

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PACIFIC COAST STEEL,

Plaintiff,

v.

TAMARA MAE L. HUNT, *et al.*,

Defendants.

Case No. 2:09-CV-02190-KJD-PAL

ORDER

Presently before the Court is Plaintiffs' Bench Brief Regarding Hunt's Continuing Obligations under the Guaranty (#468). Defendants filed a response in opposition (#476).

Evaluating the guaranty under Delaware law, the Court determines the proper interpretation and construction of contracts as pure questions of law. See O'Brien v. Progressive N. Ins. Co., 785 A.2d 281, 286 (Del. 2001). The plain language of Section 10.16 of the Asset Purchase Agreement ("APA") provides that the guaranty at issue is absolute, unconditional, and continuing. It also expressly provides that the Sellers, i.e. Century Steel, Inc. and affiliates, can modify the guarantor's obligations without notice to or consent of the guarantor. The Court has already held that Century Steel, Inc. and its affiliates agreed to the Second Codicil. See Docket No. 373, p. 15. Hunt's consent to modification within the APA is sufficient to constitute consent to future obligations, whether material or not. Therefore, Hunt's insistence that she cannot be held liable for the profit shortfall

1 computation of the Second Codicil is inconsistent with the plain language of the agreement she
2 signed. Furthermore, Hunt's argument that the language of the guaranty, particularly 10.16(b), is
3 vague does not apply to the sections at issue in this action. Section 10.16(a) is the section that binds
4 Hunt to the Second Codicil: "[Each Owner hereby irrevocably] Consents to all terms, covenants,
5 conditions and agreements heretofore or hereafter made by any Seller with any Purchaser[.]"

6 Under Delaware law, a "continuing guaranty" is one which is not limited to a single
7 transaction, but which contemplates a future course of dealing, covering a series of transactions, and
8 generally for an indefinite period of time. Cooling v. Springer, 20 A.2d 466, 469 (Del. Super. 1943).
9 Delaware federal courts have predicted that the Delaware Supreme Court would adopt the
10 Restatement (Third) of Surety and Guaranty, section 16, which provides that "a continuing guaranty
11 is a contract pursuant to which a person agrees to be a secondary obligor for all future obligations of
12 the principal obligor to the obligee." See, e.g., Falco v. Alpha Affiliates, Inc., 2000 WL 782011, *5,
13 n. 8 (D. Del. Feb. 9, 2000)(recognizing the enforceability of continuing guaranties and holding that
14 "a continuing guaranty is an offer to guarantee a series of future guaranties, which the primary
15 obligor has not yet entered into."); see also Elysian Fed. Sav. Bank v. Sullivan, 1990 Del. Ch. LEXIS
16 30, at *13 (Del. Ch. March 1, 1990). The guaranty at issue is the kind of absolute, unconditional and
17 continuing guaranty that is valid, enforceable and binding under Delaware law. Therefore, Hunt as
18 guarantor of Century Steel, Inc.'s obligations under the APA, was bound by the Second Codicil and
19 is precluded from presenting evidence or argument inconsistent with this legal holding.

20 **IT IS SO ORDERED.**

21 DATED this 14th day of November 2013.

22
23
24 

25 _____
26 Kent J. Dawson
United States District Judge