

CASE NO. 13-2045

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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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

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**REPLY BRIEF FOR APPELLANTS**  
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December 2, 2013

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## ARGUMENT

### **I. APPELLANTS HAD THE RIGHT TO MODIFY THE TERMS OF THE “FUNDING OBLIGATIONS” SO THEY WERE NO LONGER SUBJECT TO LIMITATIONS.**

Appellees wrongfully claim Appellants modified the Section 3 “Limitation” without their consent. A review of the Appellants’ October 18, 2012 letter shows they never modified any of the language to the Section 3 “Limitation”. (RE 14.5 Response, Page No. 244). The Letter clearly shows Appellants only modified, without notice, the Section 2 “Funding Obligations” so they were no longer subject to the Section 3 “Limitations”. *Id.* Such a modification was authorized by the Guaranty. Michigan law required the District Court to enforce the Guaranty as written. In violation of the Guaranty and Michigan law, the District Court committed reversible error when it failed to allow Appellants to unilaterally modify the terms of the “Funding Obligations so they were no longer subject to limitations that precluded the repayment of the debt.

Michigan law provides a court’s primary responsibility in construing a contract is to ascertain and enforce the intent of the parties. *Wonderland Shopping Venture, Ltd. Partnership v. CDC Mortgage Capital, Inc.*, 274 F.3d 1085 (6th Cir. 2001). *Howe v. Atwood*, 47 F.Supp. 979 (E.D. Mich. 1942). Based upon the “Waivers” clear and unambiguous language, the parties intended for Appellants to have the right to modify, without notice, the terms of the Section 2 “Funding

Obligations”. (RE 14.3 Response, Page No. 216). The Section 2 “Funding Obligations” included the “terms” that the duty to fund was subject to “limitations” (RE 14.3 Response, Page No. 214). Appellants had the right under the Guaranty to modify the terms of the Section 2 “Funding Obligations”, without notice, so they were no longer subject to limitations, including the Section 3 “Limitations”, which precluded repayment of the debt.

By failing to enforce the Guaranty as written, the District Court committed reversible error when it dismissed Appellants’ Amended Complaint for Declaratory Relief. This Court of Appeals must reverse the District Court’s erroneous Opinion and Order, and allow Appellants to engage in those modifications authorized by the Guaranty.

**II. THE TERM “FUNDING OBLIGATIONS” IS NOT DEFINED AS THE “SUBSCRIPTION AMOUNT” OR THE UNDERLYING DEBT.**

Generally, a guaranty may include a provision which allows the obligor and obligee to change to terms of the underlying debt without notice to the guarantor. Without such a provision, a modification to the underlying debt, without the guarantor’s consent, will discharge the guarantee. In this case, the parties did not include such language. Further, the Guaranty provides separately for the use of the underlying debt (“Subscription Amount”) and the “Funding Obligations”.

The “Waivers” expressly granted Appellants the right to modify the terms of any “Funding Obligations” without notice. (RE 14.3 Response, Page No. 9). In an effort to prevent Appellants from unilaterally modifying the terms of the Section 2 “Funding Obligations”, the District Court erroneously ruled the “Funding Obligations” in the “Waivers” only referred to the underlying debt. Thus, under the District Court’s reasoning, Appellants could only modify the underlying debt without notice to Appellees. Therefore, the District Court wrongfully found Appellants’ modification of the terms to the Section 2 “Funding Obligations”, without notice, improper. The District Court was required to enforce the Guaranty as written. It was reversible error for the District Court to change the words in the “Waivers” from “Funding Obligations” to underlying debt in order to prevent Appellants’ modifications of its terms as authorized by the Guaranty.

**A. The Guaranty Does Not Contain Any Language Providing The Subscription Amount or Underlying Debt Were Modifiable Without Notice.**

The intention of the parties to a contract is revealed by the language the parties chose to use in the formation of the contract. *Datron, Inc. v. CRA Holdings, Inc.*, 42 F.Supp2d 736 (W.D. Mich. 1999). Where words of a written contract are not ambiguous or uncertain, the court must look for the parties’ intent in such words. *Michigan Chandelier Company v. Morse*, 297 Mich. 41; 297 NW 64 (1941). Courts ought not to rewrite contracts by ignoring parties' intent; rather, they should interpret

the existing contract as fairly as possible. *AES Technology Systems Inc.*, 583 F.2d. 933, 941 (7th Cir.1978). In this case, the District Court erroneously refused to enforce the clear and unambiguous language of the “Waivers” which allowed Appellants to modify the terms of the “Funding Obligations” without notice. Despite this language, the District Court wrongfully removed the phrase “Funding Obligations” from the “Waivers” and replaced it with the phrase “underlying debt” to prevent Appellants from modifying the terms to the Section 2 “Funding Obligations”.

The terms “Funding Obligations” and the underlying debt are not similarly defined or interchangeable. Page one (1) of the Guaranty states the “Subscription Amount” is the underlying debt as is different from the Appellees’ “Funding Obligations” as follows:

WHEREAS, Section 2(c) of the Subscription Agreement requires the Subscriber to cause the Guarantors to fund amounts necessary to pay the Subscription Amount to Monroe, as when due, **under certain circumstances**, and

WHEREAS, the Subscriber’s obligation to pay the Subscription Amount to Monroe is secured by a Security Agreement... (RE 14.3, Response Page No. 214, Emphasis added).

Kewadin is the Subscriber and obligor of the underlying debt under the “Subscription Agreement”. (RE 14.2, Response Page No. 189). The Guaranty defined the term “Funding Obligations” as the Appellees’ guaranty to fund the



“Subscription Amount” subject to the limitations in the Guaranty. (RE 14.3, Response Page No. 214).

Unlike Appellees’ “Funding Obligations”, Kewadin’s duty to pay the “Subscription Amount” is not subject to the limitations set forth in the Guaranty or payable under certain circumstances. Under the Guaranty, the terms “Funding Obligations” and “Subscription Amount” are separately used. Only the “Subscription Amount” refers to the underlying debt. The phrases “Funding Obligations” and “underlying debt” are not the same or interchangeable. These phrases provide no basis for the District Court to unilaterally remove the phrase “Funding Obligations” from the “Waivers” and replace it with the phrase “underlying debt” or “Subscription Amount”.

Parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy. *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich. 41, 664 N.W.2d 776, 782 (2003). Under Michigan law, the best evidence of the parties’ intent is the contract itself. *Lozada v. Dale Baker Oldsmobile, Inc.*, 197 F.R.D. 321 (W.D. Mich. 2000). In this case, the parties chose to separately define and use the terms “Funding Obligations” and “Subscription Amount” in the Guaranty. The parties then only chose to state in the “Waivers” Appellants had the right to modify the “Funding Obligations” without notice. The parties chose not to use the term

“Subscription Amount” or “underlying debt” to describe that which was modifiable without notice. It is clear the District Court committed reversible error when it unilaterally removed “Funding Obligations” from the “Waivers” and replaced it with “underlying debt” to prevent Appellants from modifying the terms to the Section 2 “Funding Obligations”.

**B. The Standard Security Agreement is Extrinsic Evidence Which Cannot Vary the Guaranty’s Unambiguous Language.**

A court may not consider extrinsic evidence of the parties' intent to vary the meaning of a contract that is clear and unambiguous. *Burkhardt v. Bailey*, 260 Mich.App. 636, 680 N.W.2d 453, 464 (2004). Therefore, since the “Waivers” language is not ambiguous, there is no need for this Court to refer to a standard security agreement form provided by the Appellees to determine the parties’ intentions. Further, since this form security agreement is neither a guaranty nor a guaranty negotiated and drafted by these parties, it is irrelevant. This Court of Appeals must enforce the clear and unambiguous language used by the parties rather than language found in some extrinsic standard form. The Guaranty’s own language provides that the Appellants had the right under the “Waivers” to modify the terms of the “Funding Obligations” without notice.

In addition, Appellees have misapplied and misrepresented the Guaranty’s “Security” provision to claim “Funding Obligations” are defined as the underlying debt. There is absolutely no language in the “Security” provision defining Appellees’

“Funding Obligations” as Kewadin’s underlying debt. (RE 14.3 Response, Page Nos. 215-216). To the contrary, the “Security” provision declared the “Funding Obligations” belonged to the Appellees. *Id.* 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. Therefore, the District Court committed reversible error in defining the “Funding Obligations” as the underlying debt.

**C. The “Limitation” is a Modifiable Term of the “Funding Obligations”.**

The “Waivers” state Appellants had the right to modify without notice any terms of the “Funding Obligations”. (RE 14.3, Response, Page No. 216). As argued below, without any supporting language, the Section 3 “Limitation” would not be modifiable without Appellees’ consent. However, Section 2 states limitations are terms of the Appellees’ “Funding Obligations. (RE 14.3, Response, Page No. 214). The Section 3 “Limitation” state that its limitations are terms of the “Funding Obligations” *Id.* Therefore, to the extent the “Limitation” is a term of the “Funding Obligations”, Appellants have the right to modify those terms so the “Funding Obligations” are no longer subject to such limitations. The District Court’s decision

to find otherwise constitutes reversible error as it contradicts the clear and unambiguous language of the Guaranty.

**III. APPELLANTS' MODIFICATION OF THE TERMS OF THE "FUNDING OBLIGATIONS" WAS CONSISTENT WITH THE GUARANTY AND MICHIGAN LAW.**

The modification terms of the Guaranty were duly negotiated by the parties and expressly set forth in the document. Therefore, Appellants' right to modify the terms of the "Funding Obligations" is supported by the language of the Guaranty and Michigan law. The District Court committed reversible error when it failed to enforce the Guaranty as written.

**A. Since The Guaranty Was Incorporated by Reference to the Redemption Agreement, Appellants Were Parties to the Guaranty.**

Appellees wrongfully contend Appellants were not parties to the Guaranty, and therefore did not have the ability to negotiate the inclusion of modification language. Under Michigan law, when a written agreement refers to a separate document for additional contract terms, a court must be construed together as one instrument. *West Madison Inv. Co. v. Fileccia*, 58 Mich.App. 100; 226 NW2d 857 (1975). The Guaranty was executed as part of the Redemption and Subscription Agreements (RE 14.3 Response, Page No. 213). The Appellants were executing parties to the Redemption Agreement which incorporated by reference the Subscription Agreement and Guaranty. (RE 14.1 Response, Page No. 152). Since the Guaranty is incorporated into the Redemption Agreement signed by Appellants,

the Guaranty is part of the Redemption Agreement. Therefore, it is erroneous for Appellees to claim Appellants were not part of the negotiations of the modification terms provided in the Guaranty.

**B. The Guaranty Language is Clear, Unambiguous and not is Open to Construction by this Court.**

Appellees erroneously claim this Court should uphold the District Court's ruling because allowing for the modification of the terms of the "Funding Obligations", without notice, would be absurd. First, under Michigan law, the Guaranty is not open to construction because the language authorizing such modifications is clear and unambiguous. Further, the authorization is not absurd when the Court takes into account Appellants had invested over \$200 million for which it was seeking to ensure repayment under the Guaranty.

The terms of a clear and unambiguous contract provision are not open to construction and must be applied as written. *Michigan Mutual Ins. Co. v. Dowell*, 204 Mich.App. 81, 87, 514 N.W.2d 185 (1994). Under the express, clear and unambiguous language of the Guaranty, Appellants had the right to modify the "Funding Obligations", without notice, so they were no longer subject to limitations which prevented repayment of the debt. The District Court committed reversible error when it failed to enforce the language of the Guaranty which set forth Appellants' modification rights.

Further, the law presumes that business people are fully competent to enter into contracts and obligate themselves to perform in a manner in which they wish, and courts have no authority to rewrite terms of a contract because they might feel that it was an unwise agreement for a party to have entered into. *WXON-TV v. A.C. Nielsen Co.*, 740 F.Supp. 1261, 1262 (E.D. Mich. 1990). A court cannot rewrite contracts under the guise of construction of a contract when to do so would require the court to ignore the plain meaning of the words used by the parties. *Budzinski v. Metropolitan Life Insurance Co.*, 287 Mich. 469; 286 NW2d 842 (1939). Claiming absurdity, the Appellees want this Court to ignore the express, clear and unambiguous language of the Guaranty which authorizes Appellants to modify the limitation terms of the “Funding Obligations” without notice. Appellees may not like the result, but Appellants’ right to make such modification is supported by the unequivocal language of the Guaranty. The District Court erred in refusing to enforce the Guaranty’s language as written in order to avoid the result which the language authorized.

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 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".

**C. The "Limitation" Provision No Longer Applies Because the "Waivers" Granted Appellants the Authority to Modify, Without Notice, the "Funding Obligations" So They Were No Longer Subject to Such Limitations.**

Contrary to Appellees' claims, there is no inconsistency between Sections 2 and 3 of the Guaranty created by the Appellants' modification of the terms of the "Funding Obligations". Appellees erroneously claim Appellants committed an impermissible unilateral modification of the Section 3 "Limitation". Appellants' October 18, 2012 Letter never modified the Section 3 "Limitation". (RE 14.5, Response, Page No. 244). However, both Section 2 and Section 3 state "limitations" are "terms" of the "Funding Obligations". The "Waiver" state such terms are modifiable without notice. As authorized by Michigan law and the Guaranty, Appellants only modified the terms of the "Funding Obligation" so they were no longer subject to such "Limitations". Essentially, the Section 2 modification eliminated the effect of the Section 3 "Limitation".

Under Michigan law, no part of a contract is to be eliminated or stricken by some other **part unless the result is fairly inescapable**. *Laevin v. St. Vincent DePaul Society of Grand Rapids*, 323 Mich. 607, 609 -610; 36 NW2d 163 (1949). In this case, **it is fairly inescapable** that the “Waivers” authorizes a modification, without notice, to terms to which the “Funding Obligations” are subject. It is fairly inescapable then that the terms which the “Waivers” required modified would be eliminated, including the limitation terms. Therefore, the modification was authorized by Michigan law. 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”.

**IV. APPELLEES FAILED TO PROVIDE ANY SUPPORT FOR THEIR CLAIM THEY NEVER WAIVED THEIR CONTRACT DEFENSES.**

The “Waivers” state Appellees waived each and every defense of any nature under the principles of guaranty and suretyship. (RE 14.3, Response, page No. 216). Appellees wrongfully claim that guaranty and suretyship defenses do not include such contract defenses as good faith and illusory contracts. However, by law, it is clear contract law and defenses are included within the principles of the law of guaranty. Further, there is no language in the “Waivers” limiting the defenses to those listed in the *Restatement 3<sup>rd</sup> of Surety and Guaranty*. There is no support for Appellees’ claim the “Waivers” never included a waiver of contract defenses.



Even the *Restatement 3<sup>rd</sup> of Surety and Guaranty* provides contract law is a basic principle of the law of guaranty. *Restatement 3<sup>rd</sup> of Surety and Guaranty* §5. The *Restatement 3<sup>rd</sup> of Surety and Guaranty* never excluded contract defenses. Courts interpreting guaranties have found contract law to be a basic principle of the law of guaranty. *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 (7<sup>th</sup> Cir. 2001); *Prestige Capital Corp. v. Michigan Gage & Mfg LLC*, 722 F.Supp.2d 837, 843 (E.D. Mich. 2010). 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 (6<sup>th</sup> Cir. 1991). It is evident the principles of guaranty include contract defenses upon which guaranty law is premised, even those contract defenses raised by Appellees.

It is clear under the broad “Waivers”, Appellees waived all of their contract defenses which they asserted in filing the Motion to Dismiss. 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.

**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. This Court of Appeals should find the Appellants' modification of the terms of the "Funding Obligations" was proper. In the alternative, 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,

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Dated: December 2, 2013

**CERTIFICATE OF COMPLIANCE**

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

1. Exclusive of the exempted portions of the Reply Brief, as provided in Fed.R.App.P. 32(a)(7)(B), the Brief contains 3107 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 2<sup>th</sup> day of December, 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.

/s/Thomas L. Stroble

Thomas L. Stroble

**ADDENDUM**

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**DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS**

<u>Record of Entry</u>	<u>Date Filed</u>	<u>Page ID Range</u>	<u>Description</u>
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 14.5	03/25/2013	243-245	October 18, 2012 Letter