

1988

Walter E. Heller Western Incorporated, a
Callifronia corporation v. U.S. Rock Wool
Company, Inc., a Utah corporation; V. Ross Ekins;
S.O. Ekins; et al., : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Earl D. Tanner; Brad L Englund; Tanner, Bowen and Tanner; Attorneys for Defendants-Respondents.

John T. Anderson; Biele, Haslam and Hatch; Attorneys for Plaintiff-Appellant.

Recommended Citation

Legal Brief, *Walter E. Heller Western Inc. v. U.S. rock Wool Co.*, No. 880071 (Utah Court of Appeals, 1988).
https://digitalcommons.law.byu.edu/byu_ca1/864

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

57-222

.A10

DOCKET NO.

880071-CA

STATE OF UTAH

Defendants and Respondents.

• • • • •

Court of Appeals
No. 880071-CA

John T. Anderson, Esq.
BIELE, HASLAM & HATCH
Attorneys for Plaintiff-Appellant
4th Floor
50 West 300 South
Salt Lake City, Utah 84101
Telephone: (801) 328-1666

FILED

NOV 16 1988

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

WALTER E. HELLER WESTERN	:	
INCORPORATED, a California	:	
corporation,	:	
	:	PETITION OF RESPONDENTS
Plaintiff and Appellant,	:	EKINS FOR REHEARING
	:	
vs.	:	
	:	
U.S. ROCK WOOL COMPANY, INC.,	:	
a Utah corporation; V. ROSS	:	Court of Appeals
EKINS; S. O. EKINS; et al.,	:	No. 880071-CA
	:	
Defendants and Respondents.	:	

Earl D. Tanner, Esq.
Brad L Englund, Esq.
TANNER, BOWEN & TANNER
Attorneys for Defendants-
Respondents
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 538-2021

John T. Anderson, Esq.
BIELE, HASLAM & HATCH
Attorneys for Plaintiff-Appellant
4th Floor
50 West 300 South
Salt Lake City, Utah 84101
Telephone: (801) 328-1666

TABLE OF CONTENTS

INTRODUCTION.....	1
POINT I. The trial court found that Heller breached its contract with Rock Wool. As a matter of law this released the Ekins.....	2
POINT II. The trial court found that Heller breached the guaranty and the conditions of the deed of trust. As a matter of law this released the Ekins.....	4
POINT III. Contrary to the opinion expressed by this Court, the terms "unconditional" and "absolute" do not mean that the guarantor's obligation is unconditional or absolute.....	5
POINT IV. The trial court found that Heller failed to dispose of the Accounts Receivable in a commercially reasonable manner. Under California law, this released Rock Wool and automatically released the Ekins.....	7
POINT V. The trial court found that Heller wholly failed to prove an indispensable element of its cause of action; the amount, if any, due from the Ekins under their alleged guaranty.....	12
POINT VI. Even if the guaranty could be properly interpreted as consenting to a failure to perfect security, it should not be construed as consent to Heller's breach of the covenant of good faith or the other egregious conduct Heller was found to have engaged in.....	15
POINT VII. The trial court found for the Ekins on their counterclaim, but held that its decision releasing the Ekins and awarding them costs and attorneys fees fully compensated them for the damages sustained. Reversal should reinstate the counterclaim.....	18
CONCLUSION.....	19

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>American Security Bank v. Clarno</u> , 199 Cal.Rptr. 127 (Cal.App. 1984).....	15
<u>Ashton v. Ashton</u> , 51 U.A.R. 16 (February 4, 1987).....	13
<u>Bank of America Nat. Trust & Savings Assn. v. McRae</u> , 183 P.2d 385, 389 (Cal.App. 1947).....	6
<u>Carrier Brokers, Inc. v. Spanish Trail</u> , 77 U.A.R. 48, 49 (Utah App. March 9, 1988).....	6,11
<u>Citizens' Trust & Savings Bank v. Bryant</u> , 200 P. 823, 824 (Cal.App. 1921).....	7
<u>City of Ukiah v. Fones</u> , 410 P.2d 369, 371 (Cal. 1966)....	10,18
<u>Coutin v. Nessonbaum</u> , 94 Cal.Rptr. 453, 17 Cal.App. 3d 156 (Cal.App. 1971).....	6,14
<u>D.W. Jaquays & Co. v. First Security Bank</u> , 419 P.2d 85, 89 (Ariz. 1966).....	10
<u>Flickinger v. Swedlow Engineering Co., Inc.</u> , 289 P.2d 214 (Cal. 1955).....	3
<u>Walter E. Heller & Co., Inc. v. Wilkerson</u> , 627 P.2d 773, 775 (Colo.App. 1981).....	10
<u>Kansas State Bank & Trust Co. v. DeLorean</u> , 640 P.2d 343, 350 (Kan.App. 1982).....	7
<u>Langeveld v. L.R.Z.H. Corp.</u> , 376 A.2d 931 (N.J. 1977)....	9
<u>R.C. Tolman Const. Co., Inc. v. Myton Water Assn.</u> , 563 P.2d 780 (Utah 1977).....	2
<u>Sather Banking Co. v. Aurther r. Briggs Co.</u> , 72 P. 352, 354 (Cal. 1903).....	16
<u>Scharf v. BMG Corp.</u> , 700 P.2d 1068, 1070 (Utah 1985).....	13
<u>Sproul v. Cuddy</u> , 280 P.2d 158, 164 (Cal. App. 1955).....	18

<u>United States v. Willis</u> , 593 F.2d 247 (6th Cir. 1979)....	7
<u>United States Leasing Corp. v. DuPont</u> , 444 P.2d 65, 75 (Cal. 1968).....	3
<u>Valley Bank and Trust Co. v. Rite Way Concrete Forming, Inc.</u> , 742 P.2d 105, 107-109 (Utah App. 1987).....	6,11,17
<u>Western Decor & Furnishings v. Bank of America</u> , 154 Cal.Rptr. 287, 91 Cal.App.3d 293 (Cal.App. 1979).....	8,11

Statutes

California Civil Code § 2787.....	4
California Civil Code § 2809.....	13
California Civil Code § 2819.....	10
California Civil Code § 2845.....	9
California Commercial Code § 9504(3).....	8

Other

Utah Rules of the Court of Appeals.....	1
17.17	

Defendants and Respondents V. Ross Ekins and S. O.

Ekins, pursuant to Rule 36, RUCA, hereby petition for rehearing of this appeal. The Petition is necessary because the Court has overlooked, misapprehended, or failed to give legal effect to the following points of law and fact:

I. The trial court found that Heller breached its contract with Rock Wool. As a matter of law this released the Ekins.

II. The trial court found that Heller breached the guaranty and the conditions of the deed of trust. As a matter of law this released the Ekins.

III. Contrary to the Opinion, the terms "unconditional" and "absolute" do not mean that the guarantor's obligation is unconditional or absolute.

IV. The trial court found that Heller failed to dispose of the accounts receivable in a commercially reasonable manner. Under California law, this released Rock Wool and automatically released the Ekins.

V. The trial court found that Heller wholly failed to prove an indispensable element of its cause of action; the amount, if any, due from the Ekins under their alleged guaranty.

VI. Even if the guaranty could be properly interpreted as consenting to a failure to perfect security, it should not be construed as consent to Heller's breach of the covenant of good faith or the other egregious conduct Heller was found to have engaged in.

VII. The trial court found for the Ekins on their counterclaim, but held that its decision releasing the Ekins and awarding them costs and attorneys fees fully compensated them for the damages sustained. Reversal should reinstate judgment on the counterclaim.

INTRODUCTION

In defending the trial court's decision, the Ekins set out (exclusive of the counterclaim) four separate grounds for upholding the lower court's decision. In its decision to reverse

and remand, this Court dealt with only one of the separate, independent and compelling grounds for affirmance and overlooked the other grounds for upholding the decision, each of which is fully sufficient by itself to prevent reversal.

Under Utah law, the appellant has the burden of showing that the lower court's decision was incorrect. Furthermore, every judgment is presumed valid and correct. R.C. Tolman Const. Co., Inc. v. Myton Water Assn., 563 P.2d 780 (Utah 1977).

Therefore, unless Heller can show there is no valid premise upon which the trial court decision can be supported, this Court must uphold the decision. Also, where findings are susceptible of two interpretations, that interpretation which favors affirmance should be adopted. Finally, the reviewing court should affirm if it can find a reasonable basis for so doing. Therefore, this Court should not reverse and remand until and unless it has evaluated and rejected each of the grounds advanced in support of the decision.

POINT I

THE TRIAL COURT FOUND THAT HELLER BREACHED ITS CONTRACT WITH ROCK WOOL. AS A MATTER OF LAW THIS RELEASED THE EKINS.

In its opinion, this Court stated that Heller's breach of its obligations to Rock Wool to act in good faith and to act in a commercially reasonable manner were not conditions to the Ekins' liability under their unconditional guaranty. This conclusion misapprehends the law.

In United States Leasing Corp. v. DuPont, 444 P.2d 65, 75 (Cal. 1968) the California Supreme Court stated:

. . . since the liability of a surety is commensurate with that of the principal, where the principal is not liable on the obligation, neither is the guarantor. Consequently, no liability can be imposed upon defendants as guarantors unless [the debtor] is liable. . . .
(Emphasis added, citations omitted.)

In other words, if Rock Wool is not liable, the Ekins are not liable. Heller's breach of the Rock Wool's contracts reduces or eliminates liability under the Guaranty. Findings of Fact (FOF) 9 & 10, Appendix (App). 2, find Heller in default.

Furthermore, in Flickinger v. Swedlow Engineering Co., Inc., 289 P.2d 214 (Cal. 1955) the Supreme Court held that if a defense is available to the debtor, it is available to the guarantor. In that case, the creditor sued the debtor under one theory and lost. Thereafter, it sued the guarantor under another theory. The Supreme Court held that the guarantor could assert the defense of res judicata, even though it was not a party to the first action. In so ruling, the Court stated:

And as such defense to this action is available to . . . the principal, it is likewise available to . . . the surety on the bond. Sureties on a bond have a legal right to avail themselves of all defenses that would be allowed the principal and are generally in no worse position that he would be if sued separately. (Emphasis added, citations omitted.)

Supra, at 217-18. This case is applicable to the present case because the distinctions between sureties and guarantors has been

abolished in California, and references to one includes references to the other. (See California Civil Code § 2787, Trial Exhibit D-1, set out verbatim on page 1 of App. 3.) Therefore, the Ekins can assert as a defense to their liability the defense that Heller breached the covenants of good faith and commercial reasonableness in its contracts with Rock Wool. Those breaches were sufficient to release Rock Wool from its obligations, therefore they were sufficient to release the Ekins.

Furthermore, the guaranty sets the amount owed by the Ekins to be the amount owed by Rock Wool. When Rock Wool does not owe anything, the Ekins do not.

The Court misapprehended the law when it determined that Heller's obligations to Rock Wool are not conditions to the Ekins' liability. The Ekins can assert Heller's breach as a defense to their liability. Heller's breach excused Rock Wool's performance; therefore, it excused the Ekins.

POINT II

THE TRIAL COURT FOUND THAT HELLER BREACHED THE GUARANTY AND THE CONDITIONS OF THE DEED OF TRUST. AS A MATTER OF LAW THIS RELEASED THE EKINS.

It is axiomatic that a party in material breach of a contract may not require performance by the other party. In the case at bar, in addition to the agreements with Rock Wool, Heller also had two agreements with the Ekins; the Guaranty and the Deed of Trust.

In reversing the lower court's decision, this Court overlooked the FOF that Heller breached the guaranty contract and

the Deed of Trust. In FOF 9 and 10, the Trial Court stated that Heller had breached ALL of its contracts, including those with Ekins, and concluded: (1) that the Ekins were exonerated from liability under the Guaranty; and (2), that the Guaranty had been terminated and the Trust Deed should be reconveyed.

In FOF 9, the trial court held that Heller had breached the obligation of good faith "in its enforcement of the contracts on which it claims the Ekins are liable." (Emphasis added). Since subpart (c) of FOF 9 deals solely with the actions directly affecting the Ekins, that finding clearly indicates that the terms "the contracts" includes the guaranty and the Trust Deed. Since the guaranty and Trust Deed are contracts under which the Ekins are liable, subpart (c) must refer to those contracts. FOF 9(c) and FOF 10 also find that Heller's claims were a breach of its covenant in the Subordination Agreement requiring it not to take action against the Ekins home. This portion of these FOF was either overlooked or misapprehended by the Court.

POINT III

CONTRARY TO THE OPINION, THE TERMS "UNCONDITIONAL" AND "ABSOLUTE" DO NOT MEAN THAT THE GUARANTOR'S OBLIGATION IS UNCONDITIONAL OR ABSOLUTE.

In holding that Heller's breach of its duties to Rock Wool did not affect the Ekins' liability, the Court appears to have been persuaded by the fact that the guaranty signed by the Ekins' was an "unconditional" guaranty. Apparently, the Court concluded that the term "unconditional" meant that the guarantors were liable regardless of the circumstance. This, however,

misapprehends the law with regard the the terms "unconditional" and "absolute."

As both Judge Billings and Judge Orme have already made clear in recent decisions for the Court, that the terms "unconditional" and "absolute" simply mean that the creditor does not need to look first to the debtor or the collateral for payment before looking to the guarantor. The sole purpose of the terms is to indicate that there are no conditions which the creditor must fulfill before looking to the guarantor. This construction was recognized by this Court in Valley Bank and Trust Co. v. Rite Way Concrete Forming, Inc., 742 P.2d 105, 107-109 (Utah App. 1987), (Judge Orme on panel) and in Carrier Brokers, Inc. v. Spanish Trail, 77 U.A.R. 48, 49 (Utah App. March 9, 1988) (Judge Billings).

The law is the same in California. In Coutin v. Nessonbaum, 94 Cal.Rptr. 453, 17 Cal.App. 3d 156 (Cal.App. 1971), the guarantor signed a guaranty which stated that he "unconditionally and absolutely" guaranteed the obligation. However, the court held that the guarantor was released when the lender entered into an agreement with the debtor which altered the terms of the loan. Thus, the terms "unconditional" and "absolute" did not mean that the guarantor's obligation is unconditional or absolute. The sole purpose of the terms is to indicate that the lender does not need to pursue the debtor or the collateral before looking to the guarantor. Bank of America

Nat. Trust & Savings Assn. v. McRae, 183 P.2d 385, 389 (Cal.App. 1947); Citizens' Trust & Savings Bank v. Bryant, 200 P. 823, 824 (Cal.App. 1921). The term "absolute" has the same meaning as the term "unconditional." Countin, supra; Valley Bank, supra; Carrier, supra.

This definition of the terms is universal. In United States v. Willis, 593 F.2d 247 (6th Cir. 1979) the court stated that the term "unconditional guaranty" has meaning only when contrasted with a "conditional guaranty," and that the distinction between the two is primarily in the difference between the creditor's duties under each type of contract. In Kansas State Bank & Trust Co. v. DeLorean, 640 P.2d 343, 350 (Kan.App. 1982), the Court stated:

The form of the guaranty (conditional or unconditional) determines only whether the creditor is first required to proceed against the principal obligor. Separate and apart from that issue is the defense a guarantor may raise in an action against him that part or all of his obligation has been discharged by the creditors impairment of the collateral. (Emphasis added.)

Thus, even though the guaranty is "unconditional and absolute," the guarantor can still assert his defenses. Coutin, supra. Therefore, the Ekins are not precluded from raising Rock Wool's defenses.

POINT IV

THE TRIAL COURT FOUND THAT HELLER FAILED TO DISPOSE OF THE ACCOUNTS RECEIVABLE IN A COMMERCIALLY REASONABLE MANNER. UNDER CALIFORNIA LAW, THIS RELEASED ROCK WOOL AND AUTOMATICALLY RELEASED THE EKINS.

The trial court found that Heller violated its duty under California law to collect the accounts receivable in a

commercially reasonable manner. The court also found that Heller's actions caused a loss of \$41,649. (FOF 5, 6, and 8; App. 2).

Under California law, the creditor who fails to dispose of collateral for a loan in a commercially reasonable manner is barred from obtaining a deficiency judgment. Section 9504(3), Cal. Commercial Code; Western Decor & Furnishings v. Bank of America, 154 Cal.Rptr. 287, 91 Cal.App.3d 293 (Cal.App. 1979). Therefore, Heller is barred from obtaining a deficiency judgment from Rock Wool. Under the law set forth in Point I above, the Ekins can assert Rock Wool's defense. If Heller cannot obtain a deficiency judgment from Rock Wool, it cannot obtain one from the Ekins. This point was overlooked by the Court when it reversed the lower court's decision.

It cannot be argued that the Ekins consented to Heller's failure to collect the accounts receivable in a commercially reasonable manner. The only language in the guaranty which even deals with the disposition of accounts receivable is the following:

[Heller] shall not be required . . . to enforce or resort to any security, liens, collateral or other rights or remedies thereto appertaining, before calling on us for payment."

However, this language has no application to this issue whatsoever. It simply states that Heller does not have to enforce its security interests before looking to the Ekins. It says nothing more. It says nothing about consent to impairment.

Heller has argued that this clause provides the necessary consent. This same argument was put forward in Langeveld v. L.R.Z.H. Corp., 376 A.2d 931 (N.J. 1977). The court there stated:

It is one thing to say that a creditor need not pursue the collateral as a condition of precedent to pursuing the guarantor of payment and quite another to say that because of this [lack of a] condition precedent, the creditor can by misfeasance or nonfeasance prevent the guarantor of payment from ever recovering from the collateral.

The language in the guaranty merely waives the rights granted under Section 2845, Cal.Civ.Code, App.3, which permits the guarantor to require the creditor to pursue other remedies within the creditor's power before pursuing the guarantor. Absent a waiver, failure to pursue the collateral first would release the guarantor.

In essence, Heller claims that the waiver of the right to require the creditor to pursue other collateral before looking to the guarantor permits the creditor to destroy the value of the collateral. This is simply beyond natural meaning of the language. The only right waived was the right to require Heller to look first to the security. However, the Ekins did not thereby also consent to a destruction of the accounts receivable. Such a waiver would have destroyed, as to the collateral, the Ekins' right of subrogation. "If the destruction or impairment of such a right is to be waived by a guarantor, it should only be done by the most unequivocal language in the guaranty agreement,"

D.W. Jaquays & Co. v. First Security Bank, 419 P.2d 85, 89 (Ariz. 1966).

Under California law, the burden is on the party claiming a waiver of a right to prove it by "clear and convincing evidence." Doubtful cases are to be decided against a waiver. City of Ukiah v. Fones, 410 P.2d 369, 371 (Cal. 1966). Therefore, a waiver of any right must be clear and unequivocal. This clause does not in clear terms waive the Ekins rights under Section 2819, App. 3, and therefore it does not operate to prevent exoneration.

In Walter E. Heller & Co., Inc. v. Wilkerson, 627 P.2d 773, 775 (Colo.App. 1981), the Colorado court interpreted the same guaranty involved here. The Court there stated:

Here, the language of the guarantee provides only that the creditor may proceed directly against the guarantor in the event of the debtor's default without having first to proceed against the collateral Hence, under the terms of the agreement, the defendants could not compel Heller to go against the security, but once Heller elected to do so, he [sic] was required to do so in a commercially reasonable manner. (Emphasis added.)

Under the terms of the Ekins' guarantee, they could not require Heller to go after the accounts receivable. However, once Heller did so, it was required to do so in a commercially reasonable manner.

The Court must recognize this important distinction. Had Heller not taken possession of the accounts receivable, the

the Ekins could have pursued the receivables. The collateral would still have been intact and available to them by right of subrogation. However, when Heller took possession of the receivables and destroyed them, its actions deprived the Ekins of the protection afforded by subrogation. It destroyed their rights in the collateral. That is why they are released. They never consented to a destruction of their right of subrogation.

What Heller did was akin to a creditor having security interest in the crops of an apple farmer, who, at the end of the season took possession of the apples, but then taking no further steps to store or sell the apples, let them rot.

This Court should remember that it, like California, has held that a consent must be explicit and should only be by the most unequivocal language in the guaranty. Valley Bank, supra at 109; Carrier, supra at 49. There is no explicit and unequivocal language in the guaranty that consents to the failure to dispose of collateral in a commercially reasonable manner. Under California law, Heller's failure to collect accounts receivable in a commercially reasonable manner released the Ekins regardless of whether Heller could be required to pursue them first. See Western Decor, supra.

Heller's improper actions were not limited to the accounts receivable. The trial court also found that Heller's reprehensible conduct destroyed Rock Wool as a business and damaged the value of the inventory by \$25,000 (FOF 5 and 6; App.

2) Again, a gratuitous destruction of values without consent in the guaranty.

POINT V

THE TRIAL COURT FOUND THAT HELLER WHOLLY FAILED TO PROVE AN INDISPENSABLE ELEMENT OF ITS CAUSE OF ACTION; THE AMOUNT, IF ANY, DUE FROM THE EKINS UNDER THEIR ALLEGED GUARANTY.

In order to prevail on its claim, Heller must prove the amount owing under the contract with Rock Wool. Failing to prove that amount completely defeats its claim.

The trial court found that Heller failed to prove the amount owing by the Ekins. FOF 13 states:

Heller has failed to establish by a preponderance of the evidence or in any other fashion the correct amount, if any, remaining due and unpaid by Rock Wool under its contracts with Heller.

In its decision to remand the case, this Court overlooked FOF 13 or failed to give it legal significance. This Court instructed the lower court to "enter judgment for Heller in the amount of Rock Wool's indebtedness." (Emphasis added.) This instruction requires the district court to determine what is owed by Rock Wool. However, the trial court has already tried this issue and determined that Heller has not shown that anything is remaining unpaid. This Court's opinion overturns this Finding without even acknowledging its existence.

Under Utah law, Heller is required to set forth all of the evidence which supports of the disputed Finding and then show that the Finding is clearly erroneous. Heller has not done so.

Heller did not even object to the Finding in the trial court.

Therefore, under its own rules this Court cannot review or overturn this Finding. It must give it legal significance.

Scharf v. BMG Corp., 700 P.2D 1068, 1070 (Utah 1985); Ashton v. Ashton, 51 U.A.R. 16 (February 4, 1987).

When Heller failed to show what, if anything, was owed by Rock Wool, it also failed to show the amount owing by the Ekins. This is because the Ekins guaranteed the amount owing by Rock Wool. Thus, Heller failed to prove an essential element of its claim. Proper respect for the trial court's FOF 13 requires that this Court sustain the lower Court's decision, not send it back to give Heller a second chance to try its case.

In its Reply Brief, Heller argues, for the first time on appeal, that what Rock Wool owes has no bearing on what the Ekins' owe. This argument is specious and fallacious. It overlooks the language in the guaranty which sets forth precisely what the Ekins' were guaranteeing:

. . . we, . . . unconditionally guarantee to you . . . the prompt payment . . . of any and all indebtedness, obligations and liabilities of every kind or nature . . . owing to you by the Debtor (Emphasis added.)

Under the guaranty, the only way to determine what the Ekins owe is to determine the amount Rock Wool owes. The amount owing by one cannot be divorced from the amount owing by the other. (See Section 2809, Cal.Civ.Code; App. 3). The case was tried and Heller failed to prove damages. This is fatal.

Heller has judicially admitted that it must establish amount of Rock Wool's liability to show the amount of the Ekins' liability. Heller's motion to lift the Stay Order in the bankruptcy proceedings, (App. 4 hereto) averred that:

[Heller] . . . moves, that [it] be granted relief from the automatic stay . . . to the extent necessary to permit [it] to seek an adjudication . . . respecting the precise extent of [Rock Wool's] liability to Heller . . . Resolution of that issue is required to fix the liability of the debtor's accommodation parties, V. Ross Ekins and S. O. Ekins, under a certain Guaranty Agreement dated December 27, 1979. (Emphasis added.)

Thus, Heller concedes that the amount owed by the Ekin's can only be established by proving exactly how much, if anything, was owed by Rock Wool. Having failed to prove the balance due, Heller has lost its case.

Nevertheless, Heller now argues that under the guaranty the Ekins are directly, unconditionally and primarily liable jointly and severally with Rock Wool. It argues that the Ekins are independently obligated to Heller regardless of whether Rock Wool's liability has been separately established. This same argument was raised and refuted in Coutin v. Nessianbaum, 94 Cal.Rptr. 453 (Cal.App. 1971), where the California court said that a party cannot be primarily liable on an obligation and also be a guarantor at the same time. The person is either one or the other. No one disputes that the Ekins are considered guarantors. Heller sued them as "guarantors" (See Amended Complaint.) The contract itself is titled: "Guaranty." Furthermore, this

argument raised for the first time on appeal. Finally, if the Ekins were truly primarily liable, relief from the stay would not have been necessary. Heller is estopped by its judicial admission from taking a different position.

POINT VI

EVEN IF THE GUARANTY COULD BE PROPERLY INTERPRETED AS CONSENTING TO A FAILURE TO PERFECT SECURITY, IT SHOULD NOT BE CONSTRUED AS CONSENT TO HELLER'S BREACH OF THE COVENANT OF GOOD FAITH OR THE OTHER EGREGIOUS CONDUCT HELLER WAS FOUND TO HAVE ENGAGED IN.

This Court reversed the lower court's decision on the ground that it read the Guaranty as containing a consent to Heller's failure to perfect its security interest in the Rock Wool vehicles. The Court implied that consent from its conclusion that the Ekins had consented to Heller's releasing collateral. However, in order to find that Ekins had consented to a release of collateral, the Court had to imply that consent from the language of the Guaranty respecting waiver of notice of the release of collateral. Thus, the necessary consent could be found only after two tiers of implications and a construction that fails to give adequate consideration to Ekins rights of subrogation and valid protection against bad faith conduct.

Assuming, without conceding, that this Court was correct in implying a consent to release collateral from the waiver of notice of the release of collateral, the Court still misapplied the law set forth in American Security Bank v. Clarno, 199 Cal.Rptr. 127 (Cal.App. 1984). Clarno does not prevent the

release of the Ekins under circumstances and findings such as are present here. Clarno dealt only with a failure to perfect a security interest; Heller's adjudicated bad faith misconduct went far beyond that.

The trial court found that Heller took deliberate actions which destroyed Rock Wool as an operable going concern. (FOF 5.) The question this Court must address is whether the Ekins consented to Heller breaking its contracts with Rock Wool and Ekins, destroying foreclosed property and putting Rock Wool out of business. Neither Clarno nor any other case cited by Heller or this Court is on point in answering those questions. There is all the difference in the world between failing to perfect a security interest because a term of a contract permits such conduct and a case such as the one at bar where the acts of the secured party constitute a per se breach of the contract. Here, Heller's conduct is forbidden by commercial law, includes other negligent and deliberate misconduct, and is adjudged to be the proximate cause of the destruction of the business of the debtor. Will the Court imply consent to break a contract and destroy the business from an implied consent to release collateral? How far will the Court go in implying consent?

Under California law, when interpreting a guaranty contract, "no implication shall be indulged in to impose a burden not clearly inferable from the language of the contract." Sather Banking Co. v. Aurther r. Briggs Co., 72 P. 352, 354 (Cal. 1903)

(emphasis added). Can this Court say that it is "clearly inferable" from the guaranty that the Ekins consented to Heller's bad faith, premature suit, excessive demands, breach of every contract it made, destruction of foreclosed collateral and ultimate destruction of Rock Wool? In Valley Bank, supra, at 109, this Court held that a consent must be explicit and should only be the most unequivocal language in the guaranty agreement.

The only way this Court can conclude that the Ekins consented to the destruction of Rock Wool is if it implied that consent from the consent to impair or fail to perfect collateral, which consent it implied from the consent to release collateral, which consent it implied from a provision which, in the words of Heller, the scrivener, when strictly construed, waived only the notice of the release of collateral. It should be obvious that deriving consent from three tiers of implications when required to construe the document against the scrivener is not something which is "clearly inferable from the language of the contract." Nothing in the guaranty justifies a conclusion that the Ekins consented to Heller's bad faith actions of changing the terms of its contract to advance funds, or of its destruction of the business -- any of which release the Ekins from their guaranty.

As stated above, under California law, the burden is on the party claiming a waiver of a right to prove it by "clear and convincing evidence." Doubtful cases are to be decided against a waiver. "This is particularly apropos in cases in which the

right in question is one that is 'favored' in the law"
Ukiah, supra. Therefore, a waiver of any right must be clear and unequivocal. Any clause which could be pointed to in the guaranty falls far short of setting out in clear and explicit terms that the Ekins consented to the destruction of Rock Wool.

Finally, the California law looks with disfavor on "attempts to avoid liability or secure exemption from one's personal negligence, and construes such provision strictly against the person relying on them, especially when he is the author of the document. . . ." Sproul v. Cuddy, 280 P.2d 158, 164 (Cal. App. 1955). A waiver must be clear, and must be shown to have been knowingly made. City of Ukiah, supra at 371. Not one clause in the Ekins guaranty meets this standard when the question asked is "Did the Ekins really consent to all the atrocious and deliberate misconduct of which the trial court found Heller guilty?"

POINT VI

THE TRIAL COURT FOUND FOR THE EKINS ON THEIR COUNTERCLAIM, BUT HELD THAT ITS DECISION RELEASING THE EKINS AND AWARDING THEM COSTS AND ATTORNEYS FEES FULLY COMPENSATED THEM FOR THE DAMAGES SUSTAINED. REVERSAL SHOULD REINSTATE THE COUNTERCLAIM.

When this Court reversed and remanded the decision, it overlooked the trial court's decision in favor of Ekins on their Counterclaim against Heller. The trial court held that the Ekins prevailed on both liability and damages, but that the damages sustained as a result of Heller's breach of conduct were

satisfied by the judgment releasing them the Guaranty and awarding them attorneys fees and costs. (Conclusion 5; App. 2.) Heller did not challenge this Conclusion on appeal. If this Court holds to its view that the Ekins are not released from their guaranty and are not to receive their fees and costs, justice and a proper regard for the trial court's advantaged position require that this Court award the Ekins the release of their guaranty and their attorney's fees and costs under their successful and fully proven Counterclaim.

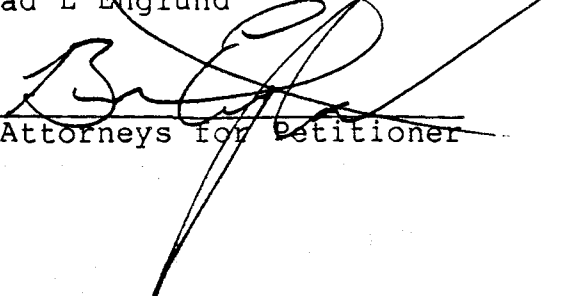
CONCLUSION

Even though the Court determined that the Ekins consented to Heller's failure to perfect its security interest in Rock Wool's equipment, the Ekins are still free of the obligation under their guaranty and entitled to their fees and costs under each of five separate theories which are fully sustained by the Findings. First, Heller failed to prove damages. Second, Heller was found to have breached its obligations under every one of its contracts with Rock Wool and the Ekins, as well as the Subrogation Agreement. Third, Heller failed to collect Rock Wool's accounts receivable in a commercially reasonable manner. Fourth, by this and other misconduct shown in the findings, Heller caused loss of values and the destruction of Rock Wool as a business. Fifth, and finally, the trial court found for the Ekins on their counterclaim. In each and every instance the Ekins, as the prevailing party, are entitled to their fees and costs.

For these reasons this Court, recognizing the ruinous consequences of the opinion as it stands and conscious, as always, of its high and sacred obligations to truth and justice, should either grant this petition for rehearing or proceed without further ado to rewrite its opinion, sustain the trial court and award the Ekins their attorney's fees and costs on appeal.

Respectfully submitted this 14th day of November, 1988.

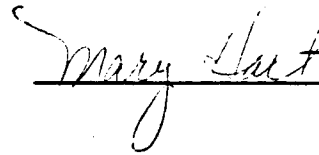
TANNER, BOWEN & TANNER
Earl D. Tanner
Brad L. Englund

By 
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 1988, four true and correct copies of the foregoing instrument were hand delivered to the following:

John T. Anderson, Esq.
BIELE, HASLAM & HATCH
4th Floor
50 West 300 South
Salt Lake City, Utah 84101



CONCLUSION

In the trial court the Ekins prevailed on four grounds, first, that under California law Heller's impairment of the security exonerated the Ekins from their Guaranty; second, that Heller was in breach of its contracts (the Guaranty and, by reference, the Mortgage and Security Agreements) with the Ekins, and therefore could not enforce the Guaranty; third, that Heller failed to pursue the accounts receivable in a commercially reasonable manner, thus releasing Rock Wool from liability for a deficiency, which automatically releases the Ekins; and fourth, that Heller failed to establish what amount, if any, Rock Wool owed Heller. The record below contains some competent substantial evidence to support each of the findings of fact and Heller has not even challenged Finding 8, that it failed to pursue the receivables in a commercially reasonable manner, or Finding 13, that it failed to prove the amount that Rock Wool owed Heller. Hence, the only theoretical possibility that this case could be reversed would be if this Court, against the unrefuted testimony of Judge Dee and Mr. Tanner, were to somehow conclude that they had lied, had in fact engaged in ex parte discussions respecting the merits, and that this conduct caused the trial to be unfair. There is nothing whatever in the record to sustain either misconduct or effect on the outcome.

On the first issue, impairment of security, this Court could, of course, view the Guaranty and the facts surrounding its promulgation and execution differently from the Ekins. However,

even if this Court should somehow conclude that the Guaranty should be interpreted as consenting to impairment, the judgment below would nonetheless have to be affirmed on three grounds, Heller's breach of contract, Heller's failure to pursue the receivables in a commercially reasonable manner, and Heller's failure to prove damages.

On the second issue, breach of contract, there is no question of law involved. Heller has not, either below or on this appeal, disputed the principle of law that there is an implied or statutory covenant of good faith in every contract controlled by California law. The only questions raised on this point are factual; i.e., did Heller do the things that the findings of fact determined? The Ekins have recited chapter and verse of abundant evidence sustaining each finding of Heller's breach of the covenant of good faith, and the whole structure is cemented into place by the testimony of Heller's vice president, Hillman, that he did those things "to pressure [the Ekins] into making payment."

But even if this Court were to decide in favor of appellant on the first and second points, it still could not reverse. There are the unchallenged findings of fact that Heller failed to pursue the receivables in a commercially reasonable manner and that Heller failed to prove what amount, if any, was due from Rock Wool to Heller, thus failing to prove the amount that should be recovered of the Ekins if Heller did prevail. Absent proof of the amount due, Heller must fail below and on

this appeal. In the absence of a finding that it pursued the receivables in a commercially reasonable manner Heller must fail below and on this appeal.

It follows that there is no basis for reversing the judgment below and it must, therefore, be affirmed; that this case should be remanded to the trial court to determine the balance of the post-judgment expenses and attorneys fees incurred by the Ekins; and that the trial court should be instructed to add to the judgment the sum thus determined.

RESPECTFULLY SUBMITTED this 1st day of December, 1986.

Earl D. Tanner
Earl D. Tanner, Jr.
Brad L Englund
TANNER, BOWEN & TANNER



By Earl D. Tanner
Attorneys for Respondents

FILED IN CLERK'S OFFICE
Salt Lake County Utah

APR 29 1986

H. Dixon Hingley, Clerk 3rd Dist. Court

By [Signature] Deputy Clerk

FILED

EARL D. TANNER #3187
BRAD L ENGLUND #4478
TANNER, BOWEN & TANNER
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 538-2021

Attorneys for Defendants
V. Ross Ekins and S. O. Ekins
and U.S. Rock Wool Defined
Benefit Trust

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

WALTER E. HELLER WESTERN
INCORPORATED, a California
corporation,

Plaintiff,

vs.

U.S. ROCK WOOL COMPANY,
INC., a Utah corporation;
V. ROSS EKINS; S. O. EKINS;
AMERICAN SAVINGS & LOAN
CORPORATION, a Utah Savings &
Loan corporation; VALLEY BANK
& TRUST COMPANY, a Utah banking
corporation; U.S. ROCK WOOL
COMPANY DEFINED BENEFIT TRUST;
and FIRST INTERSTATE BANK,
formerly known as WALKER BANK
& TRUST COMPANY, a Utah banking
corporation,

Defendants.

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Civil No. C-83-2368
Judge David B. Dee

This matter came on regularly for trial before the
Court on the 25th day of November, 1985, the Honorable David B.

Dee presiding. Plaintiff was represented by its attorneys, John T. Anderson, Esq. and Cary D. Jones, Esq., of Hansen & Anderson; and defendants V. Ross Ekins and S. O. Ekins were represented by their attorneys, Earl D. Tanner, Esq. and Brad L Englund, Esq., of Tanner, Bowen & Tanner. On December 6, 1983, defendant U.S. Rock Wool Company, Inc. (Rock Wool), filed a Petition in Bankruptcy which case is still pending in the bankruptcy court. Through their attorney of record, Anna S. Drake of Nielsen & Senior, Rock Wool and defendant U.S. Rock Wool Defined Benefit Trust (the "Trust") advised the Court that they would be bound by the determination of such issues as were before this Court, as distinguished from the bankruptcy court, without the presence of their counsel of record. Defendant American Savings & Loan Corporation has been determined to be the first lienholder on the premises here involved; First Interstate Bank has been heretofore dismissed by stipulation; and defendant Valley Bank & Trust Company, a Utah banking corporation (Valley Bank), has stipulated with plaintiff that the issues involving Valley Bank remaining undetermined after this trial, if any there be, are reserved for trial at a later date. The matter was fully presented, argued and submitted, and the Court having considered the same and being fully advised in the premises and having made and entered its Memorandum Decision herein, finds the facts, makes its conclusions of law, and directs entry of judgment as follows:

FINDINGS OF FACT

1. On December 6, 1983, Rock Wool filed a petition in the Bankruptcy Court at Salt Lake City, Utah for a Chapter 11 reorganization, which was later converted to a Chapter 7 proceeding, which is still pending in the Bankruptcy Court and which makes Heller's claims for replevin moot so far as this suit is concerned.

2. The agreements involved in this suit specify that they shall be governed as to validity, interpretation and effect, and in all other respects by the laws and decisions of the state of California.

3. The documents constituting the agreements which are the subject of this action consist of Heller's usual printed forms which were provided by Heller and had been prepared by Heller. They were signed on or about December 27, 1979. One of those agreements was a Chattel Mortgage covering, inter alia, Rock Wool's motor vehicles.

4. Heller undertook to perfect its security interest in all of the security, but negligently or intentionally failed to properly perfect its security interest in the motor vehicles. Said failure to perfect impaired that security, was material, and was not the result of any act, omission, or statement of either of the Ekins'.

5. Heller impaired its remedies and rights against the

accounts receivable and inventory of Rock Wool, both of which were part of the security for the debt referred to in the Ekins' Guaranty, by cutting off the cash available to Rock Wool and by giving notice to the account debtors at a time and in a fashion which it knew would cause the account debtors to stop or slow down the payment of their accounts and quit doing business with Rock Wool, which eventually destroyed Rock Wool as an operable going concern.

6. The only evidence of the values lost by the impairment of the said security was furnished by the Ekins' and showed that the security was impaired in the following amounts:

Motor Vehicles	\$43,600.00
Accounts Receivable	\$41,649.00
Inventory	\$25,000.00

7. The Ekins' did not consent to Heller impairing its rights against Rock Wool or the security for the Rock Wool debt, nor did they waive their right to complain of such impairment.

8. California law provides that when a UCC creditor undertakes to collect accounts receivable security, it has the burden of proving that it pursued collection in a commercially reasonable manner. This Court finds that the only actions taken by Heller to effect collection was to send out the February notice, which by its own admission it realized would impede collection, and to send certain unidentified accounts to an

attorney in Tucson, Arizona. There is no evidence as to what, if anything, the attorney did to effect collection. This is not sufficient to meet Heller's burden and the Court finds that Heller did not proceed in a commercially reasonable manner to collect the accounts receivable.

9. The California Civil Code imposes on all parties to a contract an obligation of good faith in its performance or enforcement. Heller has breached this obligation in its enforcement of the contracts on which it claims the Ekins' are liable (a) by changing the operating rules on Rock Wool unilaterally and creating an insuperable negative balance of accounts receivable security; (b) by giving notice to Rock Wool's customers which were taken from an obsolete customer list known by Heller to contain obsolete balances, and doing so at a time when Heller knew it would receive in a day or two the regular monthly updated list from Rock Wool containing current information; and (c) by attempting to coerce the Ekins' by filing suit without notice or demand at a time Heller knew the Ekins' were gone from Utah on a multi-year assignment, by claiming an unconscionably excessive amount, and by seeking the immediate appointment of a receiver to take possession of the Ekins' home and having it sold at a sheriff's sale, all at a time when Heller was bound by contract not to take action against the Ekins' home.

10. Heller made a Subordination Agreement with Valley

Bank at the time the Ekins' were refinancing a short-term note for \$67,000.00 which was ahead of Heller's Trust Deed on the Ekins' home. The Subordination Agreement provided that Heller could not demand, receive, accept or otherwise realize on the Ekins' home, or take any direct or indirect action to foreclose the Ekins' home or to realize upon its security interest in that home until such time as the Valley Bank trust deed had been paid in full. There was no provision in the Subordination Agreement entitling Heller to acquire or otherwise satisfy the Valley Bank loan ahead of its due date and thus accelerate its right to proceed against the Ekins' home.

11. Heller's tender of a Cashier's Check in the sum of \$55,000.00 was defective and unauthorized, and Valley Bank's refusal to accept the tender was not wrongful.

12. The contracts involved in this case provide for payment of attorney's fees to Heller in the event of default. Under California law, if a contract so provides, then the prevailing party is entitled to reasonable attorney's fees in addition to costs of suit. In the instant cause each of the Ekins' is, as to Heller, the prevailing party.

13. Heller has failed to establish by a preponderance of the evidence or in any other fashion the correct amount, if any, remaining due and unpaid by Rock Wool under its contracts with Heller.

CONCLUSIONS OF LAW

1. The transactions involved in all of the causes between Heller on the one side and the Ekins' or Rock Wool on the other, except those relating to the Subordination Agreement, are governed as to their validity, interpretation and effects, and in all other respects, by the laws and decisions of the state of California.

2. The Ekins' have been exonerated from liability to Heller under the Guaranty, and the Guaranty should be declared to have been terminated.

3. The Ekins' are entitled to a decree that the obligation secured by the Heller Trust Deed has been terminated and is at an end; that the property subject to the Heller Trust Deed should be reconveyed to the Ekins' free and clear of any claim or interest of Heller; and the Heller Trust Deed on their home be released and terminated.

4. The Ekins' are entitled to be awarded their attorneys' fees, costs and necessary disbursements which have been incurred in this action in an amount to be set by this Court upon notice and motion and taxed as costs herein. Said award may be supplemented upon notice and motion if post-judgment services are required of said defendants' attorneys.

5. The Ekins' have established grounds for liability on the part of Heller under their Counterclaim herein, but in

light of the determination in that they are exonerated and released from liability under the Guaranty, have not sustained costs and expenses as a result of Heller's conduct other than those attorney's fees, costs, and expenses which are compensated elsewhere herein. Accordingly, judgment of no cause of action should be entered on the Counterclaim.

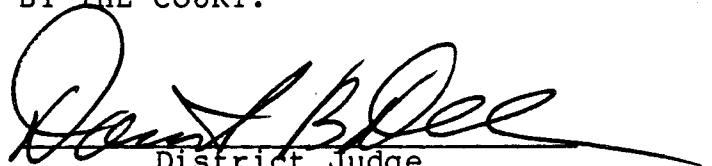
6. Defendant U.S. Rock Wool Defined Benefit Trust is entitled to judgment of no cause of action.

7. As to the defendant U.S. Rock Wool, which had filed a Chapter 11 proceedings in bankruptcy on December 6, 1983 and was a debtor-in-possession until December 10, 1984, at which time the proceedings were converted to a Chapter 7 proceedings and a trustee in bankruptcy appointed, said defendant and Heller treated the matter of the amount, if any, due from Rock Wool to Heller, or from Heller to Rock Wool under its Counterclaim as an issue which need not be determined herein except to the extent necessary to resolve the issue of whether and to what extent the Ekins' have been released from their guaranty, leaving said issue to be determined, as between themselves, in the bankruptcy proceedings. Accordingly, the issues between Rock Wool and Heller insofar as they relate to the amounts, if any, which should be awarded to one or the other, and title and right to possession of the personal property of Rock Wool, are held to be the province of the bankruptcy court, and not precluded by the

judgment herein. Subject to the foregoing, each should be granted judgment of no cause of action.

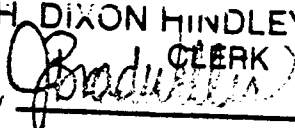
DATED this 29 day of April, 1986.

BY THE COURT:


District Judge

Approved as to form
this _____ day of April, 1986.

HANSEN & ANDERSON

TEST
H. DIXON HINDLEY
CLERK
By 
Deputy Clerk

By _____
Attorneys for Plaintiff

§ 2787. [Former distinctions abolished: Surety or guarantor defined: Guaranties of collection: Continuing guaranties]

The distinction between sureties and guarantors is hereby abolished. The terms and their derivatives, wherever used in this code or in any other statute or law of this State now in force or hereafter enacted, shall have the same meaning, as hereafter in this section defined. A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor. Guaranties of collection and continuing guaranties are forms of suretyship obligations, and except in so far as necessary in order to give effect to provisions specially relating thereto, shall be subject to all provisions of law relating to suretyships in general.

§ 2819. [Acts operating to exonerate generally]

A surety is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.

§ 2845. [Surety may require creditor to proceed against principal: Effect of neglect to proceed]

A surety may require the creditor, subject to Section 996.440 of the Code of Civil Procedure, to proceed against the principal, or to pursue any other remedy in the creditor's power which the surety cannot pursue, and which would lighten the surety's burden; and if the creditor neglects to do so, the surety is exonerated to the extent to which the surety is thereby prejudiced.

Amended by Stats 1972 ch 391 § 1; Stats 1982 ch 317 § 73.

§ 2848. Subrogation of surety to creditor's rights

THE SURETY ACQUIRES THE RIGHT OF THE CREDITOR. A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they became such.

(Enacted 1872.)

§ 2849. Surety entitled to benefit of securities held by creditor

A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not.

§ 3302

Note 1

MEASURE OF DAMAGES

Div. 4

§ 3302. Breach of obligation to pay money only

BREACH OF CONTRACT TO PAY LIQUIDATED SUM. The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon.

(Enacted 1872.)

California Civil Code

§ 1717. Action on contract; award of attorney's fees and costs; prevailing party

(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the prevailing party, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Where a contract provides for attorney's fees as set forth above, such provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

Reasonable attorney's fees shall be fixed by the court, upon notice and motion by a party, and shall be an element of the costs of suit.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.

(b)(1) The court, upon notice and motion by a party, shall determine who is the prevailing party, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the prevailing party shall be the party who is entitled to recover costs of suit.

(2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.

Where the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereupon deposits in court, for the plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a prevailing party within the meaning of this section.

(Amended by Stats.1981, c. 888, p. 2899, § 1; Stats.1982, c. 1073, p. —, § 1.)

California Commercial Code

§ 3606 Impairment of Recourse or of Collateral. (1) The holder discharges any party to the instrument to the extent that without such party's consent the holder

(a) Without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or

(b) Unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

(2) By express reservation of rights against a party with a right of recourse the holder preserves

(a) All his rights against such party as of the time when the instrument was originally due; and

(b) The right of the party to pay the instrument as of that time; and

(c) All rights of such party to recourse against others. (Stats. 1963, c. 819, § 3606.)

§ 1203 Obligation of good faith. Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement.

California Commercial Code

§ 9502. Collection Rights of Secured Party

(1) When so agreed and in any event on default the secured party is entitled to notify an account debtor or the obligor on an instrument to make payment to him whether or not the assignor was theretofore making collections on the collateral, and also to take control of any proceeds to which he is entitled under Section 9306.

(2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But, if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(Amended by Stats. 1974, c. 897, p. 2139, § 43, eff. Jan. 1, 1975.)

CALIFORNIA CIVIL CODE

Section 2809. Excessive Obligation Reducible.

The obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation.

RECEIVED

MAR 20 1983

TANNER & TANNER

John T. Anderson, Esq.
HANSEN JONES MAYCOCK & LETA
Attorneys for Walter E. Heller
Western Incorporated
Suite 600, Valley Tower
50 West Broadway
Salt Lake City, Utah 84101
Telephone: (801) 532-7520

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

IN RE:

U. S. ROCK WOOL COMPANY,
INC.,

Debtor.

:
:
:
:
:
:

Bankruptcy No. 83-A-03213
Chapter 11

—oo0oo—

STIPULATION, MOTION AND ORDER RESPECTING
DISPOSITION OF CASH COLLATERAL

Walter E. Heller Western Incorporated ("Heller"), a secured creditor of the above-named debtor ("Debtor"), through its counsel, John T. Anderson of Hansen Jones Maycock & Leta, and Debtor, through its counsel, Anna W. Drake of Nielsen & Senior, hereby stipulate and agree to Debtor's turnover and use of certain cash collateral on the following terms and conditions:

1. Heller is a secured creditor of Debtor by virtue of perfected security interests arising out of a certain Accounts Financing Security Agreement dated December 27, 1979, a certain Inventory Loan Security Agreement dated December 27, 1979, and a certain Chattel Mortgage Security Agreement dated December 27, 1979.

2. Debtor has collected, and is presently holding, monies in the sum of ^{and} \$14,096.59 (the "Collected Monies"). The Collected Monies have been derived from the collection of accounts and contract rights in which Heller has a perfected security interest, and accordingly constitute "cash collateral" within the meaning of 11 U.S.C. § 363(a).

3. Debtor shall immediately turnover to Heller the sum of ^{and} \$12,096.59 in partial satisfaction of Debtor's obligations under that certain Accounts Receivable Loan Agreement dated December 27, 1979 (the "Loan Agreement"), and shall be entitled to retain the sum of \$2,000.00 of such cash collateral as a fund from which Debtor can claim reimbursement for reasonable and necessary costs and expenses of preserving and disposing of the cash collateral for the benefit of Heller as contemplated by 11 U.S.C. § 506(c). Nothing contained in this stipulation shall preclude Heller from later challenging Debtor's entitlement to, or the amount of, any such costs or expenses and the parties expressly agree that Heller's right to so challenge is expressly preserved.

4. Heller agrees that the entire amount of the returned cash collateral shall be applied in satisfaction of the latest incurred loan advances or latest imposed interest charges under the Loan Agreement.


5. In the event the Third Judicial District Court of Salt Lake County, State of Utah, in proceedings entitled Walter E. Heller Western Incorporated v. U. S. Rock Wool Company, Inc., et al., Civil No. C-83-2368, determines that Debtor is, under the Loan Agreement, entitled to any portion of the monies represented by the returned cash collateral, Heller shall immediately return those monies, together with interest thereon at the prevailing legal rate, to Debtor.

6. Debtor and its counsel shall be entitled to undertake direct collections from Debtor's account debtors on any unpaid accounts and to hold and account for such collections for the exclusive use and benefit of Heller, subject only to deduction for allowable reasonable and necessary costs and expenses of such collections as may be determined by the court.

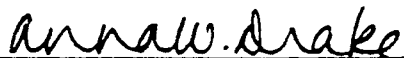
7. The parties expressly stipulate and agree that to the extent Heller has undertaken direct collections of any such accounts from Debtor's account debtors, the automatic stay imposed by 11 U.S.C. § 362 shall, with respect to any such collection, be deemed terminated nunc pro tunc to the date of filing of Debtor's Chapter 11 petition. Nothing contained herein shall limit or in any manner affect Heller's right to petition the court to allow it to undertake direct collections of any such accounts from Debtor's account debtors based on any demonstrated inability by Debtor to successfully effect such collections.

DATED this 13th day of ^{July}~~June~~, 1984.

HANSEN JONES MAYCOCK & LETA

By 
John T. Anderson
Attorneys for Walter E. Heller
Western Incorporated

NIELSEN & SENIOR

By 
Anna W. Drake
Attorneys for Debtor

ORDER

Upon reading the foregoing stipulation and motion respecting turnover and use of cash collateral, and good cause appearing therefor, it is hereby

ORDERED that the parties' stipulation and motion respecting disposition of cash collateral dated July 13, 1984, shall be, and the same hereby is, approved and adopted as the order of this court; and it is accordingly

ORDERED that the parties shall forthwith perform in accordance with the terms and conditions of the stipulation.

DATED this ____ day of July, 1984.

BY THE COURT:

United States Bankruptcy Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of July, 1984, a true and correct copy of the foregoing instrument was sent, postage prepaid in the United States mail, to the following:

Anna W. Drake, Esq.
NIELSEN & SENIOR
Attorneys for Debtor
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

/s/ _____