

1988

Walter E. Heller Western Incorporated, a California corporation v. US Rock Wool Company, Inc., a Utah corporation; V. Ross Ekins; and, S.O. Ekins :
Brief of Appellant

Utah Supreme Court

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880071-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

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WALTER E. HELLER WESTERN
INCORPORATED, a California
corporation,

Appellant,

v.

U.S. ROCK WOOL COMPANY, INC.,
a Utah corporation; V. ROSS
EKINS; and, S. O. EKINS;

Respondents.

88-0071

APPELLANT'S BRIEF

Case No. 860322

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Appeal From A Judgment Of The District Court
Of Salt Lake County, State Of Utah

The Honorable David B. Dee, Judge

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	:	
Appellant,	:	APPELLANT'S BRIEF
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v.	:	
	:	
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EKINS; and, S. O. EKINS;	:	
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EKINS; and, S. O. EKINS;	:	
	:	
Respondents.	:	

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review in this case:

1. Whether the district court, in interpreting an unconditional guaranty agreement, erroneously concluded that the guarantors under that agreement did not consent to the lender's alleged impairment of collateral.

2. Whether the district court committed reversible error in failing to consider that the guarantors' defense of impairment of collateral is unavailable where the

guarantors are the controlling shareholders of the corporate borrower whose loan obligations are being guaranteed.

3. Whether the district court erred in failing to consider that the guarantors, as controlling shareholders of the corporate borrower, had an affirmative duty to ensure the lender's perfection of security interests in the collateral pledged as security for the debt.

4. Whether the district court's finding that the lender unjustifiably impaired collateral pledged by the borrower as security for the debt was clearly erroneous.

5. Whether the district court's finding that the lender breached its duty of good faith in seeking to enforce the guaranty agreement was clearly erroneous.

6. Whether the district court improperly admitted expert testimony based on neither personal knowledge nor assumed hypothetical facts.

7. Whether the district court erred in awarding the guarantors all attorneys' fees incurred in the case.

8. Whether the district court erred in refusing to grant a new trial for irregularities in its proceedings consisting of improper ex parte communications between the court and the guarantors' counsel concerning the merits of the case.

NATURE OF THE CASE

This is an action by a secured lender to exercise its rights under a continuing, unconditional guaranty executed by the controlling shareholders of a corporate borrower. The guarantors are attempting to avoid liability under their guaranty by claiming that the lender impaired the collateral pledged by the corporate borrower as security for the debt, despite their unambiguous waiver of that defense in their guaranty.

DISPOSITION IN TRIAL COURT

In this action, appellant, Walter E. Heller Western Incorporated ("Heller"), sought judgment against respondents, V. Ross Ekins ("R. Ekins") and S. O. Ekins (collectively, the "Ekins"), for \$86,202.42 under a December 27, 1979 guaranty agreement in favor of Heller (the "Guaranty"). The Ekins' obligations under the Guaranty were secured by a deed of trust lien on their house. After a four-day, non-jury trial, the district court entered a memorandum decision that found that the Ekins were "exempted" from liability under the Guaranty because of Heller's impairment of collateral and its "bad faith" and "premature" filing of a complaint to foreclose its trust deed lien. Beyond this, the district court awarded the Ekins attorneys' fees in the amount of \$63,718.38.

RELIEF SOUGHT ON APPEAL

Heller seeks reversal of the judgment and either (i) entry of judgment in its favor as a matter of law, or (ii) a remand with directions to the district court to grant Heller a new trial free from the taint of the district court's numerous substantive and procedural errors.

STATEMENT OF FACTS

1. The Accounts Receivable Loan To Rock Wool.

Heller is a California corporation that engages in the business of making commercial loans. (R. 3, 52). Defendant, U. S. Rock Wool Company, Inc. ("Rock Wool"), before its liquidation in bankruptcy in 1984, was a Utah corporation that manufactured and sold insulation. (R. 52; Exhibit "Y"). Since 1978, the Ekins have owned approximately 99.67% of all the issued and outstanding shares of Rock Wool's capital stock. (Tr. 1672). Since approximately 1952, the Ekins' primary source of income was the salary paid to them by Rock Wool. (Tr. 1673).

In October 1979, R. Ekins, the president of Rock Wool, began negotiating with Heller to obtain accounts receivable financing for Rock Wool. (Tr. 1559-60). Due to Rock Wool's uncertain financial condition at that time, Rock Wool was unable to obtain financing from conventional lending sources such as banks or thrift companies. (Tr. 1293, 1546). After several meetings and a review of Rock Wool's financial

condition, Heller agreed to provide the requested financing. (Tr. 1274-75). Accordingly, Heller and Rock Wool (through the Ekins) entered into an accounts receivable loan arrangement (the "Loan") that was evidenced by a loan agreement dated December 27, 1979 (the "Loan Agreement") whereby Heller agreed to loan to Rock Wool up to 65% of the face value of any of Rock Wool's accounts " . . . which Heller in its sole discretion consider[ed] eligible for borrowing." (Exhibit "A"; App. i).

Rock Wool secured its obligations under the Loan Agreement by granting Heller a continuing general lien and security interest in (i) all of Rock Wool's accounts receivable, instruments, chattel paper, general intangibles and contract rights, (ii) all of Rock Wool's inventory, goods and related materials, and (iii) all of Rock Wool's machinery, equipment and chattels. These security interests were evidenced by three separate security agreements. (Exhibits "A", "B" and "D"). Heller did not perfect its security interest in Rock Wool's motor vehicles. (R. 1073).

As additional security for the Loan, and to induce Heller to make the Loan, the Ekins executed and delivered to Heller the Guaranty. (Exhibit "F"; App. ii). Under the Guaranty, the Ekins unconditionally guaranteed all debts, obligations and liabilities then or later owing by Rock Wool

to Heller. (Id.) The Guaranty provided in pertinent part that:

"[Heller] shall not be required to prosecute collection, enforcement or other remedies against the debtor [Rock Wool], or against any person liable on any said . . . agreements, obligations, indebtedness or liability so guaranteed, or to enforce or resort to any security, liens, collateral or other rights or remedies thereto appertaining, before calling on [the Ekins] for payment; nor shall [the Ekins'] liability in any way be released or affected by reason of any failure or delay on [Heller's] part so to do.

This guaranty is absolute, unconditional and continuing " (Id.) (Emphasis added).

Beginning in January, 1980, Heller began making loan advances to Rock Wool under the Loan Agreement. Pursuant to paragraph 3(f) of the Loan Agreement, Heller provided Rock Wool with a monthly statement of Rock Wool's loan account. (Tr. 1294). Paragraph 3(f) specified that the loan account " . . . will conclusively be deemed correct and accepted by [Rock Wool], unless [Rock Wool] gives Heller a written statement of exceptions within thirty (30) days after receipt of such extract or statement." (Exhibit "A", ¶ 3(f)). Rock Wool never provided Heller with any such statement of exceptions. (Tr. 1294).

2. The Valley Loan.

In May, 1981, the Ekins began negotiating with Valley Bank & Trust Company ("Valley Bank") to obtain a loan for themselves. (Tr. 1615-17). As a condition to making that

loan, Valley Bank required that Heller subordinate its trust deed lien on the Ekins' house to a trust deed lien to be granted by the Ekins to Valley Bank. (Tr. 1617). Accordingly, Valley Bank and Heller entered into a subordination agreement dated May 11, 1981 (the "Subordination Agreement") (Exhibit "DD"; App. iii) which provided in pertinent part that:

"In consideration of the credit extended to borrower [the Ekins] by the Bank [Valley Bank], the undersigned [Heller] hereby subordinates its security interest in the described security [the real property described in Heller's trust deed] to the above security interests of the Bank. The Bank may extend, modify or renew the so secured obligation without affecting this subordination. The undersigned agrees not to demand, receive, accept or otherwise realize on the security or the security interest or to take any direct or indirect action to obtain or realize such security until such time as Bank is paid in full. The undersigned agrees to pay and/or deliver to Bank immediately upon receipt any of the described security or proceeds thereof." (Emphasis added). (Id.)

The Ekins did not sign the Subordination Agreement. (Id.)

3. Rock Wool's Financial Deterioration And Collapse.

During 1982, Rock Wool's financial condition began deteriorating rapidly. (Exhibits "M" and "O").¹ Heller's October 1982 audit of Rock Wool's operations disclosed an increasing net operating loss; a persistent negative working capital position and a negative net worth. (Exhibit "O"). By letter dated October 22, 1982, Heller advised Rock Wool that it would continue its accounts receivable financing arrangement for no more than an additional sixty days. (Id.) By November 12, 1982, Rock Wool's loan availability, based on its then eligible accounts, was a negative \$631.28. (Tr. 1401-04, 1418). In December 1982, Rock Wool pleaded for an extension of time in which its outstanding loan balance could be " . . . gradually paid off." (Exhibit "P"). By letter dated December 23, 1982, Heller agreed to the requested extension, advising Rock Wool that:

"Under the circumstances and primarily because we continue to hold an equity

¹ That deterioration was discerned as early as 1980 when Rock Wool's auditors noted in their annual report for the periods ending December 31, 1978 and December 31, 1979 that:

" Unless management takes appropriate measures the capital structure will not sustain continued losses of this magnitude)." (Exhibit D-15).

There is no evidence that management took any such measures to stop Rock Wool's financial bleeding.

position in Ross Ekins' residence, I will continue to finance U. S. Rock Wool under our existing formulas for an additional period not to exceed six months from 12-31-82. Your current borrowings approximate \$80,000 which is based on a 65% advance against your eligible accounts receivable.

Because we must continue to carry you for a period not to exceed six months I want you to reduce your overall borrowings from us by at least \$10,000 a month, but in no event greater than 65% of your eligible collateral.

Assuming your loan at 12-31-82 approximates \$80,000 I would then expect your loan not to exceed \$70,000 at Jan. '83 and, \$60,000 at Feb., and \$50,000 at March end and so on until you are totally paid out but in no event later than June 30, 1983." (Exhibit "Q").

Two weeks later, on January 5, 1983, Rock Wool advised Heller of its probable inability to reduce the loan balance by the required \$10,000 per month. (Exhibit "R"). At that point, Rock Wool's loan availability, based on its then eligible accounts, had grown to a negative \$7,589. Id.

In mid-January, 1983, Heller's internal auditors discovered a mistake in the accounts receivable aging schedules that had been submitted by Rock Wool and the Ekins to Heller: the schedule understated the age of every account by thirty days. (Tr. 1286-88, 1311, 1312). As a result, accounts that had been designated by Rock Wool and the Ekins as thirty days past due were actually sixty days past due; accounts that had been designated by Rock Wool and the Ekins as sixty days past due were actually ninety days

past due, and so on. (Id.) On January 25, 1983, Heller advised Rock Wool of that problem and of its concern over the continuing increase in Rock Wool's negative loan availability. (Exhibit "S"). On that date, Heller also advised Rock Wool that Heller still wanted it to reduce its loan balance at the rate of \$10,000 per month. (Id.) Rock Wool did not do so. (Tr. 1289, 1796, 1797; Exhibit "R").

On February 7, 1983, Heller's account analyst, James E. Hillman ("Hillman"), determined that Heller had received no collections from Rock Wool's account debtors since January 31, 1983, and had received only \$9,031 from Rock Wool's debtors during the entire month of January 1983. (Exhibit "S"; Tr. 1289). It was obvious to Hillman that Rock Wool was in no position to cure its numerous defaults under the Loan Agreement or to meet Heller's payment schedule, and accordingly, on February 8, 1983, Heller exercised its right under the Loan Agreement to notify Rock Wool's account debtors to remit directly to Heller all monies owing to Rock Wool. (Exhibit "T"; Tr. 1315-17; 1342-45).

4. Commencement Of This Action.

Six weeks later, Heller filed its complaint in this action to recover the principal sum of \$116,700.43 plus accrued interest, costs and attorneys' fees. (R. 2-14). Ten months later, Heller filed an amended complaint to

reduce the amount of Heller's claim (R. 303-39) because the amount sought in its original complaint was inadvertantly and unintentionally overstated. (Tr. 1290-92).

On December 6, 1983, Rock Wool filed a petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Utah. Heller sought and obtained from the Bankruptcy Court an order granting it relief from the automatic stay imposed by 11 U.S.C. § 362 for the purpose of enabling Heller to liquidate Rock Wool's liability under the Loan Agreement. On May 3, 1984, Heller filed its proof of claim with the Bankruptcy Court to assert and preserve its secured claim against Rock Wool in the amount of \$71,780.48 plus accrued and accruing post-petition interest, late charges, services charges and attorneys' fees. (Exhibit "Z"). There is no evidence that Rock Wool objected to Heller's proof of claim.

On December 7, 1983, Heller's legal counsel tendered to Valley Bank a check in the amount of \$55,000 to pay off Valley Bank "in full" as contemplated by the Subordination Agreement. (Exhibit "II"). Valley Bank, at the Ekins' insistence, refused to accept that tender. (R. 1076).

On May 3, 1984, the district court granted partial summary judgment in favor of Heller by conclusively determining that the outstanding principal balance

established by Heller's books and records of account as owing by Rock Wool was \$73,670.75 through March 1, 1984. (R. 456, 557-59). The court expressly reserved for trial the issue of Rock Wool's liability to Heller under the Loan Agreement for the period subsequent to March 1, 1984. (Id.)²

5. The District Court's Finding That The Ekins' Were "Exempted" From Liability Under The Guaranty.

After a four-day, non-jury trial, the court issued a memorandum decision holding that (i) Heller's termination of the Loan Agreement (at a time in which Rock Wool was in default and had a negative loan availability), and Heller's exercise of its undisputable right to notify Rock Wool's account debtors to make payment directly to Heller, was "intended" by Heller to be an " . . . impairment of the accounts receivable inventory which of course eventually destroyed U. S. Rock Wool as an operable going concern"; (ii) Heller took actions "counterproductive" to its recovery

² Rock Wool's counsel approved as to form Heller's order granting partial summary judgment. That order was then submitted to the district court for signature. However, the district court never signed it. At trial, when asked why, the district court answered that:

"This [an accounting exhibit offered by the Ekins] is Mr. Tanner's [the Ekins' counsel] attempt to have me reconsider that [the partial summary judgment order]. And of course, in the course of a trial I suppose that's proper." (Tr. 1761).

of Rock Wool's accounts receivable and " . . . failed in their responsibility as factors to the borrower"; and, (iii) Heller acted in " . . . bad faith in going against the personal residence of the Ekins, proceeding with foreclosure in a sum which was not due and owing and in failing to first deal with the problem of Valley Bank & Trust " The court then concluded that because of that conduct, the Ekins were "exempted" from the claim of [Heller]". (R. 748-50).

6. The Court's Refusal To Enter A Finding As To Whether The Ekins Waived The Defense Of Impairment Of Collateral.

Notably, in the memorandum decision, the court failed even to address the issue of whether the Ekins had, under the Guaranty, waived the defense of impairment of collateral. (Id.) Even though all parties recognized that the dispositive issue in the case was whether the Ekins had waived that right (Tr. 1835), the district court felt otherwise. Its position was articulated in an incredible colloquy with counsel for the Ekins during a hearing on Heller's post-trial objections to the Ekins' proposed findings of fact and conclusions of law:

The Court: Give me the reason. Why is it [the proposed finding of fact that the Ekins did not waive the defense of impairment of collateral] placed in there? Because she [Justice Durham in the case of Continental Bank v. Utah Sec. Mortg., 701 P.2d 1095 (Utah 1985)] said something about a case that had a contract on a guaranty?

Mr. Tanner: This is the reason, Your Honor. One of
[The Ekins' necessary elements to a holding that the
legal counsel] impairment of a security by failing to
perfect and by not pursuing the
receivables, etc., one of those
essential elements to affirming a
decision that the conduct does in fact
release the guarantor, is a holding that
the guarantor has not consented to those
acts, to the release or the
impairment.

Now, --

The Court: I didn't find that. That's not in this
case. Why are you putting it in
this case? It's not in this case. You
must have tried another case. You're
thinking of another judge.

Mr. Tanner: No, Your Honor. It's in the arguments
of this case, and it's a pivotal
issue. Mr. Anderson has correctly
espoused it as the issue that -- that is
central to the question of release, and
we argued it before and during --

The Court: I don't think that's in this case. I
didn't listen to that, didn't pay any
attention to it, and it has nothing to
do with this case on the record.

Mr. Tanner: The guaranty clause, to conclude from
that that it does not constitute a
consent or waiver of the right to be
free from impairment of security, is an
essential element of the cause.

The Court: No, I don't think so. You will have to
appeal me on that, but I don't think
so.

What I thought Mr. Ekins said was the
truth, that he was told by the people
from -- representing Heller that they
wouldn't do anything to impair the
contract and so they wouldn't go ahead
and file those things. They would keep
those things out of this deal or they
didn't, which every way you went on that

situation. And he said when I was on my mission with Book of Mormon in one hand and Bible in the other I realized I was home free, because they would have to go after my trucks and things before they sell my house. And I believe that's exactly the representation they made to him. And I believe that to be the truth, and that's a finding of fact.

Mr. Tanner: But there has to be a finding that there was no consent on the Ekins' part, otherwise under California law or -- and/or under Utah law they will go up and reverse it and the Court's conclusions will be of no avail.

The Court: I don't think so. Let's try it. I don't think that's in this case. I think you're putting a lot of things in the case that are not there. Why do you put that in?

Mr. Tanner: The reason I've just explained.

The Court: I know you explained it to me, but that doesn't make any sense to me, because what he did is exactly what he intended to do.

Mr. Tanner: But Your Honor, he signed a Guaranty --

The Court: Yeah.

Mr. Tanner: -- as well as did --

The Court: Sure.

Mr. Tanner: All right. Now, this Court has to decide that Guaranty did not waive their right to -- did not have the security impaired because it's the writing that they signed. If the Court does not interpret it in that fashion, it cannot sustain that portion of the Court's decision and that is -- I mean unequivocal. So that --

The Court: I think's its equivocal as the dickens. I don't think that's in this case. I keep telling you that.

(Tr. 1834-38).

Several weeks later on April 29, 1986, the district court conducted a second hearing on Heller's objections to the Ekins' proposed findings of fact and conclusions of law. At that hearing, it advised the parties that its comments at the March 28 hearing were made for the purpose of supposedly having counsel

" . . . pare down some of the things which I thought overly broadened the information I had given you in the memorandum decision and was not necessarily my final word on what I thought ought to be in the findings of fact and conclusions of law. I stated a simple proposition for the simple reason for negotiation purposes, for shortening up your work and address the issues more directly. And in that regard I have been successful. The findings, as I now look at them, accurately represent this court's mind at the time the memorandum decision was prepared and published to the litigants." (Tr. 1899).

Heller timely filed its notice of appeal from the district court's judgment. (R. 1209-10).

SUMMARY OF ARGUMENTS

1. Under Utah law, the trial court's interpretation of a written agreement (such as the Guaranty) presents a question of law. As such, this court owes no deference to the district court's interpretation and can independently interpret the Guaranty, give effect to its plain meaning and

conclude as a matter of law that the Ekins consented to Heller's alleged impairment of collateral.

2. The Ekins, as guarantors under the Guaranty, are precluded from complaining about Heller's alleged impairment of collateral because the Guaranty does not require Heller to enforce or resort to any collateral before compelling payment from the Ekins. Therefore, under the Guaranty, the Ekins explicitly consented to Heller's alleged impairment of collateral. The district court's failure to so interpret the Guaranty constitutes reversible error.

3. The Ekins, as controlling shareholders of Rock Wool, are precluded as a matter of law from claiming a discharge under the Guaranty. Numerous cases recognize that where the guarantor controls the debtor, the guarantor is precluded from claiming a discharge based on the creditor's failure to perfect its lien in the collateral. The district court's inexplicable failure to recognize that principle constitutes reversible error.

4. As controlling shareholders of Rock Wool, the Ekins had an affirmative duty to ensure Heller's perfection of a security interest in Rock Wool's vehicles. Their breach of that duty estops them from seeking even partial discharge under the Guaranty. There is simply no precedent recognizing that a borrower can, when having knowledge of his lender's failure to properly perfect its security

interest, purposely withhold that knowledge and later rely on it as a defense to payment.

5. There is no evidence that Heller breached any duty of good faith to the Ekins in seeking to enforce the Guaranty. None of the bases on which the district court relied in support of that conclusion -- Heller's detection of misleading errors in Rock Wool's aging schedules, Heller's use of notices to Rock Wool's account debtors, and Heller's filing of a complaint in supposed violation of the Subordination Agreement -- constitute breaches of the obligation of good faith imposed on parties to a contract.

6. The trial court improperly admitted the testimony of an expert who had neither personal knowledge nor was asked to assume intelligible hypothetical facts on which to base his opinion of the value of a number of Rock Wool's motor vehicles. The court allowed the expert to base his opinions of the vehicles' value on scanty hand-written notes taken by another person which described in general and primitive terms the perceived condition of those vehicles. The clearly defective foundation for the ensuing expert opinion violates Rule 703 of the Utah Rules of Evidence and the cases interpreting that rule.

7. There is no credible evidence that Heller impaired Rock Wool's inventory in an amount of \$25,000 or any other amount. The value of that inventory, as reflected in Rock

Wool's own bankruptcy schedules, was almost \$10,000 less than the value given at trial. Therefore, even if Rock Wool failed to derive even a single penny from the sale of that inventory, Rock Wool's maximum loss would have been no more than \$15,888.26 (the value reflected in the bankruptcy schedules) -- not \$25,000.

8. The district court erred in awarding the Ekins any portion of their claimed attorneys' fees. Obviously, to the extent this court reverses the district court's determination that the Ekins are "exempted" from liability under the Guaranty, the Ekins would cease to be the "prevailing party" for purposes of taxing attorneys' fees as costs. Moreover, even if this court upholds all or a portion of the judgment, it is nevertheless clear that the district court erred by failing to allocate the attorneys' fees in the manner required by California law.

9. The record establishes numerous ex parte communications between the trial judge and the Ekins' counsel. The presence of those unauthorized communications constitutes an irregularity in the court's proceedings which prevented Heller from having a fair trial. The court's refusal to grant Heller a new trial constitutes an abuse of discretion. This court should direct a new trial at which Heller can present its substantive claims without the taint of bias or the appearance of bias.

ARGUMENT I
The District Court's Interpretation
Of The Guaranty Agreement Presents
A Question Of Law On Which
This Court Owes No Deference To
The District Court

This court has repeatedly recognized that:

"The interpretation of contract language presents us with a question of law, on which we owe no deference to the trial court's construction, but are free to make our own independent interpretation." Wade v. Utah Farm Bureau Ins. Co., 700 P.2d 1093, 1095 (Utah, 1985).

Accord, Bradshaw v. Burningham, 671 P.2d 196 (1983); Deschler v. Fireman's Fund American Life Ins. Co., 663 P.2d 97, 98 (Utah, 1983); Jones v. Hinkle, 611 P.2d 733, 735 (Utah, 1980).

In this case, the district court determined that the Guaranty was devoid of any language creating a waiver of the Ekins' right to claim impairment of collateral. (R. 1074). In reviewing that determination, this court is entitled to examine the plain language of the Guaranty and independently interpret it without deference to the district court's conclusions.

ARGUMENT II
Under The Guaranty, The Ekins
Explicitly Waived The Defense Of
Impairment Of Collateral

The Guaranty provides that:

"Heller shall not be required to prosecute collection, enforcement or other remedies against the debtor [Rock Wool], or against any person liable on any said . . . agree-

ments, obligation, indebtedness or liability so guaranteed, or to enforce or resort to any security, liens, collateral or other rights or remedies thereto appertaining, before calling on [the Ekins] for payment; nor shall [the Ekins'] liability in any way be released or affected by reason of any failure or delay on [Heller's] part so to do." (Emphasis added).

The identical Guaranty was interpreted in Walter E. Heller & Company v. Cox, 343 F.Supp. 519 (S.D.N.Y. 1972). In that case, the court held that under the guaranty the guarantor " . . . is not released or discharged by virtue of any lack of diligence with respect to or release or impairment of, collateral by a secured creditor." Id. at 526. Similarly, in the case of Walter E. Heller & Company, Inc. v. Wilkerson, 627 P.2d 773 (Colo. App. 1981), the court endorsed the very proposition advanced by Heller in this case: "under the terms of the agreement [the very Guaranty at issue in this case], the defendants [guarantors] could not compel Heller to go against the security." Id. at 775.

Nothing in the California Civil Code³ changes that result. While Section 2819 of the Code provides that, "[a] surety is exonerated . . . if by any act of the creditor, without the consent of the surety, the original obligation

³ The Loan Agreement, the Guaranty and the underlying security agreements provide that all disputes thereunder shall be governed by California law.

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," it is clear that in the Guaranty the Ekins knowingly gave their consent and waived the defense of impairment of collateral.

The established common law rule in California is that:

"A surety is not exonerated from liability by a change in a contract between the principal and the creditor which is made with his consent."
Mitchell & Tire Co. v. Bentel, 184 Cal. 315, 323, 193 P. 770 (1920).

As the later California case of Bloom v. Bender, 313 P.2d 568 (Cal., 1957), observed, "the logical corollary to this statute [§ 2819] is the exception above noted; i.e. where the surety consents to an alteration of the original obligation of the principal or the impairment or suspension of any right of the creditor's rights or remedies against the principal, the surety is not exonerated." Id. at 572. As the court further observed, if effective consent to the change in the obligation of a principal will prevent the otherwise resultant discharge of the surety, such consent may be given in advance of the alteration of the principal's obligation as well as at or after the time of such act. Id. at 573.

The California Civil Code is consistent with the California Uniform Commercial Code (whose provisions relating to the release of guarantors who are "parties to

the instrument" apply by analogy). Section 3-606 of the California Uniform Commercial Code recognizes that a guarantor may, and in the context of standard commercial dealings often does, consent to impairment of collateral. Official Comment 2 to § 3606 addresses the issue of consent:

"Consent may be given in advance, and is commonly incorporated in the instrument; or it may be given afterward. It requires no consideration, and operates as a waiver of the consenting party's right to claim his own discharge."

As noted above, the Ekins' waiver of their rights to complain about the manner in which Heller conducted itself with respect to the taking, perfecting or disposing collateral is compellingly comprehensive and far reaching. In fact, their waiver is so unequivocal that Heller is not even required to enforce or resort to any security before looking to the Ekins for payment. Therefore, the Ekins have flatly consented in advance to impairment in the manner contemplated by Official Comment 2. Numerous case have validated guaranty agreements under which the guarantor has consented in advance to such impairment.

The recent California case of American Security Bank v. Clarno, 151 Cal. App. 3d 874, 199 Cal. Rptr. 127 (1984), is factually indistinguishable from the case at bar. There, the sole shareholders of a corporation guaranteed the corporation's note to American Security Bank. The shareholders' guaranties were secured by deeds of trust on

their residences. The corporation's note was also secured by a security interest in the corporation's accounts, inventory and equipment. In addition, the corporation's wholly-owned subsidiary pledged its assets to the bank as security for the loan. However, the bank failed to perfect its security interest in that security.

After deciding that the shareholders could not invoke the impairment of collateral provisions of Section 3606 of the Commercial Code, the court then considered whether Civil Code Section 2819 offered the shareholders any relief from their guarantor liability. As in the present case, the shareholders had executed guarantees expressly allowing the bank in part:

"(i) To enter into any agreement of forbearance with respect to all or any part of the Liabilities, or with respect to all or any part of the collateral, and to change the terms of any such agreements;

(ii) To forbear from calling for additional collateral to serve any of the Liabilities or to secure any obligation comprised in the collateral;

(iii) To consent to the substitution, exchange or release of all or any part of the collateral " Id. at 880, 199 Cal. Rptr. at 130-31.

The court held that the above language constituted a waiver of the shareholders' rights under Section 2819. The court was unwilling to impose upon the bank a duty to

perfect the security interest absent an express agreement to do so. Finding no such agreement, the court stated that:

"No case requires a creditor to acquire every bit of security possible prior to imposing liability on a surety. Such a ruling would throw commercial transactions and suretyship law into utter chaos. We emphatically decline to rewrite these laws. Id. at 883, 197 Cal. Rptr. at 133.

This court has reached the same conclusion. In Continental Bank v. Utah Security Mortgage, 701 P.2d 1095 (Utah 1985), several individuals executed a guaranty agreement which provided in pertinent part that:

"[Continental Bank] shall not be required to proceed first against [Utah Mortgage] or any other person, firm or corporation or against any collateral security held by it before resorting to the guarantor[s] for payment; and the liability of the guarantor[s] shall not be affected, released or exonerated by release or surrender of any security held for the payment of any of the debts hereinbefore mentioned . . . " Id. at 1097.

The court held that that language (which is practically identical to the waiver provisions contained in the Guaranty at issue in this case) constituted an express waiver of any defense based on impairment of collateral. Accordingly, the court held that the bank's failure to perfect the security interest in the trust deeds and stock pledged by the corporate borrower did not release the guarantors from liability under their guaranties.

Identical conclusions have been reached in an extensive series of cases. American Bank of Commerce v. Covolo, 17

U.C.C. Rptr. 1052, 1058 ("Where a guarantor or surety expressly and unequivocally consents to a waiver or release of its rights in the collateral, he will not be heard to complain of the failure of the creditor to perfect the security interest therein in the first instance."); Executive Bank of Ft. Lauderdale v. Tighe, 32 U.C.C. Rptr. 894, 898-99 (N.Y. Ct. of App. 1981) (" . . . a guarantor may consent to impairment of collateral and, as is noted in U.C.C. Official Comment 2, such consent 'operates as a waiver of the consenting party's right to claim his own discharge.'"); Etelson v. Suburban Trust Co., 9 U.C.C. Rptr. 1371, 1373 (Md. 1971) (" . . . the [guarantors] by agreeing to the broad language of the endorsement limited the protection to which they might have otherwise been entitled under the U.C.C. It would be illogical to rule that the bank had a duty to file the financing statement and its failure to do so released the endorsers, when under the endorsement it could have released the collateral with impunity."); Nat'l Acceptance Co. of America v. Demes, 24 U.C.C. Rptr. 197, 201 (N. Dis. Ill. 1977) ("We cannot escape the conclusion that, however justifiable defendant's expectations that the finance company should proceed with care to perfect its security interest properly, these expectations were not protected by the guaranty agreement they signed."); Commerce Bank of St. Louis v. Wright, 37

U.C.C. Rptr. 502, 508 (Mo. 1982) ("Neither the defense of release or agreement not to sue the corporation, nor the defense of impairment of collateral is available to the guarantors since they consented, by the unambiguous terms of the guaranty set out above, to pay the debt regardless of any release of the corporation or use of the collateral."); Wilson v. Baxley State Bank, 29 U.C.C. Rptr. 1550 (Ga. 1980) ("The guaranty agreement provided that the 'bank is authorized to . . . release collateral, substitute collateral . . . without any notice to undersigned without affecting the liability of undersigned hereunder.' Such a release operates as a waiver of the consenting party's right to claim his own discharge.").

It is clear in this case that the Ekins have similarly waived in advance their right to complain of Heller's alleged impairment of collateral. It is difficult to imagine a waiver more explicitly or clearly given: a clear recognition by the Ekins that Heller shall not be required " . . . to enforce or resort to any security, liens, collateral or other rights for remedies thereto appertaining before calling on [the Ekins] for payment; nor shall [the Ekins'] liability in any way be released or affected by reason of any failure or delay on [Heller's] part so to do." (App. ii, Emphasis added).

By examining and signing the Guaranty, the Ekins voluntarily and knowingly waived their rights to complain of Heller's failure to perfect its security interest in a portion of Rock Wool's collateral. The district court's initial refusal to consider that issue and its later misinterpretation of the Guaranty constitute clear error requiring reversal of its judgment.

ARGUMENT III

The Ekins, As Controlling Shareholders Of Rock Wool, Are Precluded As A Matter Of Law From Claiming A Discharge Under The Guaranty

The Ekins own 99.67% of all the issued and outstanding capital stock of Rock Wool. (Tr. 1672). Under established law, their position as dominating controlling shareholders of Rock Wool precludes them from asserting rights of discharge otherwise available to independent third party guarantors not affiliated with the principal debtor.

Numerous cases have held that " . . . where the guarantor controls the debtor it will not be discharged, absent an express agreement to the contrary, by the failure of the creditor to perfect its lien in the collateral." Leslie Fay, Inc. v. Rich, 478 F.Supp. 1109, 1116 (S.D.N.Y. 1979), 28 U.C.C. Rptr. 830, 836. In that case, the principal debtor was a subsidiary of the corporate guarantor. The guarantor alleged that the plaintiff lessor had impaired the guarantor's rights of subrogation by failing to properly perfect its security interest in certain

leasehold fixture improvements. The court assumed for purposes of argument that where an independent third party guarantees an obligation as an accommodation to the debtor, " . . . it seems reasonable for that party to rely on the expectation that a businessman/creditor will act responsibly and make at least a reasonable effort to secure its collateral under the U.C.C., thereby protecting the guarantor's subrogation interest." The court then observed that:

"This case, though, presents a situation entirely different from that in which an independent third party guarantees a debt. Several courts, including a New York court, have recognized that where the guarantor controls the debtor it will not be discharged, absent an express agreement to the contrary, by the failure of the creditor to perfect its lien in the collateral. [Citations omitted].

This rule is sound. In such a situation, the guarantor as a principal party to the negotiations resulting in the ultimate transaction is in a strong position to include in the agreement specific conditions upon which guaranty is based. In this case the guaranty was unconditional despite the fact that the parties outlined, in great detail, conditions concerning the collateral . . . in this context, the unconditional guaranty must be read at face value."

The court in Rich cited with approval the case of Nation Wide v. Scullin, 256 F.Supp. 929, 932, 3 U.C.C. Rptr. 724 (Dist. Ct. N.J. 1966):

"These defendants were not cast in the familiar role of accommodation endorsers, or sureties, a status which would entail less stringent responsibilities in the eyes of the law. Rather they were businessmen -- the principal anchors, both as individuals and their corporate alter ego -- who undertook to perform this arrangement. It is reasonable to assume, nothing contra wise on the record, that they were possessed of some measure of business acumen, when they undertook to guarantee their company's contract performance.

The paramount obligation here is the guaranty contract of defendants, the consideration for which was the contract of the corporation . . . their obligation is unconditional."

The Rich court accordingly concluded that, "defendants should not be allowed to evade their personal obligations by virtue of corporate acts that were fully within their control . . ." Id. at 837.

In the instant case, the Ekins executed the Loan Agreement, the trust deed and the three separate security agreements in their respective capacities as corporate president and secretary of Rock Wool. Between them they held and continue to hold all but a negligible portion of Rock Wool's capital stock. Heller's loan advances were essential to the preservation of their interest in Rock Wool -- a corporation on which they relied as their primary source of income. Their de facto domination of Rock Wool precludes them from asserting the status of an independent

disinterested third party guarantor able to claim discharge by resort to common law and U.C.C. suretyship defenses.

The district court's failure to so hold constitutes reversible error.

ARGUMENT IV

The Ekins, As Controlling Shareholders Of Rock Wool, Had An Affirmative Duty To Ensure Heller's Perfection Of A Security Interest In Rock Wool's Vehicles And Their Breach Of That Duty Estops Them From Seeking Even Partial Discharge Under The Guaranty

The extraordinary identity of interest between the Ekins and Rock Wool carries an additional consequence. It imposes on the Ekins an affirmative duty to protect and preserve the security pledged by Rock Wool to Heller and thereby preserve their rights of subrogation. As shown below, any breach of that duty precludes them from obtaining a discharge from the Guaranty.

The principle that a guarantor who possesses a substantial identity of interest with the corporate borrower cannot assert suretyship defenses otherwise available to an independent guarantor is so widely recognized that one court has stated that it could find " . . . no reported case where a person who has an interest in the transaction can avail himself of this defense [discharge or release] where there has been a failure to file a financing statement." Mikanis Trading Corp. v. Lowenthal, 22 U.C.C. Rptr. 1000 (N.Y. 1977).

The courts have consistently held that in such situations the guarantors not only have a substantial interest in protecting the security but also have an opportunity at least equal to that of the creditor to insure that the creditor's security interest in the collateral is duly perfected. Mikanis Trading Corp. v. Lowenthal, supra, at 1001, ("defendant's argument [that he is discharged from liability on his guaranty by reason of the lender's failure to perfect a security interest in collateral pledged by the borrower] overlooks the fact that he, as well as plaintiff, had a substantial interest in protecting the security as against third parties in light of his guaranty. Defendant, as well as plaintiff, could have seen to the filing under the Code."); Tampa Bay Bank v. Loveday, 17 U.C.C. Rptr. 1247, (Tenn. 1975) ("In the case at bar the defendant [as chief executive officer of the corporate borrower] was not only in an equal position, but we find that she was in a more superior position to protect the collateral than was the plaintiff bank."). Accord, Rushton v. U M & M Credit Corp., 5 U.C.C. Rptr. 1078 (Ark. 1968); Union Bank v. Kruger, 1 Wash. App. 622, 463 P.2d 273 (1969).

The record establishes that between December, 1979 and December 7, 1983 (the date on which Rock Wool filed its petition in bankruptcy), Rock Wool, through the Ekins, sold anywhere between five and fifteen motor vehicles having an

estimated fair market value of at least \$31,700. (Tr. 1716-20, 1811-16). Heller could locate no evidence suggesting that Rock Wool remitted any portion of those sales proceeds to Heller. Even charitably assuming that Heller was negligent in failing to perfect its security interest in the motor vehicles, it is clear that the Ekins had the last clear chance to avoid any loss by apprising Heller of its need to perfect and thereby ensure its ability to receive proceeds derived from the sale of the vehicles. Under either analysis -- duty to mitigate or last clear chance -- the Ekins are plainly estopped from claiming any impairment of collateral.

The district court's consequent failure to grant Heller a credit in the amount of \$31,700 against any loss claimed by the Ekins constitutes reversible error.

ARGUMENT V

The District Court's Finding That Heller Breached Its Obligation Of Good Faith In The Enforcement Of The Guaranty Is Clearly Erroneous

The district court found that Heller breached its obligation of good faith to the Ekins in its enforcement of the Guaranty. That supposed breach consisted of the following incidents:

- (i) Heller's creation of an "insuperable negative balance" in Rock Wool's loan availability through its detection of a misleading error in

Rock Wool's account receivable aging schedules (R. 1075);

(ii) Heller's use of direct notices sent to the account debtors identified by Rock Wool itself (Id.);

(iii) Heller's filing of a complaint without advance notice or demand which sought the appointment of a receiver to take possession of the Ekins' home " . . . all at a time when Heller was bound by contract not to take action against the Ekins' home." (Id.)

Even charitably assuming the existence of a duty of good faith the record discloses no evidence establishing the existence of an actionable breach.

A. Heller's Detection Of A Misleading Error In Rock Wool's Accounts Receivable Aging Schedule.

The record establishes that in mid-January, 1983, Heller's internal auditors discerned an error in the accounts receivable aging schedule submitted by Rock Wool to Heller for the purpose of reflecting the nature, extent and age of Rock Wool's accounts receivables. (See, pp. 9-10, supra). On January 25, 1983, Heller advised Rock Wool of that problem and of the consequent increase in its negative loan availability. (Exhibit "X"). Notably, Rock Wool's loan availability had, since November 12, 1982, fluctuated

between a negative \$631.28 and a negative \$7,589.30. (Tr. 1401-04, 1418).

Therefore, Heller's detection of the errors in Rock Wool's aging schedule simply increased the Rock Wool's loan availability from a negative \$7,589.30 to a negative \$52,000. It did not, as the district court found, create an "insuperable negative balance." (Finding of Fact No. 9; R. 1075). That balance had been negative for the ten weeks preceding Heller's adjustment. (Tr. 1401-04, 1418). Thus, there is no factual support in the record for a finding that Heller's contractually authorized adjustment of the amount of Rock Wool's loan availability did anything other than increase its negative balance. Rock Wool had, by its own inability to effect collection of its accounts, created its own negative loan availability.

B. Heller's Use Of Notices To Rock Wool's Debtors.

On February 7, 1983, Heller's account analyst noted that Heller had received no collections from Rock Wool's account debtor since January 31 and had received only \$9,031 from those debtors during the entire month of January. (Exhibit "S"; Tr. 1289). Accordingly, on the following day, Heller sent to each of the account debtors reflected in the last monthly report sent to it by Rock Wool, a notice requesting each account debtor to remit directly to Heller all monies owing to Rock Wool. (Exhibit "T"; Tr. 1315-17,

1342, 1345). The use of such notices is expressly authorized in the Loan Agreement. (See, Exhibit "A", ¶ 6). Moreover, § 9-502(1) of the California Uniform Commercial Code provides that:

"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 "

The district court clearly erred in determining that Heller's use of notices to Rock Wool's debtors violated its duty of good faith owed to the Ekins.

C. Heller's Inadvertant Overstatement Of The Amount Sued For And Its Filing Of A Complaint In The Face Of The Subordination Agreement.

Heller's original complaint sought to recover the principal sum of \$116,700.43 plus after-accrued interest, costs and attorneys' fees. (R. 2-14). Heller later filed an amended complaint to reduce the amount of Heller's claim (R. 303-39) because the amount sought in its original complaint was inadvertantly overstated. (Tr. 1290-92). Heller's never purposely overstated the sought amount. (Tr. 1385, 1408).

In filing its complaint, Heller was aware of the Subordination Agreement which it had entered into with Valley Bank. The Subordination Agreement provided in pertinent part that:

"In consideration of the credit extended to borrower [the Ekins] by the Bank [Valley Bank], the undersigned [Heller] hereby subordinates its security interest in the described security [the real property described in Heller's trust deed] to the above security interests of the Bank. The Bank may extend, modify or renew the so secured obligation without affecting this subordination. The undersigned agrees not to demand, receive, accept or otherwise realize on the security or the security interest or to take any direct or indirect action to obtain or realize such security until such time as Bank is paid in full. The undersigned agrees to pay and/or deliver to Bank immediately upon receipt any of the described security or proceeds thereof." (Emphasis added). (See, Exhibit "DD"; App. iii).

Heller's accounts analyst, James E. Hillman, testified that Heller filed its complaint in reliance on the last sentence of the Subordination Agreement which contemplated that upon sale of the property any proceeds in an amount up to and including the loan balance owing by the Ekins to Valley Bank would be remitted to Valley Bank and any surplus could be retained by creditors of the Ekins (such as Heller). (Tr. 1407-08, 1409).

There is simply no basis for concluding that the Subordination Agreement precluded Heller, as a matter of law, from filing a complaint to judicially foreclose its trust deed. The last sentence of the Subordination Agreement expressly contemplates such an occurrence. The district court's tortured interpretation to the contrary should be reversed as a matter of law.

ARGUMENT VI
The District Court Improperly Admitted
The Testimony Of An Expert Who Had Neither
Personal Knowledge Nor Intelligible
Assumed Hypothetical Facts On Which
To Base His Opinion

At trial, the Ekins adduced the testimony of an appraiser for the purpose of establishing the fair market value of several motor vehicles in which Heller had not perfected a security interest. (See, Tr. 1482-1501). However, in purporting to render his opinion of the vehicles' value, the appraiser acknowledged that he " . . . did not see the vehicles." (Tr. 1485). Instead, the appraiser based his opinion on a description of the vehicles prepared three years earlier by David Ekins. (Tr. 1485-89). Heller's counsel timely interposed an objection to the testimony, (Tr. 1487-89) but the court allowed the testimony. The appraiser indicated that it was unusual for him to render an opinion of value without having actually inspected the physical condition of the subject of his appraisal. (Tr. 1491). In addition, he acknowledged the tenuousness of that procedure:

Question by Mr. Anderson: And having said that, is it fair to say that the perception of a lay person [such as David Ekins] of the condition of a vehicle may well be different than the perception of a qualified appraiser such as yourself?

Answer: There is no question. Everybody would look at things differently.

Question: And they would use different words to describe the condition, would they not?

Answer: Oh, yes.

* * *

Question: [And] regardless of the subjective allowance that you may have made for that condition, it's a fact, is it not, that the condition -- that the language utilized by a lay person to describe a condition may well be different than the language utilized by an appraiser?

Answer: That's true.

Question: And you have no way of verifying whether Mr. Ekins' perception of the condition comports with yours?

Answer: No.

(Tr. 1499, 1500).

The proffered testimony is absolutely inadmissible under Rule 703 of the Utah Rules of Evidence which provides that:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

A vitally important precondition to the admittance of expert evidence is the showing of a proper foundation. The importance of a proper foundation has been stressed in Edwards v. Didericksen, 597 P.2d 1329 (Utah 1979). In that case, this court stated that:

"The admissibility of [expert] evidence depends in large measure upon the foundation laid. The expertise of the witness, his degree of familiarity with the necessary facts, and logical nexus between his opinion and the facts adduced must be established. When such a foundation is laid, Rule 56 [which is the predecessor of the presently enacted Rule 703] of the Utah Rules of Evidence makes an expert's opinion admissible, even though it embraces an ultimate issue."

A fortiori, failure to lay a proper foundation for the witness' opinion requires exclusion of that opinion. As this court noted in Day v. Lorenzo Smith & Son, Inc., 17 Utah 2d 226, 408 P.2d 189 (1974):

"The witness must testify as to the facts upon which he bases his opinion and the facts should be related to the opinion. Otherwise, the testimony would be of little assistance to the court and jury, and there would be no way of testing the validity of the opinion." (Emphasis added). Id. at 1331-32.

In this case, there is no way the appraiser had any "degree of familiarity" with the necessary facts since he readily acknowledged that the language employed by David Ekins to describe the vehicles could well have been substantially different than his own. Therefore, there are no credible "facts" on which his opinion is based. Similarly, there can be no "logical nexus" between the opinion and the adduced facts since there is no way of determining with any clarity or precision just exactly what those facts are. In simple terms, there is simply no way

for Heller to test and plumb-bob the validity of the appraiser's opinion since it is impossible to know whether the standards used by David Ekins to describe the condition of the vehicles comported even remotely with those used by the appraiser in rendering his opinion.

The Ekins' clear failure to lay a proper foundation for that testimony required the district court to exclude it. Its failure to do so constitutes reversible error.

ARGUMENT VII
There Is No Credible Evidence
Supporting A Finding That Heller
Impaired Rock Wool's Inventory
In An Amount of \$25,000 Or Any
Other Amount

David Ekins (son of the Ekins) testified that Rock Wool was forced to sell its inventory at a loss of \$25,000.00. (Finding of Fact No. 6; R. 1074). Mr. Ekins lied: on Rock Wool's bankruptcy schedules, which he prepared and signed under penalty of perjury, he represented that the total market value of all of Rock Wool's "inventory and supplies" was the sum of \$15,888.26. (See, Exhibit "Y", specifically attachment to Schedule B-2(k) and Exhibit "SS", p. 3). Therefore, even if he failed to derive even a single penny from the sale of that inventory, Rock Wool's maximum loss would have been \$15,888.26 -- some \$10,000.00 less than the amount to which he testified. Clearly, the inventory and supplies fetched some amount of monies which represent a portion of that figure. Therefore, there is no way Rock

Wool suffered any loss remotely approaching the figure to which he testified and which the district court adopted.

ARGUMENT VIII
The District Court Erred In Awarding
The Ekins Any Portion Of Their Sought
Attorneys' Fees

The district court awarded the Ekins attorneys' fees in the amount of \$63,718.38. (R. 1096-99). The purported basis for the recovery of such fees is Section 1717 of the California Civil Code which provides in pertinent part that:

"(i) In any action on a contract, where the contract specifically provides that attorneys' 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, when the party who is determined to be the prevailing party, whether he or she is the party specified in the contract are not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements."
(Emphasis added).

Thus, to determine the Ekins' eligibility for recovery of attorneys' fees under that statute, two threshold determinations must be made: (i) on which contract are the Ekins relying to support their claim for the recovery of attorneys' fees, and (ii) does that contract specifically provide for the recovery of attorneys' fees which are incurred to enforce that contract? The answer to the first question, namely, the identity of the contract thought to support the claim for attorneys' fees is the Guaranty and the Trust Deed. Those contracts are the only operative

instruments executed by the Ekins in connection with the transactions at issue in this case.⁴ Therefore, they are the sole documents on which the Ekins can rely to recover attorneys' fees in this case.

Having established that it is the Guaranty and the Trust Deed which determine the Ekins' right to recover attorneys' fees, the next issue is whether the Guaranty specifically provides for the recovery of attorneys' fees which are incurred to enforce the Guaranty itself as required by the statute. The only provision in the Guaranty relating to attorneys' fees is as follows:

" . . . we [the Ekins] also hereby jointly and severally agree on demand to reimburse you [Heller] and your assigns for all expenses, collection charges, court costs and attorneys' fees incurred in endeavoring to collect or enforce any of the foregoing against the debtor and/or undersigned or any other person or concern liable thereon." (Emphasis added). (See, Exhibit "F"; App. ii).

That provision, then, allows Heller to recover attorneys' fees incurred for the purpose of collecting or enforcing obligations owing under the Loan Agreement and the underlying security agreements described in the preceding portion of that paragraph. The Guaranty nowhere provides

⁴ The Loan Agreement and the underlying security agreements were, of course, executed by Rock Wool. The Ekins are not signatories to those agreements.

for the recovery of attorneys' fees incurred in the enforcement of the Guaranty itself. Therefore, the statutory requirement that attorneys' fees are recoverable only if they are incurred to enforce the provisions of that very contract has not been met. The district court's obvious failure to recognize that requirement resulted in an erroneous conclusion that the Ekins were entitled to an award of attorneys' fees.

Finally, the Ekins can seek to recover only those expenses which they can demonstrate are directly related to their obligations under the Guaranty and the Trust Deed. Recovery must be denied for any attorneys' fees expended in connection with any other matter in the case -- such as declaratory judgment on the Subordination Agreement; issues related to Rock Wool's bankruptcy filing; matters respecting the prosecution of the counterclaim for damages; etc. In short, any matter not directly referable to their liability under the Guaranty or the Trust Deed is not taxable as a cost against Heller. Accordingly, the district court should be required to conduct further hearing to determine the precise allocation to be accorded any requested attorneys' fees.

ARGUMENT IX

The Trial Judge's Ex Parte Communications With The Ekins' Counsel Constitutes An Irregularity In Proceedings Which Prevented Heller From Having A Fair Trial

No principle could be better settled than the proposition that a judge should refrain from ex parte

communications with counsel concerning any matter related to a pending proceeding. Canon 3A(4) of the Utah Code of Judicial Conduct could not be clearer:

"A judge should . . . neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding."

Similarly, Disciplinary Rule 7-110(b) of the Utah Code of Professional Responsibility, with narrow exceptions, forbids such communications.

For obvious reasons (including the happily infrequent occurrence of such contacts and the practical difficulty of detecting such abuses), there are few reported cases addressing the consequences of improper ex parte communications between the court and counsel. Those that do, however, decline to countenance or rationalize such conduct. For example, in Williams v. Williams, 249 P. 920 (Okla. 1926), the record established that the trial judge had permitted the parties to bring the case to his attention in conversations outside the regular proceedings. In reversing the trial judge's refusal to disqualify himself, and in remanding for a new trial, the court noted as follows:

"Our jurisprudence guarantees a fair and impartial trial to litigants in express terms. As the ultimate powers of the courts to enforce their judgment must be made to rest upon the public confidence and the good faith and integrity of the courts, it is implied, and is the concern of the courts

that a case not only be tried fairly in fact and in law, but in such an atmosphere that neither party plausibly can point to grounds as a support for the charge that the judgment followed from prejudice or bias of the trial judge.

* * *

A judge can protect himself from such charges by forbidding anyone to discuss the case with him. The law provides means for punishing those who may persist in imposing upon the judge. We go no farther than to say that the trial judge should not have permitted the parties to discuss the case, or talk to him about the case, outside of a regular court proceeding. But having permitted the instance to occur, the application for disqualification ought to have been sustained."

To the same effect are State v. Crismore, 213 P.2d 293 (Okla. 1949) (If the petitioner had been able to establish that the judge discussed the merits of certain criminal matters with the District Attorney, disqualification would be ordered); Rosenfield v. Vosper, 195 P.2d 530 (Cal. 1948) (Absent an express agreement between all counsel to allow one of those counsel to discuss the merits of proposed findings of fact and conclusions of law in chambers without the other counsel, new trial would be granted upon showing of prejudice.); In re Hasler, 447 S.W.2d 65 (Mo. 1969) (Where it was established that the judge conducted telephonic and written communications with the wife in a divorce proceeding before him without the knowledge of the husband, the judge was properly disbarred.)

In this case, the record clearly establishes that the trial judge and the Ekins' counsel engaged in at least four separate telephone conversations and apparently one meeting concerning the merits of this case. The time slips of the Ekins' counsel attached to the Affidavit of Attorneys' Fees dated March 17, 1986 (R. 878-1019), clearly disclose that the trial judge and the Ekins' counsel conducted telephone conversations on July 26, 1984, on July 31, 1984, on August 1, 1984 and on December 2, 1985. (See, App. iv).

In addition to those telephone conversation (at least two of which extended for at least 12 minutes), there are two other entries in the time slips strongly suggesting the occurrence of direct contact between the court and the Ekins' counsel: On June 11, 1984, the Ekins' counsel personally delivered certain unspecified pleadings to "Judge Dee." (See, App. v). In addition, on July 5, 1984, the Ekins' counsel either traveled to the court to contact "clerk or judge" or tried to contact "clerk or judge," again indicating his brazen belief that he was entitled, as a matter of course, to contact the court with respect to this case in the absence of Heller's counsel. (See, App. vi).

The trial judge's explanation of why supposed scheduling matters required 12 minutes of discussion was that he may have placed the Ekins' counsel on hold while he looked for the file. (See, App. vii). However, the

affidavit of the Ekins' counsel which seeks to explain and justify those ex parte conferences makes no mention of that fact. (R. 1154-62).

It is impossible to conceive of any conduct more at variance with the principle of evenhanded, impartial and fair meteing out of justice. Heller -- as a California corporation who made substantial loan advances which the court determined need not be repaid -- has now been informed that the Utah judge who made that decision has chatted at length with the borrowers' counsel concerning the case in the absence of Heller's counsel. Surely, despite whatever explanation or rationalization is advanced for that conduct, Heller can never be convinced that it had a full and fair adjudication of its claims. Like any other litigant, Heller is entitled to a trial presided over by a judge whose impartiality cannot be questioned.

Accordingly, this court should reverse the district court's order denying Heller's motion for new trial and enable Heller to litigate its claims with a trial judge whose impartiality cannot be questioned.

CONCLUSION

For the foregoing reasons, the court should reverse the district court's judgment and either (i) enter judgment in favor of Heller as a matter of law, or (ii) remand to the

district court to retry this case in accordance with this court's decision.

RESPECTFULLY SUBMITTED this 19th day of September, 1986.

HANSEN & ANDERSON

By /s/ John T. Anderson
Cary D. Jones
John T. Anderson
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of September, 1986, four true and correct copies of the foregoing instrument were sent, postage prepaid in the United States mail, to the following:

Earl D. Tanner, Sr., Esq.
TANNER, BOWEN & TANNER
Attorneys for Respondents
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

/s/_____

December 27, 1979 **ACCOUNTS FINANCING SECURITY AGREEMENT**
LIEN AND SECURITY INTEREST

U. S. Rock Wool Co., Inc.

Its chief place of business is located at 45 W. Senior Way
 Number Street
Salt Lake Salt Lake Utah 84115
 City County State

hereinafter called "Borrower", for valuable consideration, receipt whereof is hereby acknowledged, hereby grants to WALTER E. HELLER, INCORPORATED, hereinafter called "Heller", a continuing general lien and security interest in all accounts receivable, instruments, chattel paper, general intangibles and contract rights (hereinafter collectively called "Accounts"; the obligors thereon being sometimes referred to as "account debtors" or "account debtors"), now or hereafter owned or acquired by Borrower, however, the same shall arise or be acquired, and all proceeds of collections thereof, all guaranties and other security therefor, all right, title and interest of Borrower in the merchandise which gave rise thereto, including the right of stoppage in transit, all returned, rejected, rerouted or repossessed goods, the sale or lease of which shall have given rise to any point or any such instruments or chattel paper (all, including the Accounts, hereinafter collectively called the "Collateral"), in the proceeds thereof in all of Borrower's books and records relating to the Collateral. The lien and security interest of Heller (or, in those states in which the Uniform Commercial Code has not become effective, the lien of Heller arising by the assignment to Heller of accounts (receivable) is to secure the payment and performance of all liabilities and obligations of Borrower to Heller of every kind and description, direct, absolute or contingent, due or to become due, whether now existing or hereafter arising hereunder or under any other agreement, document or instrument heretofore, now or hereafter executed and delivered by Borrower to Heller ~~under any oral agreement between Borrower and Heller~~ or by operation of law, whether or not evidenced by any written agreement, document or instrument, including obligations to perform acts and refrain from taking action as well as obligations to pay money, including, without limitation, those arising under:

Inventory Loan Security Agreement of even date herewith.
 Chattel Mortgage Security Agreement of even date herewith.

I hereinafter called "Obligations").

WARRANTIES

Borrower hereby represents and warrants to Heller, and covenants, as follows:

- All books, records and documents relating to the Accounts are and will be genuine and in all respects what they purport to be; the amount of the Account shown on the books and records of Borrower represented as owing or to be owing at maturity by each account debtor is and will be the correct amount actually owing or to be owing by such account debtor at maturity; each debtor liable upon the Accounts has and will have capacity to contract; Borrower has no knowledge of any fact which would impair the validity or collectibility of any of the Accounts.
- If Borrower is a corporation, it is duly organized and existing under the laws of the state of its incorporation, as set out above and is duly qualified and in good standing in every other state in which the nature of its business requires such qualification.
- The execution, delivery and performance hereof are not in contravention of law or of any indenture, agreement or undertaking to which Borrower is a party or by which it is bound and, if Borrower is a corporation, the same are within Borrower's corporate powers, have been duly authorized and are not in contravention of its charter, by-laws, or other incorporation papers.
- At the time of assignment, each account receivable represents and will represent an undisputed, bona fide sale and delivery of goods or services rendered, or both, (or in the case of a contract right, represents and will represent an undisputed, bona fide agreement) and is not and will not be subject to any setoff, contra-claim, discount or condition of any nature, except as specified in writing on or before the delivery to Heller of schedules of assignment of accounts receivable; Borrower is, or, at the time of the assignment, will be the lawful owner of each Account and has unqualified right to assign and grant liens and security interests to Heller therein; Borrower will, with respect to each Account, deliver to Heller such papers as Heller may require, including, without limitation, the original delivery or other receipts and duplicate invoices.
- Borrower keeps and will continue to keep all of its books and records concerning accounts receivable and contract rights and all of its other books and records at its chief place of business, unless written notice to the contrary is given by Borrower to Heller.
- In addition to those shown in Paragraph 1. hereof, Borrower has places of business only at the following locations:

~~XXXX~~ 2320 Wall, Ogden, Utah 84401

- All information furnished by Borrower to Heller concerning Collateral and proceeds thereof, its financial condition or otherwise, is and will be complete, accurate and correct in all material respects at the time the same is furnished.
- Borrower has fully complied and will fully comply hereafter with the requirements of all applicable laws, federal, state and local, and all reserves provided upon Borrower's books and records are now and will be maintained hereafter in sufficient amounts to fully reflect all liabilities which have accrued or may hereafter accrue.
- The Collateral and all goods giving rise thereto are and, for so long as any of Borrower's Obligations remain unpaid, will remain free of any liens, charges, security interests, encumbrances and adverse claims, except for the benefit of Heller.
- All covenants, representations and warranties contained in this Agreement shall be true and correct at the time of the execution of this Agreement and shall be deemed continuing.

LOANS

- Heller agrees, during the continuance of this Agreement, to make loans and advances to Borrower, payable on demand, against those Accounts which Heller in its sole discretion considers eligible for borrowing, as follows: up to 65 % of the face value of each Account shall be paid upon the acceptance thereof by Heller; the remainder, being not less than 35 % of said face value, shall be held by Heller as a reserve to secure the collection and payment of such Account and to secure the payment and performance of all Obligations. It is Heller's intention, in the absence of any default in the Obligations, to refund the amounts held as such reserve to Borrower to the extent that the Accounts, in respect of which such amounts are held, have been collected. The aggregate amount of Borrower's indebtedness and obligations to Heller incurred pursuant to this Agreement, from time to time, shall be referred to hereinafter as "Borrower's Receivables Loan Balance." If Bor-

orrower's Receivables Loan Balance shall at any time exceed 65 % of the aggregate face value of said accepted Accounts, Heller may, but need not, require Borrower, upon demand, to pay such excess to Heller or may require Borrower to immediately deliver such additional security to Heller as may be satisfactory to Heller.

- TURNED GOODS; INSTRUMENTS**

- ### REPORTS; INSPECTION OF RECORDS; FURTHER ASSURANCE

1. At all times to allow Heller, by or through any of its officers, agents, employees, attorneys and accountants, to possess, remove to the premises of Heller or any agent of Heller for so long as Heller may desire, to make full use thereof in aid of Heller's rights under this agreement, and to examine, audit and make extracts and copies from Borrower's books and all other records, and, for said purposes or to aid Heller in the enforcement of any of its rights under this Agreement, to enter, to remain upon and, without cost to Heller, to use the premises of Borrower or wherever the same may be found as often and for as long as Heller may desire.
2. To furnish Heller an aged accounts receivable trial balance in such form and as often as Heller requires.
3. To furnish to Heller, promptly upon request, Borrower's monthly statements of account with its customers. Borrower agrees that Heller may from time to time verify the validity, amount and any other matters relating to the Accounts by means of mail, telephone or otherwise, in the name of Borrower, Heller or such other name as Heller may choose.
4. To do all things required by Heller in its sole judgment, in order more completely to vest in and assure to Heller its rights hereunder. The Accounts shall be assigned to Heller by written or printed instruments (hereinafter called "Schedules") in form acceptable to Heller, executed in such quantities as Heller may require, but the lien and security interest of Heller hereunder shall not be limited in any way to or by the inclusion of Accounts within such Schedules and to the extent the terms and provisions hereof shall conflict with said Schedules this Agreement shall be controlling; in the event the Uniform Commercial Code applies to any of the Accounts, Borrower need not furnish Schedules relating thereto unless Heller shall so request; but Borrower's failure to execute and deliver such Schedules shall not limit the security interest granted to Heller hereunder.
5. To furnish to Heller within sixty (60) days from the end of its fiscal year, financial statements (including balance sheet, profit and loss figures and accountant's comments) for that year and, at Heller's request, will furnish to Heller financial statements for each month by the fifteenth day of the following month. All such annual financial statements shall be prepared by certified public accountants acceptable to Heller.
6. Borrower will promptly notify Heller in writing of any change of its officers, directors and key employees, change of location of its principal offices, change of location of any of its assets (except the shipment, temporary storage or use in its manufacturing processes of inventory in the ordinary and normal course of Borrower's business), change of Borrower's name, death of any co-partner (if Borrower is a partnership), any sale or purchase out of the regular course of Borrower's business and any other material change in the business or financial affairs of Borrower.

a. Borrower agrees that it will, upon the request of Heller and in such form and at such times as Heller shall request, give notice of the assignment of or the granting of a security interest in all or any of the Accounts to the account debtors and that Heller may itself give such notice at any time and from time to time in Heller's or Borrower's name, without notice to Borrower, requiring such account debtors to pay the account directly to Heller.

b. Borrower irrevocably appoints Heller its true and lawful attorney, with power of substitution, in the name of Borrower or in the name of Heller or otherwise, for the use and benefit of Heller, but at the cost and expense of Borrower, without notice to Borrower or any of its representatives or successors, to repair, alter or supply goods, if any, necessary to fulfill in whole or in part the purchase order of any account debtor from which any Collateral has arisen; to demand, collect, receipt for and give renewals, extensions, discharges and releases of any Collateral; to institute and to prosecute legal and equitable proceedings to realize upon the Collateral; to settle, compromise, compound or adjust claims in respect of any Collateral or any legal proceedings brought in respect thereof; and generally to sell in whole or in part for cash, credit or property to others or to itself at any public or private sale, assign, make any agreement with respect to or otherwise deal with any of the Collateral as fully and completely as though Heller were the absolute owner thereof for all purposes. Borrower shall have no power to make any allowance or credit to any account debtor without Heller's written consent.

c. Borrower also hereby irrevocably appoints Heller its true and lawful attorney, with power of substitution, to take control in any manner of any cash or non-cash items of payment or proceeds thereof; to endorse the name of Borrower upon any notes, acceptances, checks, drafts, money orders, bills of lading, freight bills, chattel paper or other evidences of payment or Collateral that may come into Heller's possession; to sign Borrower's name on any invoices relating to any Accounts, on drafts against account debtors and notices to account debtors; to sign Borrower's name on any Proof of Claim in Bankruptcy against account debtors; to sign Borrower's name on any Notice of Lien, Claim of Mechanic's Lien or Assignment or Satisfaction of Mechanic's Lien; and to do all other acts and things necessary, in Heller's sole judgment, to carry out this Agreement. At any time or times when Borrower is in default hereunder, Heller shall have the right to enter upon Borrower's premises and to receive and open all mail directed to Borrower; Heller shall turn over to Borrower all of such mail not relating to Collateral. In the event of default, Heller shall have the right, in the name of Borrower, to notify the Post Office authorities to change the address for the delivery of mail addressed to Borrower to such address as Heller may designate. All checks and other forms of payment received as provided herein by Borrower shall be endorsed "Pay to the order of Walter E. Heller & Company of California" or in such other form as may be designated by Heller.

Heller at its option, at any time by: i) giving notification of its assignment of, or lien and security interest in the Accounts to the account debtors, and no notice thereof to Borrower shall be required, or ii) giving notice of such revocation to Borrower. All moneys, checks, notes, drafts, other things of value and items of payment together with any and all relating vouchers, identifications, communications or other data received from account debtors collected or received by Borrower (or by any receiver, trustee, or successor in interest of Borrower, or by any person acting on behalf of Borrower) in reference to the Accounts shall belong to Heller and shall be immediately transmitted by Borrower to Heller at its office (or, if directed by Heller, deposited in Heller's account in a bank designated by Heller) in the original form in which the same are received and endorsed by Borrower. Borrower shall have no right and agrees not to commingle with its own funds or to use, divert or withhold any of the proceeds of any collections. Borrower hereby divests itself of all dominion over the Accounts and the proceeds thereof and collections received thereon. Borrower shall make entries on its books and records in form satisfactory to Heller disclosing the absolute and unconditional assignment of Accounts to Heller and shall keep a separate account on its record books of all collections received thereon. Borrower further agrees to advise Heller immediately of any claims or disputes arising with respect to any Account and of any occurrence that may in any way impair or affect any of the Accounts or tend to reduce the value thereof. Should any suit or proceeding be instituted by or against Heller or Borrower upon any of the Collateral or for the collection or enforcement of any Account, Borrower shall, without expense to Heller, make available such of its officers, employees, agents, books, records and files as Heller may deem necessary to make proper proof in Court.

Heller shall be entitled to recover from Borrower all damages sustained by Heller by reason of any misrepresentation, breach of warranty or breach of covenant of Borrower herein, expressed or implied, whether caused by the acts or defaults of Borrower, account debtors or others; and also all reasonable attorneys' fees, court costs, court reporter expenses, long distance telephone charges, telegram costs, collection expenses, accountants' fees, supervisory fees, expenses of attorneys, agents, officers, auditors, collectors, clerks and investigators for travel, lodging and food costs, traveling expenses, disbursements, and all other expenses which may be incurred by Heller in enforcing payment of any Account or of Borrower's Obligations in attempting to enforce payment, in realizing upon any Collateral, whether against any debtor, Borrower, Borrower's guarantors or others, in supervising the records and proper management and disposition of the collection of Accounts, in prosecuting or defending any proceeding arising from the efforts of Heller to recover any money or other thing of value or otherwise to enforce or protect any of Heller's rights hereunder.

Borrower agrees that, as to any insurance it now or hereafter may maintain covering risks of damage to or loss or destruction of its books and records, each such policy of insurance shall contain a loss payable clause in a form satisfactory to Heller naming Heller as payee and providing that all proceeds payable thereunder shall be payable in any event to Heller, unless written consent to the contrary is obtained from Heller; such proceeds shall be applied to Borrower's Receivables Loan Balance. Each such insurer shall agree that it will give Heller thirty (30) days written notice before any such policy shall be altered or cancelled and that no act or default of Borrower or any other person shall affect the right of Heller to recover thereunder in case of such damage, loss or destruction. Certified copies of such policies shall be delivered to Heller upon demand.

FINANCING STATEMENTS AND NOTICES OF ASSIGNMENT

1. At the request of Heller, Borrower will join with Heller in executing one or more Financing Statements and/or Notices Of Assignment of Accounts Receivable pursuant to any applicable law, in form satisfactory to Heller.
2. Without the written consent of Heller, Borrower will not allow any Financing Statement or Notice Of Assignment of Accounts Receivable covering any Collateral or proceeds thereof to be on file in any public office.

EVENTS OF DEFAULT; ACCELERATION

All Obligations shall, notwithstanding any time or credit allowed by any instrument evidencing a liability, become immediately due and payable upon notice or demand upon the occurrence of any of the following events of default:

1. Borrower shall fail to make any payment or to perform any Obligation promptly when due;
2. Any warranty, representation, or statement made or furnished to Heller by or in behalf of Borrower shall have been false in any material respect when made or furnished;
3. Any event shall arise which results in the acceleration of the maturity of the indebtedness of Borrower to others under any indenture, agreement or undertaking;
4. There shall occur any loss, theft, damage, destruction, sale or encumbrance to or of any of the Collateral, or any levy, seizure or attachment thereof or thereon shall be made;
5. Any of the following shall occur: dissolution, termination of existence, insolvency, business failure, appointment of a receiver for any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceeding under any bankruptcy or insolvency law by or against Borrower or any guarantor or surety for Borrower, entry of a court order which enjoins, restrains or in any way prevents Borrower from conducting all or any part of its business affairs in the ordinary course, failure to pay any federal, state or local tax or other debt of Borrower unless the same is being contested in good faith, termination of guaranty by any guarantor of Borrower's indebtedness to Heller, whether under this Agreement or otherwise; it being expressly agreed that upon the happening of any event described herein, Borrower and each of Borrower's guarantors and sureties hereunder having or acquiring knowledge thereof shall immediately give written notice of said event or fact to Heller;
6. Heller shall determine, at any time or times hereafter, that it is insecure with respect to the performance by Borrower of all or any part of the Obligations;
7. Borrower recognizes that, in the event it violates any of the warranties, covenants, terms and conditions of this agreement, no remedy at law will provide adequate relief to Heller and Borrower hereby agrees that Heller shall be entitled to temporary and permanent injunctive relief in case of any such breach without the necessity of proving actual damages.

RIGHTS AND REMEDIES

Upon the occurrence of any such event of default, and at any time thereafter, Heller shall have the rights and remedies of a secured party under California Uniform Commercial Code and under any and all other laws in addition to the rights and remedies provided herein in any other instrument or paper executed by Borrower. All rights, powers and remedies hereunder or in any other instrument provided are cumulative and none is exclusive.

ONE GENERAL OBLIGATION; CROSS COLLATERAL

All loans and advances by Heller to Borrower under this Agreement and under all other agreements constitute one loan, and all indebtedness obligations of Borrower to Heller under this and under all other agreements, present and future, (including, without limitation, the documents set forth in Paragraph 1 hereof) constitute one general Obligation secured by collateral and security held and to be held by Heller hereunder and by all of all other agreements between Borrower and Heller now and hereafter existing. It is distinctly understood and agreed that all of the rights and remedies of Heller contained in this Agreement shall likewise apply insofar as applicable to any modification of or supplement to this Agreement and to all other agreements, present and future, between Heller and Borrower.

APPLICATION OF PAYMENTS

All payments made by or in behalf of and all credits due Borrower may be applied and reapplied in whole or in part to any of Borrower's

TERMINATION

This Agreement, on acceptance by Heller, shall continue until December 27, 1981 and from year thereafter unless terminated as to future transactions by the giving of notice by registered mail by either party to the other, not less than 30 (30) days prior to any anniversary hereof. Borrower, at such termination date, shall make payment in full of all Obligations, whether evidenced by installment notes or otherwise, and whether or not all or any part of such Obligations are otherwise then due and payable by Borrower to Heller. Borrower may terminate upon immediate notice at any time in the event Borrower commits any act of default enumerated in Paragraph 8. hereof. No termination of this Agreement shall in any way affect or impair any right of Heller arising prior thereto or by reason thereof, nor shall any such termination relieve Borrower or any of the guarantors of any obligation to Heller under this Agreement or otherwise until all of said obligations are paid and performed, nor shall any such termination affect any right or remedy of Heller arising from any such obligation, and all agreements, covenants and representations of Borrower shall survive termination.

BENEFITS OF THIS AGREEMENT

This Security Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors, representatives and assigns.

GOVERNING LAW; SUBMISSION TO JURISDICTION

The validity, interpretation, enforcement and effect of this Security Agreement shall be governed by the laws of the State of California. Borrower hereby consents to the jurisdiction of all courts in said State and hereby appoints _____

as its agent for service of process in said State.

SEPARABILITY

In the event that any provision hereof be deemed to be invalid by reason of the operation of any law or by reason of the interpretation placed upon by any court, this Agreement shall be construed as not containing such provision and the invalidity of such provision shall not affect the validity of any other provision hereof and any and all other provisions hereof which are otherwise lawful and valid shall remain in full force and effect.

NOTICES AND PAYMENTS

Any notice, payment or refund required hereunder or by reason of the application of any law shall be deemed to have been given by either party hereto when the same shall have been deposited in the United States mail, postage prepaid, at least five (5) calendar days prior to the date proposed thereby (except that notice of termination shall be given in the manner set forth in Paragraph 12. hereof), addressed:

- If to Borrower, at the address of Borrower specified in Paragraph 1. hereof, or to the latest address of Borrower of which Heller shall have received notice from Borrower;
- If to Heller, at _____

300 Montgomery Street
San Francisco, California 94104

ATTORNEYS' FEES

If, at any time or times hereafter, Heller employs counsel for advice or other representation with respect to any Collateral or this Agreement or other agreement, document or instrument heretofore, now or hereafter executed by Borrower and delivered to Heller, or to commence, defend, intervene, file a petition, complaint, answer, motion or other pleadings, or to take any other action in or with respect to any suit or proceeding relating to this Agreement or any other agreement, instrument or document heretofore, now or hereafter executed by Borrower and delivered to Heller, or to protect, collect, lease, sell, take possession of, or liquidate any of such Collateral, or to attempt to enforce any security interest or lien in any Collateral, or to represent Heller in any litigation with respect to the affairs of Borrower or in any way relating to any of the Collateral, or to enforce the rights of Heller or Obligations of Borrower, liabilities of Account Debtors, or any other person, firm, or corporation which may be obligated to Borrower by virtue of this Agreement or any other agreement, document or instrument heretofore, now or hereafter delivered to Heller by or for the benefit of Borrower; then, in any of such events, all of the reasonable attorneys' fees arising from such services, and any expenses, costs and charges incurred thereto, shall constitute additional Obligations of Borrower, secured by the Collateral, payable on demand.

WAIVERS

- Borrower hereby waives any and all causes of action and claims which it may ever have against Heller as a result of any possession, collection or sale by Heller of any Collateral in the event of a default by Borrower, notwithstanding the effect of such possession, collection or sale upon the business of Borrower, and Borrower waives all rights of redemption, if any, it may have.
- The failure at any time or times hereafter to require strict performance by Borrower of any of the provisions, warranties, terms and conditions contained in this Agreement or any other agreement, document or instrument now or hereafter executed by Borrower and delivered to Heller, shall not waive, affect or diminish any right of Heller hereafter to demand strict compliance and performance therewith and with respect to any other provisions, warranties, terms and conditions contained in such agreements, documents and instruments, and any waiver of any default shall not waive or affect any other default, whether prior or subsequent thereto, and whether of the same or of a different type. None of the warranties, conditions, provisions and terms contained in this Agreement or any other agreement, document or instrument now or hereafter executed by Borrower and delivered to Heller shall be deemed to have been waived by any act or knowledge of Heller, its agents, officers or employees, but only by an instrument in writing, signed by an officer of Heller and directed to Borrower specifying such waiver.
- Borrower waives any and all notice or demand which Borrower might be entitled to receive with respect to this Agreement by virtue of any applicable statute or law, and waives demand, protest, notice of protest, notice of default or dishonor, notice of payments and nonpayments, or of any default, release, compromise, settlement, extension, or renewal of all commercial paper, accounts, contract rights, instruments, chattel paper, guaranties, and otherwise, at any time held by Heller on which Borrower may in any way be liable, notice of nonpayment at maturity of any and all accounts, instruments or chattel paper, notice of any action taken by Heller unless expressly required by this Agreement and hereby ratifies and confirms whatever Heller may do pursuant to this Agreement and agrees that Heller shall not be liable for any acts of commission or omission or for any errors of judgment or mistakes of fact or law.

EFFECTIVE DATE

This Agreement, which has been signed and delivered to Heller on the day and year first above written, shall not become effective until accepted by Heller under the signature of its duly authorized officers at its address set forth herein in Paragraph 16.

U. S. Rock Wool Co., Inc.
Borrower

Accepted at: San Francisco

this 2nd day of January 1980

WALTER E. HELLER WESTERN INCORPORATED

Walter E. Hellman

Vice President

FILE: President Digitized by the Howard W. Hunter Law Library, BYU

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GUARANTY

WALTER E. HELLER WESTERN, INCORPORATED

Date December 27, 1979

Witness:

U. S. Rock Wool Co., Inc.

To induce you to purchase or otherwise acquire from U. S. Rock Wool Co., Inc. (hereinafter called "Debtor") accounts receivable, conditional sale or lease agreements, chattel mortgages, drafts, notes, bills, acceptances, trust receipts, contracts or other obligations or choses-in-action (herein collectively called "receivables"), or to advance moneys or extend credit to the Debtor, or to factor the sales or finance the accounts of the Debtor (either according to any present or future existing agreement or according to any changes in any such agreement or on any other terms and arrangements from time to time agreed upon with the Debtor, hereby including to and waiving notice of any and all such agreements, terms and arrangements and changes thereof) or to otherwise directly or indirectly advance money to or give or extend faith and credit to the Debtor, or otherwise assist the Debtor in financing its business or sales, without obligating you to do any of the foregoing) we, the undersigned, for value received, do hereby jointly and severally unconditionally warrant to you and your assigns the prompt payment in full at maturity and all times thereafter (waiving notice of non-payment) of any and all indebtedness, obligations and liabilities of every kind or nature (both principal and interest) now or at any time hereafter owing to you by the Debtor, and of any and all receivables heretofore and hereafter acquired by you from said Debtor or in respect of which the Debtor has or becomes in any way liable, and the prompt, full and faithful performance and discharge by the Debtor of each and every one of the terms, conditions, agreements, representations, warranties, guaranties and provisions on the part of the Debtor contained in any such agreement or assignment or in any modification or addenda thereto or substitution thereof, or contained in any schedule or other instrument heretofore or hereafter given by or on behalf of said Debtor in connection with the sale or assignment of any such receivables to you, or contained in any other instruments, undertakings or obligations of the Debtor with or to you, of any kind or nature, and we also hereby jointly and severally agree on and to reimburse you and your assigns for all expenses, collection charges, court costs and attorney's fees incurred in endeavoring to collect or enforce any of the foregoing against the Debtor and/or undersigned or any other person or concern liable thereon; for all of which, we warrant at the highest lawful contract rate after due until paid, we hereby jointly and severally agree to be directly, unconditionally and primarily liable jointly and severally with the Debtor, and agree that the same may be recovered in the same or separate actions brought to recover the principal indebtedness.

Notice of acceptance of this guaranty, the giving or extension of credit to the Debtor, the purchase or acquisition of receivables, or the advancement of money or credit thereon, and presentment, demand, notices of default, non-payment or partial payments and protest, notice of dishonor and all other notices or formalities to which the Debtor might otherwise be entitled, prosecution of collection or remedies against the Debtor against the makers, endorsers, or other person liable on any such receivables or against any security or collateral thereto appertaining, are hereby waived. The undersigned also waive notice of any consents to the granting of indulgence or extension of time payment, the taking and releasing of security in respect of any said receivables, agreements, obligations, indebtedness or liabilities so guaranteed hereunder, or your accepting partial payments thereon or your settling, compromising or compounding any of the same in such manner and at such times as you may deem advisable, without in any way impairing or affecting our liability for the full amount thereof; and you shall not be required to prosecute collection, enforcement or other remedies against the Debtor or against any person liable on any said receivables, agreements, obligations, indebtedness or liabilities so guaranteed, or to enforce or resort to any security, liens, collateral or other rights or remedies thereto appertaining, before calling on us for payment; nor shall our liability in any way be released or affected by reason of any failure or delay on your part so to do.

This guaranty is absolute, unconditional and continuing and payment of the sums for which the undersigned become liable shall be made to us at your office from time to time on demand as the same become or are declared due, notwithstanding that you hold reserves, credits, collateral security against which you may be entitled to resort for payment, and one or more and successive or concurrent actions may be brought hereagainst the undersigned jointly and severally, either in the same action in which the Debtor is sued or in separate actions, as often as deemed advisable. We expressly waive and bar ourselves from any right to set-off, recoup or counter-claim any claim or demand against said Debtor, or against any other person or concern liable on said receivables, and, as further security to you, any and all debts or liabilities now or hereafter owing to us by the Debtor or by such other person or concern are hereby subordinated to your claims and are hereby assigned to you.

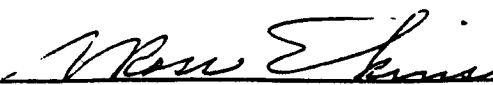
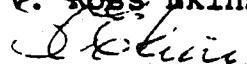
Each guarantor shall continue liable hereunder until you actually receive written notice from him by registered mail terminating the same as to his debt, undertaking or liability incurred or undertaken prior to such time. The death of any of the guarantors shall not terminate this guaranty as to his estate or as to the surviving guarantors, but the same shall continue in full force and effect until notice of termination is received and received as hereinbefore provided and all of said indebtedness, liabilities or obligations created or assumed are fully paid.

In case Bankruptcy or insolvency proceedings, or proceedings for reorganization, or for the appointment of a receiver, trustee or custodian of the Debtor or over its property or any substantial portion thereof, be instituted by or against the Debtor, or if the Debtor becomes insolvent or makes an assignment for the benefit of creditors, or attempts to effect a composition with creditors, or encumber or dispose of all or a substantial portion of its property, or if the Debtor defaults in the payment or repurchase of any of such receivables or indebtedness as the same may become due, or fails promptly to make good any default in respect of any undertaking, then the liability of the undersigned hereunder shall at once, without notice become immediately fixed and be enforceable for the full amount thereof, whether then due or not, the same as if all said receivables, debts and liabilities has become past due.

This guaranty shall inure to the benefit of yourself, your successors and assigns. It shall be binding jointly and severally on the undersigned, their heirs, representatives and assigns, regardless of the number of persons signing as guarantors or the turn or order of their signing.

This instrument shall be governed as to validity, interpretation, effect and in all other respects by the laws and decisions of the State of Utah.

41 Park Terrace Dr.
Salt Lake City, Utah
Residence Address


V. Ross Ekins

S. O. Ekins

APP. 111

In consideration of the financial accommodations given or to be given or continued by Valley Bank and Trust Company ("Bank" hereafter) to V. Ross and Sonoma O. Ekins ("Borrower" hereafter) the undersigned agrees as follows:

Borrower has the following obligations owing to the undersigned:

- A. Title of obligation or instrument Deed of Trust
- B. Date of such obligation December 27th, 1979
- C. Due date of obligation _____
- D. Present balance owing _____
- E. Security for obligation Lot #408, Mt. Olympus Park #4

Borrower has or is proposing to obtain a loan from Bank dated May 7, 1981, in the amount of \$ 67,000.00 and secured by the same security or portions thereof as are presently pledged to undersigned and described in Paragraph E.

In consideration of the credit extended to Borrower by the Bank, the undersigned hereby subordinates its security interest in the described security to the above security interest of the Bank. The Bank may extend, modify or renew the so secured obligation without affecting this subordination. The undersigned agrees not to demand, receive, accept or otherwise realize on the security or the security interest or to take any direct or indirect action to obtain or realize such security until such time as Bank is paid in full. The undersigned agrees to pay and/or deliver to Bank immediately upon receipt any of the described security or proceeds thereof.

This Agreement shall inure to and be binding upon the parties and their successors, assigns and personal representatives.

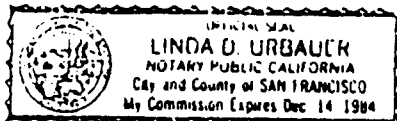
IN WITNESS WHEREOF, the undersigned has executed this Agreement as of this 11th day of May, 1981.

Walter E. Heller Western Incorporated

By: James E. Selman V.P.

STATE OF CALIFORNIA

COUNTY OF San Francisco



On this 11th day of May, 1981, in the year one thousand nine hundred and eighty one, before me _____, a Notary Public, State of California, duly commissioned and sworn, personally appeared _____ known to me to be the _____ of the corporation described in and that executed the within instrument, and also known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal in the _____ County of San Francisco, the day and year in this certificate first above written.

Notary Public, State of California

My commission expires _____

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Cowdery's Form No. 28 - Acknowledgement
Corporation (C.C. Secs. 1190-1190.1)

he executed the above and foregoing Acceptance.

My Commission Expires:

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6/11/84	CAW	2 hr	per V. V. V.	6.3	
DATE	INITIALS	C	ENT	MATTE	CODE
					TIME
					MONEY

1540 CX2

CODE CLASSIFICATION

A COURT APPEARANCE	D DICTATION	R RESEARCH	V TRAVEL
B BRIEFING	F FACTS INVESTIGATION	S PETTY CASH	O OTHER
C CONFERENCE	P PREPARATION	T TELEPHONE	

ADDITIONAL COMMENTS: Review Mot. & Order. T. C. W. Att'y V. V. V. 10:15-11:15 (3.0)

Work on planning for motions & trial.

Relay findings to Judge R. C. W. V. V., copy V. V. V. doc's

Work further on analysis. Dictate notes 11:15-12:15 (3.0)

FORM SAN-28-BH (4-80)

7/15/84	BJS	Lkins	Heller	.6	✓
DATE	INITIALS	CLIENT	MATTER	CODE	TIME

1540-002

CODE CLASSIFICATION

A COURT APPEARANCE	D DICTATION	R RESEARCH	V TRAVEL
B BRIEFING	F FACTS INVESTIGATION	S PETTY CASH	O OTHER
C CONFERENCE	P PREPARATION	T TELEPHONE	

ADDITIONAL COMMENTS: *L.F. Court re hearing - contact clerk or judge.*

FORM SAN-28-6H (4-60)

1 Mr. Tanner also said I was ruining his summer vacation,
2 a lot of things like that, but I did do those things to
3 try and move the case along. In all the conversations I
4 had as far as I remember had to do with keeping this case
5 moving. As you all acknowledge, this case grew like
6 Topsy. What initially started out to be a collection
7 matter, because of the posture of the defendants, that
8 this was in some way aggregious conduct on the part of
9 the collector, and because of the California law, it grew
10 a lot. It grew a lot more than the money involved, but
11 I can't help that. That's what you wanted to do. And I
12 was mindful of that, and I was hoping someplace along
13 the line because of the sum that started out to be collected
14 that we could resolve the issue. It didn't happen. I made
15 the decision on the law as I saw it and the facts and I
16 saw them applied to the law, and I in no way got any
17 input from Mr. Tanner and his office or Mr. Anderson and
18 his office that reflected on my determination of law and
19 fact.

20 Motion for a new trial is denied. The stay is
21 denied except as agreed to between counsel without the
22 posting of the appropriate bond as required by the rules.

23 Thank you, gentlemen.

24 MR. ANDERSON: Your Honor, I appreciate
25 the Court's comments. Just one matter though.

50

1 One thing that concerns me is that if the Court
2 is convinced that these conversations with Mr. Tanner took
3 20 or 30 seconds and was confined totally to scheduling
4 matters, I'm at a loss to know how the Court can allow
5 Mr. Tanner to recover for 12 minutes of time and why the
6 Court - -

7 THE COURT: I can tell you - -

8 MR. ANDERSON: - - the fact that 20
9 seconds' conversation becomes 12 minutes of conversation
10 on every time sheet that doesn't taint - -

11 THE COURT: That's an easy answer. I
12 can give you a straight, easy answer. Frequently when
13 I'm answering the telephone, because there are three lines,
14 I have to put people on hold. Mr. Tanner says I'm holding,
15 and that's at my client's expense. And somebody has got
16 to pay for my time. That's the business I'm in.

17 I can certainly account for that. If in fact
18 I said hold the phone while I get the file, which may be in
19 Mrs. Renshaw's office, my court reporter, to see what
20 you're talking about, or hold the phone while I pull out
21 those documents that may be on my side bar for the
22 purpose of specifically finding out where they are, I
23 suppose if Mr. Tanner wants to charge his clients for that
24 time while he's waiting, he can, but I don't keep time
25 records. I'm just responding to the question. And this

1 was a complicated case. And I suppose when a piece of
2 paper might have to do with the question being specifically
3 asked, it may take me some time to get.

4 This may come as a surprise to you. This is
5 not my only case.

6 MR. ANDERSON: I appreciate that.

7 THE COURT: I've other things I'm looking
8 for, and if I can't find it right away I might put
9 Mr. Tanner on hold for 15 minutes while I'm looking for
10 what he wanted me to respond to. Independently I can't
11 remember the length of that conversation, but I do have
12 occasions when I do have lawyers on hold for some time
13 to find out whether the documents they are talking about
14 have in fact been received in this office or whether they
15 are across the street in the County Clerk's Office, not
16 atypical as what I have here today. I've got all your
17 courtesy copies, and I don't have the file. And the reason
18 I don't have the file is because one of you has asked
19 Mrs. Renshaw, the court reporter, to transcribe the record,
20 and she's got the file. So if you called and asked me
21 what's in the file, I would have to find out where it is
22 just today. And that might take me a little while, to
23 find where Brad or Mrs. Renshaw has got it, and that would
24 account for a lapse of time. And I can explain that.

25 Okay. Thank you.