specific enforcement of the settlement agreement. We disagree. Plaintiff's guaranty is part of a financial accommodation that Comerica-Illinois entered into with Success. The proposed compromise agreement would modify that financial accommodation because it would have settled plaintiff's liability in the amount of $947,968.70, plus costs and expenses, for a reduced amount of $500,000, to be paid in installments. Because the proposed agreement involves a promise and commitment of the type prescribed in MCL 566.132(2), it is not enforceable unless it is in writing and signed by an authorized representative of defendant. *Crown Technology Park v. D & N Bank, FSB*, 242 Mich.App 538, 549-550; 619 NW2d 66 (2000). The undisputed evidence discloses that the proposed agreement was never signed by defendant

bank. Therefore, the alleged agreement is unenforceable under MCL 566.132(2), and plaintiff's claim for specific performance of the agreement was properly dismissed by the trial court.

II. Defendant's Counterclaim

Plaintiff next argues that the trial court erred in granting defendant's motion for summary disposition of its counterclaim to enforce plaintiff's personal guaranty. Resolution of this claim hinges on whether plaintiff waived a violation of the covenant of good faith and fair dealing as a defense to the guaranty. The guaranty agreement provides, in pertinent part:

> The undersigned unconditionally and irrevocably waive(s) each and every defense and setoff of any nature which, under the principles of guaranty or otherwise, would operate to impair or diminish in any way the obligation of the undersigned under this Guaranty, and acknowledge(s) that each such waiver is by this reference incorporated into each security agreement, collateral assignment, pledge and/or other document from the undersigned now or later securing this Guaranty and/or indebtedness, and acknowledge(s) that as of the date of this Guaranty no such defense or setoff exists. The undersigned acknowledge(s) that the effectiveness of this Guaranty is subject to no conditions of any kind.

We conclude that this language is binding and enforceable and, therefore, the trial court properly granted defendant's motion for summary disposition of its counterclaim to enforce the guaranty.

Defendant's counterclaim is governed by Illinois law pursuant to a provision in the guaranty agreement providing, "THIS GUARANTY SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF ILLINOIS." Under Illinois law, guaranty agreements containing waivers of all defenses, including the duty to act in a commercially reasonable manner, are enforceable. See *Chemical Bank v. Paul*, 244 Ill App 3d 772, 781; 614 N.E.2d 436 (1993) (noting also that "a covenant of good faith and fair dealing is implied into every contract, absent express disavowal"); *Lincoln Park Fed Sav & Loan Ass'n v Carrane*, 192 Ill App 3d 188, 192-193; 548 N.E.2d 636 (1989).[FN1] In addition, the United States District Court for the Northern District of Illinois has interpreted Illinois law in this way. See *National Acceptance Co v. Wechsler*, 489 F Supp 642, 647 (ND Ill, 1980). Therefore, summary disposition of this claim was properly granted.

> FN1. It appears that the Illinois Supreme Court has never decided the question whether a guarantor may waive the duty of good faith or commercial reasonableness. See *AAR Aircraft & Engine Group, Inc v Edwards*, 272 F3d 468, 470 (CA 7, 2001).

III. Statutory Interest

***6** Finally, because the written guaranty does not contain a specified interest rate, we conclude that the trial court erred in determining that the twelve percent interest rate prescribed in MCL 600.6013(5) is applicable to this case. Although defendant contends that MCL 600.6013(5) is the proper subsection to apply because the standstill agreement contains specified interest rates, judgment was not entered on the basis of that instrument. Rather, the written guaranty was the instrument on which judgment was entered. Because the guaranty does not contain a specified interest rate, statutory interest is to be calculated in accordance with MCL 600.6013(6) and (8). Accordingly, we reverse the trial court's judgment in part insofar that it provides for statutory interest at a rate of twelve percent and remand for recalculation of interest as prescribed in MCL 600.6013(6) and (8).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Not Reported in N.W.2d, 2004 WL 1801034 (Mich.App.)
(Cite as: 2004 WL 1801034 (Mich.App.))

Mich.App.,2004.
Morris v. Comerica Bank
Not Reported in N.W.2d, 2004 WL 1801034 (Mich.App.)

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Slip Copy, 2013 WL 272061 (E.D.Pa.)
(Cite as: 2013 WL 272061 (E.D.Pa.))

United States District Court,
E.D. Pennsylvania.
U.S. BANK, NATIONAL ASSOCIATION, Plaintiff/Counterclaim Defendant,
v.
Maury ROSENBERG, Defendant/Counterclaim Plaintiff.

Civil Action No. 12–723.
Jan. 24, 2013.

Stacey A. Scrivani, Stevens & Lee, Reading, PA, for Plaintiff/Counterclaim Defendant.

Susan M. Verbonitz, Weir & Partners, LLP, Philadelphia, PA, for Defendant/Counterclaim Plaintiff.

MEMORANDUM OPINION

RUFE, District Judge.

***1** Plaintiff U.S. Bank, N.A., filed this action to enforce the terms of an Individual Limited Guaranty ("Guaranty" or "Limited Guaranty") executed by Defendant Maury Rosenberg. Before the Court are Plaintiff's Motion to Dismiss Defendant's Counterclaims and its Motion to Strike Defendant's Affirmative Defenses. Plaintiff argues that by the express language of the Guaranty, Defendant waived his right to assert any claims, counterclaims, or affirmative defense in this litigation, and therefore that the Court should dismiss his counterclaims and strike his affirmative defenses in their entirety. While the Court recognizes the express language in the Guaranty by which Defendant waives his right to assert certain claims, the Court does not find that the provision applies to all claims and defenses asserted here. Accordingly, the Motions will be granted in part and denied in part.

I. BACKGROUND

Since the Court writes primarily for the parties who are well familiar with the complex factual and procedural background in this matter, the Court provides only the facts and procedure necessary to provide context for its decision.

A. Facts Relevant to Plaintiff's Claims as Alleged in the Complaint

On August 12, 2005, Mr. Rosenberg, on behalf of companies with which he was affiliated (referred to in the Complaint as "NMI Parties"), entered into a Settlement Agreement with Lyon Financial Services, U.S. Bank's predecessor in interest.[FN1] Pursuant to the Settlement Agreement, the parties modified the terms of existing commercial equipment leases, and reduced and restructured the payment obligations of the NMI Parties under the existing leases. Mr. Rosenberg guaranteed a portion ($7,661,945) of the NMI Parties' obligations in the Guaranty.[FN2]

FN1. Compl., Ex. A, Settlement Agreement (Doc. No. 1–4).

FN2. Compl., Ex. B, Limited Guaranty (Doc. No. 1–5).

While the NMI Parties made 21 payments in accordance with the Settlement Agreement, they stopped payments beginning in February 2008. At the time of the NMI Parties' default under the Settlement Agreement, the guaranteed amount had been reduced to $4,980,264.32. As of January 12, 2012, this amount remained outstanding. U.S. Bank, as the present payee of the obligations under the Guaranty, sent a written notice to Mr. Rosenberg stating that the NMI Parties were in default under the Settlement Agreement, and

demanding that Mr. Rosenberg pay the outstanding amount due under the Guaranty. Mr. Rosenberg did not pay the amount demanded and U.S. Bank filed this suit for breach of the Guaranty.

B. Facts Relevant to Defendant's Counterclaims and Defenses as Alleged in Defendant's Counterclaim

On July 31, 2008, Lyon, acting as an agent for U.S. Bank, filed a Complaint in confession of Judgment in the Bucks County Court of Common Pleas ("Bucks County Action") seeking the guaranteed amount that remained outstanding.[FN3] Mr. Rosenberg alleges that while the complaint stated that Lyon was entitled to judgment against him in the amount of $4,724,866.16, a judgment of $43,481,820.71 was erroneously entered against all defendants in that case. According to Mr. Rosenberg, Lyon had knowledge of this error, but did not correct it. On August 22, 2008, Mr. Rosenberg filed a petition to strike or open the confessed judgment and requested a stay of execution of such judgment. This petition notwithstanding, Lyon transferred the nearly $43 million judgment to the Philadelphia Court of Common Pleas on October 10, 2008.

FN3. Pl.'s Mot. to Dismiss, Ex. A, Bucks County Action Compl. (Doc. No. 11–2).

*2 During the pendency of Mr. Rosenberg's petition to strike/reopen, U.S. Bank "orchestrated the commencement and prosecution of an involuntary bankruptcy case against Rosenberg" in the Bankruptcy Court for the Eastern District of Pennsylvania on November 7, 2008.[FN4] The bankruptcy case was later transferred to the Bankruptcy Court for the Southern District of Florida, where Mr. Rosenberg resides. On August 21, 2009, the Bankruptcy Court dismissed the involuntary bankruptcy case. Mr. Rosenberg alleges that this dismissal shows that U.S. Bank with or through Lyon "orchestrated the improper 'sham' bankruptcy case without justification or excuse, knowing that the filing of an involuntary bankruptcy case would cause the demise of the [NMI parties] and put Rosenberg in financial ruin." [FN5]

FN4. Counterclaim (Doc. No. 20) ¶ 24.

FN5. *Id.* ¶ 35.

After the dismissal of the involuntary bankruptcy case, U.S. Bank moved for a determination on the motion to strike/reopen, which had remained pending in the Bucks County Court of Common Pleas. On November 22, 2011, the Bucks County Court entered an order striking the confessed judgment entered against Mr. Rosenberg and opening the confessed judgment entered against the NMI parties. [FN6]

FN6. *See* Answer, Ex. B (Doc. No. 10–2 at 2).

C. Procedural Posture of this Case

Three months later, on February 10, 2012, U.S. Bank filed the Complaint in this case. In response, Mr. Rosenberg filed a Motion to Dismiss arguing that pursuant to the terms of the Settlement Agreement and the Limited Guaranty, Bucks County state court has exclusive jurisdiction over the case. The Court denied the motion, holding that venue was proper in this Court because the forum selection clause provides that venue is proper in the federal district court whose judicial district encompasses Bucks County, and ordered that Mr. Rosenberg file an answer.

Mr. Rosenberg thereafter filed an answer raising 37 affirmative defenses and asserting counterclaims for Wrongful Use of Civil Proceedings (Count I), Abuse of Process (Count II), and Breach of the Covenant of Good Faith and Fair Dealing (Count III). U.S. Bank now moves to dismiss all counterclaims and defenses, asserting that pursuant to the terms of the Limited Guaranty, Mr. Rosenberg waived his right to assert any claims, counterclaims, or defense with respect to the terms of the Guaranty. Alternatively,

U.S. Bank argues that the counterclaims are insufficiently alleged and must be dismissed, and that certain defenses are insufficient as a matter of law and must be stricken.

II. LEGAL STANDARD

A. Motion to Dismiss

Pursuant to Federal Rule of Civil Procedure 12(b)(6), dismissal of a complaint for failure to state a claim upon which relief can be granted is appropriate where a plaintiff's "plain statement" lacks enough substance to show that he is entitled to relief.[FN7] In determining whether a motion to dismiss should be granted, the court must consider only those facts alleged in the complaint, accepting the allegations as true and drawing all logical inferences in favor of the non-moving party.[FN8] Courts are not, however, bound to accept as true legal conclusions couched as factual allegations. [FN9] Something more than a mere *possibility* of a claim must be alleged; rather plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." [FN10] The complaint must set forth "direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory." [FN11] The court has no duty to "conjure up unpleaded facts that might turn a frivolous ... action into a substantial one." [FN12]

FN7. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

FN8. *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir.1994); *Fay v. Muhlenberg Coll.*, No. 07–4516, 2008 WL 205227, at *2 (E.D.Pa. Jan.24, 2008).

FN9. *Twombly*, 550 U.S. at 555, 564.

FN10. *Id.* at 570.

FN11. *Id.* at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir.1984)) (internal quotation marks omitted).

FN12. *Id.* (quoting *McGregor v. Industrial Excess Landfill, Inc. .*, 856 F.2d 39, 42–43 (6th Cir.1988)).

B. Motion to Strike

***3** "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense[.]" [FN13] Federal Rule of Civil Procedure 12(f) permits a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." [FN14] The Third Circuit has cautioned, however, that "a court should not grant a motion to strike unless the insufficiency of the defense is clearly apparent" from the face of the pleading.[FN15] Since the sufficiency of the defense is determined by examining the face of the pleadings, a defense cannot be stricken where its success depends on disputed issues of fact or law. [FN16] However, "if the defense asserted could not possibly prevent recovery under any pleaded or inferable set of facts," it may be stricken. [FN17]

FN13. Fed. R Civ. P. 8(c).

FN14. Fed. R Civ. P. 12(f).

FN15. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 188 (3d Cir.1986) ("The underpinning of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where ... the factual background for a case is largely undeveloped.").

FN16. *Linker v. Custom–Bilt*, 594 F.Supp. 894, 898 (E.D.Pa.1984).

FN17. *Id.*

While the Third Circuit has not applied the pleading standards of *Ashcroft v. Iqbal,*[FN18] and *Bell Atlantic Corp. v. Twombly,*[FN19] to the pleading of affirmative defenses, "when an affirmative defense omits a short and plain statement of facts entirely and fails totally to allege the necessary elements of the claim, it has not satisfied the pleading requirements of the Federal Rules[.]" [FN20] Thus, where a defense is insufficiently pled so as to fail to put the opposing party on notice of the nature of defense, the defense may be stricken with leave to amend.[FN21]

FN18. 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

FN19. 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

FN20. *Dann v. Lincoln Nat'l Corp.*, 274 F.R.D. 139, 146 (E.D.Pa.2011) (quoting *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1295 (7th Cir.1989)).

FN21. *Id.*

III. DISCUSSION

A. The Waiver Provision

U.S. Bank's primary argument in support of both its Motion to Dismiss and its Motion to Strike is that the express language of the Guaranty's waiver provision bars all of Mr. Rosenberg's claims and defenses here. In contrast, Mr. Rosenberg argues that the existence of the waiver provision does not defeat his counterclaims or his defenses because the enforceability of the waiver provision is at issue in this litigation. According to Mr. Rosenberg, the entire Guaranty fails for lack of consideration. Thus, he asserts that all of the Guaranty's provisions are unenforceable, including the waiver provision.

Alternatively, Mr. Rosenberg submits that the waiver provision does not defeat his claims because the Guaranty's waiver provision conflicts with the waiver provision of the Settlement Agreement, which he asserts controls pursuant to the "conflict clause" in the Settlement Agreement, which states: "In the event of any conflict between the provisions of this Agreement and the provisions of any other Transaction Documents, the provisions of this Agreement will prevail." [FN22]

FN22. Settlement Agreement ¶ 25

The Limited Guaranty provides:

> Without limiting the generality of any other provisions of the Limited Guaranty, Guarantor [Mr. Rosenberg] hereby expressly waives: ... (e) any defense, right of set-off, claim or counterclaim whatsoever and any and all other rights benefits, protections and other defenses available to the Guarantor now or at any time hereafter.[FN23]

FN23. Rosenberg Guaranty ¶ 6.

It further states:

> Guarantor waives all rights and defenses arising out of an election of remedies by [U.S. Bank], even though that the election of remedies has destroyed the Guarantor's rights of contribution, subrogation and reimbursement against the Lessees [ ] or other guarantors by the operation of any applicable law or otherwise." [FN24]

FN24. *Id.* ¶ 8.

***4** The Settlement Agreement also contains a waiver provision by which "[e]ach NMI party ... waive[d] any defenses, offsets or counterclaims to the enforcement of the Modified Leases, the Security Agreements, the Guarantees or the Confession of Judgment." FN25

FN25. Settlement Agreement ¶ 15(d).

As the Court stated in ruling on Mr. Rosenberg's Motion to Dismiss:

> "The fundamental rule in contract interpretation is to ascertain the intent of the contracting parties." FN26 In ascertaining the intent of the parties, "all provisions in the agreement will be construed together and each will be given effect. [The Pennsylvania Supreme Court] will not interpret one provision of a contract in a manner which results in another portion being annulled." FN27 Thus, to the extent possible, a contract should be interpreted in a manner which prevents provisions from becoming meaningless, superfluous, or contradictory.FN28 Furthermore, where, as here "two or more writings are executed at the same time and involve the same transaction, they should be construed as a whole." FN29 The Court will not read the Settlement Agreement in a manner which creates ... a conflict between the Settlement Agreement and the Guaranty.FN30

FN26. *Lesko v. Frankford Hosp.-Bucks Cnty.*, 609 Pa. 115, 15 A.3d 337, 343 (Pa.2011). It is undisputed that Pennsylvania law applies here.

FN27. *Id.* (quoting *LJL Transp., Inc. v. Pilot Air Freight Corp.* ., 599 Pa. 546, 962 A.2d 639, 647–48 (Pa.2009)); *see also Kamco Indus. Sales, Inc. v. Lovejoy, Inc.*, 779 F.Supp.2d 416, 427 (E.D.Pa.2011).

FN28. *See Sloan & Co. v. Liberty Mut. Ins. Co.*, 653 F.3d 175, 181 (3d Cir.2011).

FN29. *Sanford Inv. Co. v. Ahlstrom Mach. Holdings, Inc.*, 198 F.3d 415, 421 (3d Cir.1999) (quoting *Western United Assurance Co. v. Hayden*, 64 F.3d 833, 842 (3d Cir.1995)).

FN30. 6/12/12 Order (Doc. No. 9) at 3–4.

Moreover, U.S. Bank attempts too broad a reading of the Guaranty's waiver clause to encompass claims unrelated to the agreement between the parties. This interpretation is contrary to the intent of the parties as stated in the Settlement Agreement and the Guaranty.

While the Court recognizes that contracting parties may waive their right to assert certain claims, counterclaims and defenses having to do with execution, performance and enforcement of the underlying agreement,FN31 there is no authority to support the enforceability of a waiver provision with the scope U.S. Bank urges the Court to give the provision at issue here. Thus, even if the Settlement Agreement and the Guaranty evidenced the parties' intent to create a waiver of this sort, which the Court has held it did not, it is questionable that this provision would be enforceable as a matter of law.

FN31. *Lyon Fin. Servs., Inc. v. Woodlake Imaging, LLC*, No. 04–3334, 2005 WL 331695, at *4–6 (E.D.Pa. Feb.9, 2005) (recognizing the enforceability of "hell or high water" provisions in certain finance lease transactions); *see also* Doc. No. 12–1 at 5 (citing cases).

Consequently, the Court finds that the waiver provision at issue here does not bar the assertion of all counterclaims and defenses raised by Mr. Rosenberg.

To the extent that the provision limits the assertion of specific counterclaims and defenses, the Court will discuss these limitations below.

1. *Counterclaim Count III*

Counterclaim Count III alleges that "U.S. Bank ... breached its contract with Rosenberg by failing to act in good faith and deal fairly with Rosenberg with respect to the Rosenberg Guaranty, causing Rosenberg to suffer damages." FN32 Unlike the other counterclaims which are not within the scope of the waiver provision contained in the Guaranty, a fair reading of the Guaranty leads to the conclusion that this counterclaim is within the scope of the waiver provision and therefore, barred by it.

FN32. Counterclaim ¶ 59.

As stated above, a party may contractually waive its right to assert claims, counterclaims and defenses having to do execution, performance and enforcement of the underlying agreement.FN33 In contrast to the tort claims of wrongful use of civil proceedings and abuse of process as alleged in Counterclaim Counts I and II, breach of contract claims depend upon the terms, execution, and performance of the contract. It is the type of claim contemplated by the Guaranty and would be waived under the Settlement Agreement or the Guaranty. Therefore, the Court finds that Counterclaim Count III is within the scope of the waiver provision and has been waived thereunder. Counterclaim Count III will be dismissed with prejudice.

FN33. *See, e.g., HFC Commercial Realty, Inc. v. Axelrod,* No. 89–8739, 1990 WL 198184, at *3 (E.D.Pa. Dec.4, 1990) (citing *Paul Revere Protective Life Ins. Co. v. Weis,* 535 F.Supp. 379, 386 (E.D.Pa.1981), *aff'd without opinion,* 707 F.2d 1403 (3d Cir.1982)).

2. *Affirmative Defenses*

***5** Like Mr. Rosenberg's breach of contract counterclaim, several of his affirmative defenses, those concerning the terms, execution, and performance of the contract, are waived by virtue of the Guaranty's waiver provision for the reasons stated above with respect to Mr. Rosenberg's breach of contract counterclaim. These defenses are Mr. Rosenberg's Third,FN34 Fifth, FN35 Sixth,FN36 Seventh,FN37 Eighth,FN38 Ninth, FN39 Tenth,FN40 Eleventh,FN41 Fourteenth,FN42 Seventeenth,FN43 Eighteenth, Nineteenth, Twentieth, Twenty–First, Twenty–Second, Twenty–Third, TwentyFourth, Thirtieth,FN44 and Thirty–First. FN45

FN34. "U.S. Bank's claims are barred by its waiver of the assertion of any rights under the Settlement Agreement and Rosenberg Guaranty." Answer at 5.

FN35. "U.S. Bank's claims are barred by lack of privity." Answer at 6.

FN36. "U.S. Bank's claims are barred by the absence and/or failure of consideration for the Rosenberg Guaranty." Answer at 6.

FN37. "The Rosenberg Guaranty is a contract of adhesion and unconscionable and is void *ab initio."* Answer at 6.

FN38. "U.S. Bank's claims are barred by the financial distress imposed upon Rosenberg by U.S. Bank and/or its agents at the time Rosenberg was required to execute the Rosenberg Guaranty." Answer at 6.

FN39. "U.S. Bank's claims are barred by the doctrine of accord and satisfaction." Answer at 6.

FN40. "U.S. Bank's claims are barred by the doctrine of justification." Answer at 6.

FN41. "The losses alleged by U.S. Bank were not caused by any fault, act or omission on the part of Rosenberg, but were caused by circumstances or persons or entities, including U.S. Bank itself and or its agents, for which Rosenberg is not responsible." Answer at 6.

FN42. "At all times relevant hereto, Rosenberg acted in good faith and compliance with any and all of his contractual obligations." Answer at 7.

FN43. Mr. Rosenberg's Seventeenth through Twenty–Fourth Affirmative Defenses all concern the defense of impairment of collateral stated in different forms. Answer at 8–9.

FN44. "U.S. Bank is precluded from seeking relief against Rosenberg by reasons of its own failure to comply with the Settlement Agreement and Rosenberg Guaranty." Answer at 9.

FN45. "U.S. Bank's claims are barred by reason of its own bad faith and fair dealing in both the making and performance of the Settlement Agreement and Rosenberg Guaranty." Answer at 10.

B. Sufficiency of the Remaining Claims

1. *Counterclaim Counts I and II*

U.S. Bank moves to dismiss Mr. Rosenberg's counterclaims for wrongful use of civil proceedings (Count I) and abuse of process (Count II), arguing that Mr. Rosenberg has failed to allege that U.S. Bank brought the underlying confession of judgment proceedings in Bucks County primarily for an improper purpose, an element of both wrongful use of civil proceedings and abuse of process claims. [FN46] Mr. Rosenberg does not dispute that he must show that the "primary purpose" of the underlying proceedings was improper to succeed on either claim; he asserts however, that the facts as alleged in his Counterclaim are sufficient. The Court agrees.

FN46. *See* 42 Pa. Cons.Stat. § 8351("(a) Elements of action.—A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings: (1) He acts in a grossly negligent manner or without probable cause and *primarily for a purpose other* than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and (2) The proceedings have terminated in favor of the person against whom they are brought.") (emphasis added); *Shiner v. Moriarty*, 706 A.2d 1228, 1236 (Pa.Super.Ct.1998) (quoting *Rosen v. American Bank of Rolla*, 426 Pa.Super. 376, 627 A.2d 190, 192 (Pa.Super.Ct.1993) ("The tort of 'abuse of process' is defined as the use of legal process against another *'primarily* to accomplish a purpose for which it is not designed.' To establish a claim for abuse of process it must be shown that the defendant (1) used a legal process against the plaintiff, (2) *primarily* to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff." (internal quotation marks omitted) (emphasis added).

While Mr. Rosenberg's counterclaim does not contain a conclusory statement that the primary purpose of the Bucks County confession of judgment proceedings was improper, the factual allegations are sufficient to support this inference. For example, Mr. Rosenberg alleges "U.S. Bank, by and through its agent, Lyon, ... instituted a scorched earth campaign

against Rosenberg in an effort to destroy him and his business, and to extract money or a settlement from Rosenberg and others," by filing "a single Complaint in Confession of Judgment in the Court of Common Pleas of Bucks County," and "causing a single judgment in the total amount of $43,481820.71 to be entered on the docket," despite U.S. Bank's knowledge that Rosenberg's liability was limited to $4,724,866.16. [FN47] Taken as a whole, the facts as alleged in the Counterclaim support an inference that the primary purpose of the underlying proceedings was improper and Counterclaim counts I and II are sufficient to withstand U.S. Bank's Motion to Dismiss.

FN47. Counterclaim ¶¶ 17–18.

2. *Affirmative Defenses*

In addition to its wholesale challenge to Mr. Rosenberg's affirmative defenses as waived, U.S. Bank challenges specific defenses as insufficiently pled. The Court now addresses those which have not been waived.

a. *Fifteenth Affirmative Defense*

The Fifteenth Affirmative Defense states:

> By Order and Memorandum Opinion dated August 21, 2009, the U.S. Bankruptcy Court for the Southern District of Florida found that any amounts required to be paid by [Mr.] Rosenberg under the Rosenberg Guaranty to Lyon was limited to the fees and expenses of Lyon, which finding was not disturbed by the District Court for the Southern District of Florida on appeal.[FN48]

FN48. Answer at 7.

***6** U.S. Bank argues that this statement mischaracterizes the Bankruptcy Court's August 21, 2009 Order and must be stricken. The Court agrees.[FN49]

FN49. In doing so, the Court takes judicial notice of the Bankruptcy Court's Opinion and Order. "[A] court may take judicial notice of a prior judicial opinion." *McTern an v. City of York*, 577 F.3d 521, 526 (3d Cir.2009).

The Bankruptcy Court did n ot hold that the amount of Mr. Rosenberg's liability under the Guaranty was limited to Lyon's fees and expenses as the affirmative defense as stated suggests. In fact, the Bankruptcy Court was not concerned with the extent of Mr. Rosenberg's obligations under the Limited Guaranty. Rather, the court considered whether the "petitioning creditors" (those who filed the involuntary bankruptcy petition against Mr. Rosenberg) were "creditors" under the Limited Guaranty giving them standing to file the involuntary petition. The Bankruptcy Court found that the petitioning creditors were not "creditors," because Mr. Rosenberg's obligations under the Guaranty run solely in favor of Lyon.[FN50] The Bankruptcy Court wrote:

FN50. *See* Civ. A. No. 12–22275, Doc. No. 97 (S.D.Fla. Jan. 8, 2013) submitted as Ex. A to Pl.'s Notice of Recent Supplemental Authority (Doc. No. 31).

> "Rosenberg executed an individual limited guaranty (the "Limited Guaranty") in the maximum about of $7,6661,945.00, which was to be reduced each month by the sum of $127,699.08 for each monthly payment made on account of the Master Lease as set forth in the Settlement Agreement.... The Limited Guaranty contains several other provisions, which obligations thereunder run solely to and in favor of Lyon. Specifically, upon an event of default under the Limited Guaranty, only Lyon can demand payment of the obligations thereunder and only the fees and expenses of Lyon [as opposed to the fees and expenses of another entity] are required to be paid by Rosenberg." [FN51]

FN51. Bankr.Ct. Op. (Doc. No. 12–2) ¶¶ 28,

33 (bracketed material added for clarification and context).

Mr. Rosenberg conflates several important findings of the Bankruptcy Court and the result is misleading. For this reason, the Fifteenth Affirmative Defense is stricken. Mr. Rosenberg is granted leave to amend this defense to clarify the holding of the Bankruptcy Court and its import to his defense to the extent he is able to do so.

b. *Twenty–Fifth Affirmative Defense*

In his Twenty–Fifth Affirmative Defense, Mr. Rosenberg states that "U.S. Bank's claims are barred by its unclean hands and inequitable conduct...." [FN52] U.S. Bank asserts that this defense must be stricken because U.S. Bank seeks only money damages in its complaint and the equitable defense of unclean hands is only available where a plaintiff seeks equitable relief. Mr. Rosenberg argues that "[a]n affirmative defense need not be plausible to survive; it must merely provide fair notice of the issue involved." [FN53]

FN52. Answer at 9.

FN53. Doc. No. 15 at 9.

While the Court recognizes that Third Circuit has not applied the pleading standards of *Iqbal* and *Twombly* to the pleading of affirmative defenses, Rule 12(f) nevertheless allows a court to strike an affirmative defense where "the insufficiency of the defense is clearly apparent" from the face of the pleading.[FN54] Because the doctrine of unclean hands is not applicable where a party does not seek equitable relief, the insufficiency of this defense is clearly apparent from the face of the pleading and will be stricken. [FN55]

FN54. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 188 (3d Cir.1986) ("The underpinning of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where ... the factual background for a case is largely undeveloped.").

FN55. *See Farm Credit of Nw. Fla. ACA v. Dilsheimer*, No. 10–4515, 2011 WL 725084, at *3 (E.D.Pa. Mar.1, 2011).

c. *Thirty–Second and Thirty–Third Affirmative Defense* s

***7** U.S. Bank argues that the Court should strike these defenses because they are merely restatements of Mr. Rosenberg's Counterclaims, which U.S. Bank asserts Mr. Rosenberg is barred from asserting pursuant to the waiver provision of the Guaranty. Since the Court has found that Mr. Rosenberg is not barred from asserting these claims, it will not strike these defenses on this basis.

IV. CONCLUSION

For the foregoing reasons, U.S. Bank's Motion to Dismiss Mr. Rosenberg's Counterclaims and Motion to Strike his Affirmative Defenses will be granted in part and denied in part. Counterclaim Count III will be dismissed and the following affirmative defenses will be stricken: Third, Fifth through Eleventh, Fourteenth, Fifteenth, Seventeenth through Twenty–Fifth, Thirtieth, and Thirty–First. Mr. Rosenberg will be granted leave to amend his Fifteenth Affirmative Defense.

An appropriate Order follows.

ORDER

AND NOW, this 24th day of January 2013, upon consideration of Plaintiff's Motion to Dismiss Defendant's Counterclaims (Doc. No. 11) and its Motion to Strike Defendant's Affirmative Defenses (Doc. No. 12), Defendant's responses in opposition thereto, Plaintiff's reply briefs, Defendant's surreply, and Plaintiff's Notice of Recent Supplemental Authority, and for the reasons stated in the Opinion filed this day, it is hereby **ORDERED** that the Motions are

GRANTED in part and DENIED in part as follows:

1. The Motion to Dismiss is **GRANTED in part** and Counterclaim Count III is **DISMISSED with prejudice.** The Motion is **DENIED** in all other respects.

2. The Motion to Strike is **GRANTED in part** and Defendant's Third, Fifth through Eleventh, Fourteenth, Fifteenth, Seventeenth through Twenty–Fifth, Thirtieth, and Thirty–First Affirmative Defenses are **STRICKEN.** The Motion is **DENIED** in all other respects. Defendant is granted leave to amend his Fifteenth Affirmative Defenses within seven (7) days of the date of this Order.

It is so **ORDERED.**

E.D.Pa.,2013.
U.S. Bank, Nat. Ass'n v. Rosenberg
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