Case No. 13-2045

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TED GATZAROS AND MARIA GATZAROS,

Appellants,

v.

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS AND KEWADIN CASINOS GAMING AUTHORITY,

Appellees.

On appeal from the U.S. District Court
for the Eastern District of Michigan, Southern Division

BRIEF OF APPELLEES SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS AND KEWADIN CASINOS GAMING AUTHORITY

Grant S. Cowan
FROST BROWN TODD LLC
3300 Great American Tower
301 East Fourth Street
Cincinnati, Ohio 45202
(513) 651-6745
(513) 651-6981 (facsimile)
gcowan@fbtlaw.com

Counsel for Appellees Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, Appellees Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

/s/ Grant S. Cowan
Grant S. Cowan

Counsel for Appellees Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority

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INTRODUCTION

Prior to 2000, Appellants Ted and Maria Gatzaros ("the Gatzaroses") had a significant ownership interest in Monroe Partners, LLC ("Monroe Partners"). Monroe Partners at the time owned about one-half of the Greektown Casino in Detroit, Michigan. In July 2000, the Gatzaroses decided to sell their membership interests back to Monroe Partners, for about $265 million, payable over time. Monroe Partners obtained a limited guaranty from Appellees Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority (collectively "the Tribe") to guaranty the payments owed by Monroe Partners to the Gatzaroses, pursuant to a Guaranty to Fund Subscription Amount ("Guaranty").[1] The Guaranty is the subject of this action, and the Gatzaroses claim to be third-party beneficiaries of the Guaranty.

As is customary in guaranty agreements, the Guaranty contains language providing that Monroe Partners may from time to time modify the terms of the underlying debt guaranteed by the Tribe (defined in the Guaranty as the "Funding Obligations") without the Tribe's consent and without discharging the Tribe from its guaranty obligations. The Guaranty also contains standard contractual language

[1] Kewadin Casinos Gaming Authority is a political subdivision of the Sault Ste. Marie Tribe of Chippewa Indians. They are separate and distinct entities and both are parties to the Guaranty.

which prohibits Monroe Partners from modifying or changing the terms of the Guaranty itself, without the Tribe's written consent.

The Gatzaroses acknowledge and admit that, under the clear and unambiguous terms of the Guaranty, they cannot modify the terms of the Guaranty without the Tribe's written consent. One of the key terms of the Guaranty, which cannot be modified without the Tribe's written consent, is the "Limitation" provision. Pursuant to the Limitation provision, the Tribe's Funding Obligation (i.e., its obligation to guaranty the underlying debt) is triggered **if and only if** the Tribe receives distributions from the Greektown Casino in excess of an agreed upon distribution floor. The Gatzaroses acknowledge and admit that the Tribe never received distributions from the Greektown Casino in excess of the distribution floor and, therefore, the Tribe's guaranty obligations—its Funding Obligations—were never triggered.

In 2008, the Greektown Casino and Monroe Partners went bankrupt and Monroe Partners thus defaulted on its obligation to make payments to the Gatzaroses. Over four years later, the Gatzaroses decided to try to collect the amounts owed to them, by going after the Tribe on the Guaranty. The Gatzaroses realized that the Guaranty had never been triggered, due to the Limitation provision, so they embarked upon a desperate and futile attempt to amend the Guaranty by removing the Limitation provision. They did so by purporting to

amend the Funding Obligation provision of the Guaranty, to include a new sentence stating that the Guaranty was no longer subject to the separate Limitation provision of the Guaranty. Thus, the purported modification results in the absurdity of having Paragraph 2 of the Guaranty state that the Funding Obligations **are not** subject to the Limitation provision while having Paragraph 3 of Guaranty state that the Funding Obligations **are** subject to the Limitation.

The Tribe rejected the Gatzaroses' attempt to unilaterally eliminate the Limitation provision in the Guaranty without their consent. Thereafter, the Gatzaroses filed this action, seeking a declaration from the District Court approving their unilateral modification of the Guaranty. The District Court correctly concluded that the clear and unambiguous language of the Guaranty prohibits the Gatzaroses from modifying the Guaranty by eliminating the Limitation provision without the written consent of the Tribe.

JURISDICTIONAL STATEMENT

The District Court has jurisdiction over proceedings related to a case under Title 11 of the United States Code. 28 U.S.C. § 1334. Under "related-to" jurisdiction, a district court has jurisdiction over any proceeding that could conceivably have any effect on the estate being administered in bankruptcy. In re Dow Corning Corp., 86 F.3d 482, 489 (6th Cir. 1996). An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or

freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate. Id.

On May 29, 2008, Monroe Partners and Kewadin Greektown Casino, LLC ("Kewadin Greektown") each filed a voluntary petition for relief in the Bankruptcy Court for the Eastern District of Michigan, under Chapter 11 of the Bankruptcy Code. (Brief in Opposition to Remand, Bankr. RE 14-1, p. 8).[2] The Monroe Partners and Kewadin Greektown bankruptcy cases were later converted to cases under Chapter 7 of the Bankruptcy Code. (Id., p. 9, fn. 4).[3] The Gatzaroses are scheduled as secured creditors and have filed proofs of claims in the bankruptcies of Monroe Partners and Kewadin Greektown. (Id., p. 9). The Gatzaroses claim to be owed a "Subscription Payment" by Monroe Partners, which Subscription Payment was to have been made by Kewadin Greektown to Monroe Partners (and from Monroe Partners to the Gatzaroses). (Id., p. 9).

In this action, the Gatzaroses claim that the Subscription Payment is guaranteed by the Tribe, pursuant to the Guaranty. The amount sought by the Gatzaroses from the Monroe Partners and Kewadin Greektown bankruptcy estates

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[2] References to the record in the Adversary Proceeding in Bankruptcy Court, Adv. Pro. 12-06160, will be "Bankr. RE __, p. __".

[3] The Monroe Partners case is Case No. 08-53107, Bankruptcy Court, Eastern District of Michigan; the Kewadin Greektown case is Case No. 08-53105, in the same court.

is the same amount sought by the Gatzaroses from the Tribe in this action.[4] Thus, if the Gatzaroses are successful in this action, the claims asserted by the Gatzaroses in the Bankruptcy Cases against the assets of Monroe Partners would be substantially reduced, regardless of whether the Tribe would be deemed to replace the Gatzaroses as the claimant against the estates. (Id., p. 18-21). In addition, if the Gatzaroses are successful in this action, the bankruptcy estate of Kewadin Greektown would be impacted by satisfaction of Monroe Partners' scheduled unsecured claim in the Kewadin Greetown bankruptcy case, even without considering the satisfaction of the secured claim asserted by the Gatzaroses against Kewadin Greektown. (Id.). Accordingly, this action could "conceivably affect" the bankruptcy estates of Kewadin Greektown and Monroe Partners, and "related to" jurisdiction exists. See Michigan Tractor and Machinery Co. v. Red Top Rentals, Inc. (In re Red Top Rentals, Inc.), 2010 WL 2737182, at *3 (Bankr. E.D. Mich. Jan. 11, 2010) (holding that related to jurisdiction exists in action between non-debtor parties to enforce guaranty); Johnson v. Fifth Third Bank, Inc., 476 B.R. 493, 501 (W.D. Ky. 2012) ("To the extent that Plaintiffs are successful in the instant case, their claims in the bankruptcy estate will be reduced and/or

[4] The Gatzaroses' claim in this action is larger than their claim in the Bankruptcy Cases, presumably due to the accrual of interest since the filing of the Bankruptcy Cases.

extinguished, lest they experience an impermissible double recovery."); In re Meadowbrook Estates, 246 B.R. 898 (Bankr.E.D.Ca.2000) (finding that "related to" jurisdiction exists for civil proceedings that take place between non-debtor parties "such as a suit between a creditor and a guarantor of the debtor's obligation"); see also Collier on Bankruptcy ¶ 3.05[2] (16th ed. 2013) ("related to" proceedings are "those civil proceedings that take place between third parties, such as a suit between a creditor and a guarantor of a debtor's obligation")

Appellate jurisdiction rests upon 28 U.S.C. §§ 1291 and 1294(1), this being an appeal from a final order of judgment of the United States District Court for the Eastern District of Michigan, entered July 9, 2013. (Judgment, RE 21, Page ID# 787-788). The Gatzaroses timely filed their Notice of Appeal on August 2, 2013. (Notice of Appeal, RE 23. Page ID# 831).

STATEMENT OF THE QUESTIONS PRESENTED

Does the Guaranty permit the Gatzaroses to modify the Guaranty by eliminating the Guaranty's Limitation provision, without the written consent of the Tribe?

Does the Tribe's purported waiver of its defenses under principles of guaranty or suretyship permit the Gatzaroses to modify the Guaranty without the written consent of the Tribe?

STATEMENT OF THE CASE

This action was initially filed in state court in Wayne County, Michigan. The Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority (collectively "the Tribe") removed the action to the Bankruptcy Court for the Eastern District of Michigan, as a case related to the Monroe Partners, LLC and Kewadin Greektown Casino, LLC bankruptcies. (Notice of Removal, Bankr. RE 1, p. 1-215). The Tribe removed the action pursuant to Rule 9027 of the Federal Rules of Bankruptcy Procedure and 28 U.S.C. §§ 1334 and 1452. Thereafter, the parties stipulated to the withdrawal of the reference to the Bankruptcy Court, and the District Court ordered the reference withdrawn, with all further proceedings in the action to be adjudicated in the District Court. (Stipulation, RE 4, Page ID# 45-46; Order Granting Motion to Withdraw the Reference, RE 5, ID# 50-51).[5]

The Gatzaroses filed an Amended Complaint and the Tribe filed a Motion to Dismiss for failure to state a claim. (Amended Complaint, Bankr. RE 27, P. 1-10; Motion to Dismiss, RE 7, Page ID# 55-88). The Court granted the Motion to Dismiss and entered Judgment in favor of the Tribe. (Opinion and Order, RE 20,

[5] References to the record in the District Court action will be: "RE __, Page ID#__".

Page ID# 758-786; Judgment, RE 21, Page ID# 787-788). The Gatzaroses filed a Notice of Appeal. (Notice of Appeal, RE 23, Page ID# 831).

STATEMENT OF FACTS

Prior to July 28, 2000, the Gatzaroses owned a substantial membership interest in Monroe Partners. Monroe Partners owned 50% of Greektown Casino, LLC, which owned and operated the Greektown Casino in Detroit. (Amended Complaint, Bankr. RE 27, ¶¶ 9-10). On July 28, 2000, Monroe Partners, the Gatzaroses, and Kewadin Greektown entered into a series of agreements, pursuant to which the Gatzaroses sold their membership interests in Monroe Partners back to Monroe Partners, and Kewadin Greektown simultaneously agreed to buy those membership interests from Monroe Partners. (Amended Complaint, Bankr. RE 27, ¶¶ 11-15).

Specifically, Monroe Partners redeemed the Gatzaroses' entire membership interest for $265,000,000, pursuant to an Amended and Restated Limited Liability Company Redemption Agreement with Monroe Partners ("Redemption Agreement"). (Amended Complaint, Bankr. RE 27, ¶ 11; Redemption Agreement, Bankr. RE 28-2, Exh. 2, pg. 5). The Redemption Agreement required Monroe Partners to pay the $265 million over time in a series of "Liquidation Payments." (Id., p. 7-8). On the same day, Monroe Partners sold the redeemed membership interests to Kewadin Greektown pursuant to an Amended and Restated Limited

Liability Company Subscription Agreement ("Subscription Agreement"). (Amended Complaint, Bankr. RE 27, ¶ 12). The Subscription Agreement required Kewadin Greektown to pay the "Subscription Amount" ($265,000,000) to Monroe Partners "at such time or times and in such amounts and manner as may be required to enable Monroe Partners to pay the Retiring Member [the Gatzaroses] the principal and interest on the Liquidation Payments when due…" (Subscription Agreement, Bankr. RE 28-3, pg. 3).

The Subscription Agreement required Kewadin Greektown, as the "Subscriber," to obtain a limited guaranty of the Tribe to pay the Subscription Amount should Kewadin Greektown default on its obligation to pay the Subscription Amount to Monroe Partners. The Subscription Agreement provides in pertinent part:

> If and to the extent the Mandatory Tax Distributions which are not Retained Tax Distributions are subject to any tax imposed by the Sault Tribe, the Authority or any instrumentality thereof, the Subscriber shall cause the Sault Tribe and the Authority to guarantee the payment of the Subscription Amount in the amount of such tax paid to the Sault Tribe and/or Authority after default by the Subscriber in contributing the Subscription Amount and while such default remains uncured.

(Subscription Agreement, Bankr. RE 28-3, pg. 4) (emphasis added).

Accordingly, on the same day, July 28, 2000, the Tribe and Monroe Partners entered into the Guaranty. (Amended Complaint, Bankr. RE 27, ¶ 15). The

Guaranty, at Paragraph 2, describes the underlying indebtedness guaranteed by the Tribe, i.e., the Subscription Amount, and provides that the Tribe "unconditionally and absolutely guarant[ies] to fund the Subscription Amount…upon an event of default by the Subscriber [Kewadin Greektown] in making the Subscription Amount…" The obligation of the Tribe to guaranty the payment of the Subscription Amount is defined as the "Funding Obligation." (Guaranty, Bankr. RE 27-1, p. 2).

Paragraph 3 of the Guaranty, an entirely separate and distinct paragraph from the "Funding Obligation" provision, sets forth the significant limitation on the Tribe's guaranty. That Paragraph, entitled "Limitation," is consistent with the Subscription Agreement and significantly limits the Tribe's guaranty obligations, requiring the Tribe to guaranty the Subscription Amount only if and when the Tribe received payments from Greektown Casino in excess of certain monetary thresholds. (Guaranty, Bankr. RE 27-1, p. 2).

On December 1, 2005, the Gatzaroses, Monroe Partners, Kewadin Greektown, the Tribe, and other parties, including Greektown Holdings, LLC ("Greektown Holdings"), entered into an Agreement, pursuant to which (a) the Gatzaroses agreed to accept a payment from Greektown Holdings of $60,740,377 on December 2, 2005, as full payment of all amounts due the Gatzaroses through November 10, 2006. (Agreement, Bankr. RE 28-5, p. 2). The December 1, 2005

Agreement further provided that the Gatzaroses were to be paid an additional $58 million dollars over time: $20,666,666.67 on or prior to November 10, 2007; $19,333,333.34 on or prior to November 10, 2008; and $18,000,000 on or prior to November 10, 2009. (Agreement, Bankr. RE 28-5, p. 2). Hereinafter, the $58 million payment to the Gatzaroses is referred to as the "Remaining Payment."

On May 29, 2008, Kewadin Greektown and Monroe Partners filed for bankruptcy, seeking to discharge their respective obligations under the Subscription Agreement and Redemption Agreement. (Amended Complaint, RE 27, ¶ 29). As a result, Kewadin Greektown breached its obligation under the Subscription Agreement to pay the Subscription Amount to Monroe Partners, which caused Monroe Partners to breach the Redemption Agreement by failing to pay the Remaining Payment to the Gatzaroses.

It is undisputed that the Tribe never received distributions from Greektown Casino in excess of the established floor and, therefore, the Tribe's guaranty obligations were never triggered. The Gatzaroses acknowledge this fact several times in their Appellate Brief: "Following Kewadin's default, the limitations in the Guaranty prevented [the Tribe] from making any payments toward the debt. The conditions in the 'Limitation' which would have allowed funding, and thus

repayment, never occurred." (Appellate Brief, p. 6).[6] Accordingly, the Tribe was never obligated to guaranee the Remaining Payment under the Guaranty.

Over four years after Kewadin Greektown's default on the Subscription Amount, counsel for the Gatzaroses sent a letter to the Tribe, pursuant to which the Gatzaroses attempted to unilaterally modify the Guaranty, by removing the Limitation provision. Having purported to have removed the Limitation provision from the Guaranty, the Gatzaroses asserted that the Tribe was obligated to pay the Remaining Payment to the Gatzaroses. (Amended Complaint, Bankr. RE 27, ¶ 32; Letter from Counsel, Bankr. RE 28-6, p. 2).

The purported modification provides, in pertinent part:

> **As of October 17, 2012, the Guaranty is no longer subject to the Paragraph 3 hereunder, entitled 'Limitation**.' The Tribe and/or Authority shall immediately pay to Ted Gatzaroses and Maria Gatzaroses, 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.

(Letter from Counsel, Bankr. RE 28-6, p. 2) (emphasis added).

The Tribe refused to make any payment to the Gatzaroses and has denied all liability under the Guaranty. (Amended Complaint, Bankr. RE 27, ¶ 33). The

[6] Elsewehere in their Appellate Brief, the Gatzaroses acknowledge that the "limitations" in the Guaranty "were precluding [the Tribe's] funding of the debt"

(footnote continued on next page)

Gatzaroses filed this action against the Tribe, seeking to recover the Remaining Payment pursuant to the Guaranty. The Gatzaroses claim the Remaining Payment currently amounts to $73,903,863. (Amended Complaint, Bankr. RE 27, ¶ 28).

SUMMARY OF ARGUMENT

The Guaranty contains a "Limitation" provision which substantially limits the Tribe's guaranty obligations. The Guaranty also contains a provision which prohibits the Gatzaroses from modifying a term of the Guaranty—including the Limitation provision—without the written consent of the Tribe. In order to trigger the Tribe's guaranty obligations, the Gatzaroses concede that they must eliminate the Limitation provision. Their attempt to remove the Limitation provision violates the no-modification without written consent provision of the Guaranty and, therefore, the purported modification violates the clear and unambiguous terms of the Guaranty and is without force and effect.

The Guaranty contains a Waiver provision, pursuant to which the Tribe purports to waive its defenses based on principles of guaranty or suretyship. The Waiver provision does not waive the Tribe's defense that the Gatzaroses failed to

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(footnote continued from previous page)
and "[the Tribe's] 'Funding Obligation' was subject to limitation terms that made eventual funding of the debt impossible." (Appellate Brief, p. 9, 20).

state a claim for relief, nor does the Waiver provision waive the Tribe's non-suretyship defenses, including its contract defenses.

STANDARD OF REVIEW

Whether the District Court properly dismissed the Gatzaroses' claims under Rule 12(b)(6) is a question of law subject to *de novo* review. League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 527 (6th Cir. 2007) (citations omitted).

ARGUMENT

I. THE GUARANTY'S LIMITATION CANNOT BE MODIFIED WITHOUT THE WRITTEN CONSENT OF THE TRIBE

The Guaranty is governed by Michigan law. (Guaranty, Bankr. RE 27-1, Paragraph 10). In construing a guaranty, the intention of the parties should govern. Where the language of the writing is not ambiguous, the construction is a question of law for the court, on a consideration of the entire instrument. Mazur v. Young, 507 F.3d 1013, 1018 (6th Cir. 2007), quoting First Nat'l Bank of Ypsilanti v. Redford Chevrolet Co., 270 Mich. 116, 258 N.W. 221, 223 (1935). Also, under Michigan law, a guaranty is to be strictly construed in favor of the guarantor. Bandit Indus., Inc. v. Hobbs Int'l, Inc., 463 Mich. 504, 511-12, 620 N.W.2d 531, 533-35 (2001).

The Guaranty clearly provides that the Tribe's guaranty obligations are substantially limited. Paragraph 3, the Limitation provision, sets forth a substantial

condition precedent to the Tribe's guaranty obligation, requiring the Tribe to guaranty the payments **only** if the Tribe received distributions from the Greektown Casino in excess of an established floor. (Guaranty, Bankr. RE 27-1, Paragraph 3). The Guaranty also clearly provides that the terms of the Guaranty, such as the Limitation provision, cannot be modified or changed without the Tribe's written consent. Paragraph 10—General—provides in pertinent part: "No waiver, consent, modification or change of the terms of the Guaranty shall bind any of the Sault Tribe and Authority or Monroe Partners unless in writing and signed by the waiving party or an authorized officer or manager of the waiving party." (Guaranty, Bankr. RE 27-1, p. 6 of 10).

The Gatzaroses acknowledge and admit that the Limitation provision cannot be modified or changed without the Tribe's written consent. (Gatzaroses Response to Motion to Dismiss, RE 14, Page ID# 131) (The Gatzaroses "agree with [the Tribe] that they cannot modify any other provision in [the] Guaranty, including the 'Limitation Provision,' without their written consent."). And, the Gatzaroses acknowledge that the "lone limitation term is found in the 'Limitation'" provision, Paragraph 3. (Appellate Brief, p. 16). Despite their admission that the Limitation provision cannot be modified or changed with the Tribe's written consent, the Gatzaroses attempted to do just that, by sending a letter to the Tribe, stating in pertinent part: "**As of October 17, 2012, the Guaranty is no longer subject to**

the Paragraph 3 hereunder, entitled 'Limitation.'" (Letter from Counsel, Bankr. RE 28-6, p. 2) (emphasis added). The purported modification violates the no-modification without written consent provision in Paragraph 10 of the Guaranty.

The law regarding contract interpretation is well-settled in Michigan. Courts should interpret a contract in accordance with its plain meaning. Wilkie v. Auto-Owners Ins. Co., 469 Mich. 41, 61, 664 N.W.2d 776, 787 (2003) (internal citations and quotation marks omitted) ("Well-settled principles of contract interpretation require one to first look to a contract's plain language. If the plain language is clear, there can be only one reasonable interpretation of its meaning and, therefore, only one meaning the parties could reasonabl[y] expect to apply. If the language is ambiguous, longstanding principles of contract law require that the ambiguous provision be construed against the drafter."); Dillon v. DeNooyer Chevrolet Geo, 217 Mich.App. 163, 550 N.W.2d 846, 848 (1996) ("Contractual language is construed according to its plain and ordinary meaning, and technical or constrained constructions are to be avoided.").

In Michigan, parties to a contract may modify the contract by a later agreement. Quality Products & Concepts Co. v. Nagel Precision, Inc., 469 Mich. 362, 372–373, 666 N.W.2d 251 (2003). However, there must be mutual assent for the modification, and a modification will be considered mutual if it is established

through clear and convincing evidence of a written agreement establishing a mutual agreement to waive the terms of the original contract. Id.; Adell Broad. v. Apex Media Sales, 269 Mich. App. 6, 11, 708 N.W.2d 778, 782 (2005).

The Guaranty clearly provides that no terms of the Guaranty can be modified or changed without the written consent of the Tribe. Thus, it is clear that the Gatzaroses cannot modify or change the Limitation provision—and they certainly cannot remove it from the Guaranty—without the written consent of the Tribe. As the District Court correctly explained, "[a] straightforward reading of the contractual language compels the conclusion that the Gatzaroses have attempted a modification of the terms of the Guaranty itself, specifically Paragraph 3, not of the terms of any Funding Obligations. By their own admission, they cannot do so without the consent of the Tribe." (Order and Opinion, RE 20, Page ID# 778).

II. THE GATZAROSES CANNOT MODIFY OR CHANGE THE LIMITATION PROVISION BY PURPORTING TO MODIFY THE FUNDING OBLIGATION PROVISION

The Guaranty is a fairly typical, tripartite guaranty. The secondary obligor (the Tribe) agrees to guaranty an underlying obligation (the Subscription Amount) owed by the primary obligor (Kewadin Greektown) to the obligee (Monroe Partners). See, e.g., Kilpatrick Brothers Painting v. Chippewa Hills School District, 2006 WL 664210 at *3 (Mich. App. March 16, 2006).

The Guaranty contains a customary waiver provision that permits the obligee (i.e., Monroe Partners) to modify or change the terms of the underlying indebtedness (i.e., the Subscription Amount) without discharging the debt or guarantee of the Tribe. Under Michigan law, and the Restatement of (Third) of Suretyship and Guaranty,[7] any material alteration of a principal debt or obligation operates to completely discharge any guaranty of that debt or obligation, unless the guarantor consents to the alteration. Wilson Leasing Co. v. Seaway Pharmacal Corp., 53 Mich. App. 359, 220 N.W. 2d 83, 88-89 (Mich. App. 1974); Mazur, 507 F.2d at 1018 (As a general rule, the guarantor is released from liability if some act or omission on the part of the creditor discharges the principal debtor of the principal obligation by a rule of law, even if the principal obligation has not been paid). Any alteration that increases the debt or obligation or extends the time for performance is material. Wilson, 220 N.W.2d at 89.

Thus, Paragraph 8—Waivers—provides Monroe Partners the right to modify the underlying obligation—the Subscription Amount—without notice to or consent of the Tribe, without discharging the Tribe's guaranty obligation. Specifically,

[7] Michigan courts seek guidance in the Restatement on matters relating to sureties and guarantees. Will H. Hall & Son, Inc. v. Ace Masonry Construction, Inc., 260 Mich. App. 222, 677 N.W. 2d 51 (Mich. App. 2004); Kilpatrick Brothers Painting v. Chippewa Hills School District, 2006 WL 664210 at *3 (Mich. App. March 16, 2006).

Paragraph 8 provides in pertinent part that "Monroe Partners may, once or any number of times, modify the terms of any Funding Obligations, compromise, extend, increase, accelerate, renew or forbear to enforce any payment of any or all Funding Obligations, all without notice to [the Tribe] and without affecting in any manner the unconditional obligation of [the Tribe] under this Guaranty." (Guaranty, Bankr. RE 27-1, p. 4).

The Waiver provision in the Guaranty is lifted largely word-for-word from a standard Michigan UCC form, found in the Michigan Compiled Laws Annotated, Article 9 Secured Transactions, Part 2A, General Agreements. (MCLA Sample Agreement, RE 16-1, Page ID# 396). Paragraph 5.6 of that form clearly provides that the waiver provision applies to the underlying indebtedness, stating in pertinent part:

> Debtor waives notice of acceptance of this 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 Indebtedness, any and all other notices to which the undersigned might otherwise be entitled, and diligence in collecting any Indebtedness, and agree(s) that *the Bank may, once or any number of times, modify the terms of any Indebtedness, compromise, extend, increase, accelerate, renew or forbear to enforce payment of any or all Indebtedness, or permit Borrower to incur additional Indebtedness, all without notice to Debtor and without affecting in any manner the unconditional obligation of Debtor under this Agreement.*

4 Mich. UCC Forms Annotated Form 9:1010 (3d ed.) (emphasis added). This same form is routinely used in guaranty agreements in Michigan. See Comerica Bank v. Belovicz, Case No. 2:08-cv-12244-GER-MKM, E.D. Mich. May 22, 2008 (Complaint and Guaranty, RE 16-2, Page ID #56). In this case, it is clear that the parties simply inserted the term "Funding Obligation" for the term "Indebtedness" in the Waiver provision in the Guaranty. Thus, the "Funding Obligation" that may be modified by Monroe Partners, without the Tribe's consent, is the underlying indebtedness guaranteed by the Tribe.

This interpretation is consistent with the use of the term "Funding Obligation" in other parts of the Guaranty, where the Guaranty makes reference to the payment of the Funding Obligations, either by the Tribe or by others, such as Kewadin Greektown. (Guaranty, Bankr. RE 27-1, Paragraph 6) ("The Sault Tribe and the Authority agree that no security now or later held by Monroe Partners for the payment of any Funding Obligations, whether from the Subscriber, either the Sault Tribe and/or the Authority, or otherwise..,") (emphasis added). In other words, the Guaranty makes clear, by referencing payment of the Funding Obligation by the Tribe and others, that the Funding Obligation refers to the funding of the underlying indebtedness—the Subscription Amount. As the District Court correctly explained, the language of Paragraph 6 "clearly contemplates that the Funding Obligations, i.e., the underlying debt, could be paid by the Tribe, the

Authority 'or otherwise.'" (Opinion and Order, RE 20, Page ID# 775). Thus, while Monroe Partners may have the right under the Waiver provision of Paragraph 8 to modify the terms of the underlying indebtedness—the Subscription Amount—it does not have the right to modify any term of the Guaranty, such as the Limitation provision.

Finally, the Gatzaroses claim that the limitations in the Guaranty are a term of the Funding Obligation. (Appellate Brief, p. 17). But, the Gatzaroses admit that the "lone limitation term is found in the 'Limitation'" provision, Paragraph 3. (Appellate Brief, p. 16). Thus, in order to try to trigger the Tribe's guaranty obligation, the Gatzaroses are forced to eliminate the Limitation provision. The purported modification clearly seeks to do this:

> **As of October 17, 2012, the Guaranty is no longer subject to the Paragraph 3 hereunder, entitled 'Limitation**.' The Tribe and/or Authority shall immediately pay to Ted Gatzaroses and Maria Gatzaroses, 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.

(Letter from Counsel, Bankr. RE 28-6, p. 2) (emphasis added). The no-modification provision in Paragraph 10 of the Guaranty, however, specifically prohibits a modification or change to the terms of the Guaranty, including the Limitation provision, without the Tribe's written consent. As the District Court correctly explained, "[a]pplying these interpretive principles, it is clear that the

proposed unilateral modification, however it is characterized, seeks to modify the terms of the Guaranty, not the terms of the underlying Funding Obligations. The Limitation Provision is a separate term of the Guaranty not a term of the Funding Obligation." (Opinion and Order, RE 20, Page ID# 778).

III. THE GATZAROSES' INTERPRETATION OF THE GUARANTY AGREEMENT DEFIES COMMON SENSE AND CREATES AN ABSURD RESULT

The thrust of the Gatzaroses' argument is that the "very purpose of the Guaranty was to ensure funding and repayment of the debt" and, although the Guaranty contained a specific limitation on the Tribe's guaranty obligations, the Gatzaroses contend that they are permitted to "remove those limitation terms that prevented the actual guaranteed funding of the debt." (Appellate Brief, p. 19-20). Indeed, in their Appellate Brief, the Gatzaroses go so far as to claim that **they** "included the modification language [Paragraph 8—Waivers] to remove the limitation terms that prohibited funding." (Appellate Brief, p. 21). The Gatzaroses are wrong, for several reasons.

First, the Gatzaroses were not parties to the Guaranty, so for them to suggest that **they** included language in the Guaranty for any purpose is simply false as a matter of fact.

Second, in Michigan, contracts must be construed "consistent with common sense and in a manner that avoids absurd results." Almetals, Inc. v. Wickeder

Westfalenstahl, Gmbh, 08-10109, 2008 WL 2026122 (E.D. Mich. May 12, 2008); M & A Associates, Inc. v. VCX, Inc., 657 F. Supp. 454, 461 (E.D. Mich. 1987) aff'd, 856 F.2d 195 (6th Cir. 1988) ("Moreover, a 'contract should be interpreted to avoid an absurd or unreasonable result.'"), quoting Miller v. Van Kampen, 154 Mich.App. 165, 168, 397 N.W.2d 253 (1986). The Gatzaroses' interpretation is not consistent with common sense and would create an absurd result.

To accept the Gatzaroses' proposed interpretation, one would have to conclude that the Tribe agreed to guaranty the payment of the Subscription Amount **only on the condition that** it received distributions from the Greektown Casino exceeding an agreed floor (a substantial limitation on its guarantee obligation), but at the same time agreed to give Monroe and the Gatzaroses the right to eliminate this substantial limitation without the Tribe's consent, at any time. Such a strained interpretation is unreasonable and defies common sense. As the District Court correctly explained, "[u]nder this interpretation, the Gatzaroses could have at any time, even the day the Agreement was signed, unilaterally removed the Greektown Distribution Limitation and demanded payment of the Tribe for the Subscription Amount. Clearly such an absurd result does not follow inescapably from the contractual language. Such a reading of the Guaranty entirely eliminates Paragraph 3, which Gatzaroses agree they have no contractual right to modify, let alone eliminate." (Opinion and Order, RE 20, PG ID 777); see

also (Opinion and Order, RE 20, Page ID# 779) ("It would be an absurd result to permit the Gatzaroses to simply eliminate by fiat this important, bargained for limitation.").

Moreover, the Gatzaroses' proposed modification renders the Guaranty internally contradictory and unintelligible. Under the Gatzaroses' amendment, Paragraph 2 provides that "the Guaranty is no longer subject to the Paragraph 3 hereunder, entitled 'Limitation,'" yet Paragraph 3—which remains in the Guaranty—provides just the opposite: "The aggregate Funding Obligations are limited to the following amounts…." Thus, following the Gatzaroses' purported modification of the Guaranty, in one Paragraph, the Guaranty states that it is **not** subject to any limitations, and in the next Paragraph, the Guaranty states that it **is** subject to substantial limitations. The absurdity of this result is self-evident.

Finally, under Michigan law, contracts should be construed to give effect to each term or phrase whenever practicable. Iriquois On The Beach, Inc. v. General Star Indemnity Co., 550 F.3d 585, 588 (6th Cir. 2008), quoting Klapp v. United Ins. Group Agency, Inc., 468 Mich. 459, 663 N.W.2d 447, 452 (Mich. 2003). This Court has further recognized that the Michigan Supreme Court has rejected an interpretation of a contract that rendered a provision meaningless and without purpose. Associated Indemnity Corporation v. The Dow Chemical Company, 935 F.2d 800, 804 (6th Cir. 1991), citing Associated Truck Lines v. Baer, 346 Mich.

106, 110, 77 N.W.2d 384 (Mich. 1956). Under the Gatzaroses' interpretation of the Guaranty, the Limitation provision would be rendered meaningless and without purpose, since it could be eliminated by the Gatzaroses at any time and without the consent of the Tribe. (Appellate Brief, p. 21) (The Gatzaroses included the Waiver language so that they could "remove the limitation terms that prohibited funding."). Such an interpretation would render the Limitation provision meaningless and illusory, and is thus contrary to Michigan law. The same is true for the no-modification provision of the Guaranty. That provision is rendered meaningless and illusory if the Gatzaroses are permitted to disregard it, by significantly modifying the Guaranty without the consent of the Tribe. As the District Court correctly explained, the Gatzaroses "concede that they are powerless to remove the Limitation Provision without the Tribe's consent, yet they do just that through their strained interpretation of Paragraph 8." (Opinion and Order, RE 20, Page ID# 779).

IV. THE TRIBE DID NOT WAIVE ITS LEGAL AND CONTRACTUAL DEFENSES

As noted above, under Michigan law, if any material changes are made to the underlying obligation (i.e., the Subscription Amount), such as by extending the time for payment or changing the amount of payment, the secondary obligor (i.e., the Tribe) is released from his guaranty, unless he consents. Estate of Bluestone v. General Electric Credit Corporation, 329 N.W.2d 446, 450 (Mich. App. 1982)

(Under Michigan law, a variation of the underlying obligation which should have been anticipated by the guarantor as a possibility will not discharge the guarantor). As a result, it is routine for a secondary obligor (guarantor) to waive the "suretyship defenses" which would otherwise result in a discharge of the guarantor if the underlying obligation is modified. Restatement (Third) of Suretyship and Guaranty, § 48, Comments (1996); see also Norton Creditors' Rights Handbook § 2:7 ("The guarantor has numerous potential defenses to enforcement of the guaranty that are commonly referred to as suretyship defenses. The good news is that the suretyship defenses are generally waiveable. Virtually all guaranties contain waivers of all suretyship defenses.").

The Guaranty contains a fairly standard and common provision by which the Tribe waived its suretyship defenses. Paragraph 8—Waivers—of the Guaranty provides in pertinent part:

> The Sault Tribe and the Authority unconditionally and irrevocably waive each and every defense and setoff of any nature which, under the 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…(Guaranty, Par. 8, Waivers) (emphasis added).

(Guaranty, Bankr. RE 27-1, p. 4) (emphasis added).

The primary suretyship defenses are referred to as impairment of recourse and impairment of collateral. Norton Creditors' Rights Handbook § 2:7; see also

Opinion and Order, RE 20, Page ID# 783 ("The typical suretyship defenses are release, extension or modification of the underlying obligation, impairment of collateral and impairment of recourse.") (citing Restatement (Third) of Suretyship §§ 39-44); United States v. Vahlco Corp., 800 F.2d 462, 465-66 (5th Cir. 1986) ("These defenses, based upon changes to the underlying obligation and therefore changes to the guaranty, are termed suretyship defenses."); Barclays Business Credit, Inc. v. Freyer, 1997 WL 255248 at *3 (Superior Ct. Conn. May 6, 1997) ("Under § 48 of the Restatement (Third) of Suretyship and Guaranty, a waiver in a guaranty waives those defenses for actions of the obligee directed against the secondary obligor's surety status that would otherwise, absent the waiver, discharge the secondary obligation.").

The defense asserted by the Tribe, which forms the basis of its motion to dismiss, is the legal defense of failure to state a claim under Civ. R. 12(b)(6). Nothing in the Guaranty purports to waive the Tribe's defense that the Gatzaroses failed to state a claim upon which relief may be granted. Accordingly, the Gatzaroses have no basis to argue that the Tribe's motion to dismiss is barred by waiver.

Moreover, to the extent that the Tribe has asserted contract defenses, it did not waive those defenses under the Guaranty. The Gatzaroses fail to recognize the distinction between a waiver of **all** defenses and a **limited** waiver of defenses

under principles of suretyship and guaranty. The Gatzaroses, as the parties asserting the waiver, bear the burden of proof. The Cadle Co. v. City of Kentwood, 285 Mich. App. 240, 255, 776 N.W.2d 145, 157 (2009), citing Burke v. City of River Rouge, 240 Mich. 12, 14, 215 N.W. 18 (1927). The defenses which the Gatzaroses claim the Tribe has waived, lack of good faith and fair dealing, and the defense that Plaintiffs' interpretation of the Guaranty would render it illusory, are not suretyship/guaranty defenses. See defenses referenced in Restatement (Third) of Suretyship and Guaranty, § 48, Comments (1996). The Tribe has not waived its non-suretyship defenses to the Guaranty. As the District Court correctly explained, "[i]n the Guaranty, the Tribe expressly waived any defense that would rest on principles of guaranty or suretyship. The Gatzaroses have failed to support their legal contention that this waiver should extend to *any* defense that the Tribe may assert in this case. The Court concludes that the Tribe is not precluded from asserting the non-suretyship defenses it relies on [in] this action."). (Opinion and Order, RE 20, Page ID# 783) (emphasis in original).

Finally, the cases cited by the Gatzaroses offer no help, because they involve waiver provisions that waived all defenses, not just those based on principles of suretyship and guaranty. See, e.g., Morris v. Comerica Bank, 2004 WL 1801034 (Mich. App. August 12, 2004) (guarantor waived each and every defense and setoff "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…") (emphasis added); U.S. Bank, N.A. v. Rosenberg, 2013 WL 272061 (E.D. Pa. Jan. 24, 2013) (guarantor waives "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.") (emphasis added).

CONCLUSION

The District Court properly interpreted the Guaranty and concluded that the Gatzaroses are not permitted to unilaterally remove the Limitation provision without the Tribe's written consent. The District Court also properly concluded that the Tribe did not waive its non-suretyship defenses in the Guaranty. Accordingly, the District Court correctly dismissed the Gatzaroses' action. This Court should affirm.

Respectfully submitted,

/s/ Grant S. Cowan
Grant S. Cowan
FROST BROWN TODD LLC
3300 Great American Tower
301 East Fourth Street
Cincinnati, Ohio 45202
(513) 651-6800
(513) 651-6981 (facsimile)
gcowan@fbtlaw.com

Counsel for Appellees Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority

CERTIFICATION OF COMPLIANCE

I hereby certify that this Brief of Appellees the Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority complies with the type-volume limitation of Fed. R. App. P. 32(a)(7). Excluding the corporate disclosure statement, table of contents, table of authorities, certification of compliance, and certification of service, this brief contains 6,249 words.

/s/ Grant S. Cowan

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2013, I electronically filed the Brief for Appellees the Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered counsel of record.

/s/Grant S. Cowan

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 30(b), Defendants/Appellees The Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority designate the following relevant district court documents:

DESCRIPTION OF ENTRY	**DATE**	**RECORD ENTRY NO.**	**PAGE ID #**
United States District Court for the Eastern District of Michigan Southern Division Case No. 2:13-cv-10291-PDB-RSW			
Tribe Motion to Dismiss for Failure to State A Claim	3-4-13	7	55-88
Papas and Gatzaroses Response to Motion to Dismiss	3-25-13	14	118-142
Tribe Reply to Response to Motion to Dismiss	4-8-13	16	376-385
Opinion and Order Granting Motion to Dismiss	7-9-13	20	758-786
Judgment	7-9-13	21	787-788

United States Bankruptcy Court for the Eastern District of Michigan Southern Division Adv. Pro. No. 12-06160	DATE	RECORD ENTRY NO.	PAGE #
Tribe Brief in Opposition to Motion to Remand	1-22-13	14-1	1-30
First Amended Complaint	2-6-13	27	1-10
Guaranty to Fund Subscription Amount	2-6-13	27-1	1-10
Amended and Restated LLC Redemption Agreement	2-6-13	28	1-40
Amended and Restated LLC Subscription Agreement	2-6-13	28-5	1-42

Agreement (12/1/2005)	2-6-13	28-8	1-4
Stroble Letter (10/18/2013)	2-6-13	28-9	1-4