IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERISOURCEBERGEN DRUG CORPORATION	:	CIVIL ACTION
	:	NO. 03-CV-6769
v.	:	
RANDELL MEIER, and	:	
ADVANCED PHARMACY SOLUTIONS, LLC.	:	

SURRICK, J. **DECEMBER 14, 2004**

MEMORANDUM & ORDER

Presently before the Court is Plaintiff Amerisoucebergen Drug Corporation's Motion for Partial Summary Judgment (Doc. No. 13) and Defendants Randall Meier and Advanced Pharmacy Solutions, LLC's Response and Cross-Motion for Summary Judgment (Doc. No. 15). For the following reasons, Plaintiff's Motion will be granted and Defendants' Motion will be denied.

I. FACTUAL BACKGROUND

Advanced Pharmacy Solutions LLC ("APS") was a specialty pharmacy company headquartered in Oklahoma City that sold psychotropic drugs to mental health clinics and managed their Patient Assist Programs. (Doc. No. 15 Ex. A at 18-19.) John Maguire, Dr. Rudy Rutter, Penny Bates, and William Yarborough managed APS. (*Id*. at 19.) In 2003, John Maguire

introduced Randall Meier to APS management, who was looking for an investment partner. (*Id*. at 19-25.) Meier was interested, loaned approximately $2.6 million to APS, and became a 50.5% shareholder of APS. (*Id*. at 22-25, 44-45, 54.) Meier also became the President of APS and signed documents for APS, but did not play a day-to-day role in the management of APS. (*Id*. at 23; Meier Decl. ¶ 3.)

In June 2003, APS was looking for a new wholesale distributor to stock its pharmacies with mental health-related drugs. (Doc. No. 15 at 4.) Amerisourcebergen Drug Corporation ("ABDC") is a wholesaler of pharmaceuticals. (Chamberlain Decl. ¶ 2.) In June 2003, ABDC and APS began discussions concerning ABDC becoming a supplier to APS. (Doc. No. 15 Ex. A at 32-35.) At the time, Meier owned 50.5% of APS. (*Id*. at 44-45.) The parties executed a Prime Vendor Agreement ("PVA") dated July 1, 2003. (Doc. No. 15 Ex. D.) The PVA provided the terms by which APS would compensate ABDC for the drugs. (*Id*.) The PVA provided that APS would have "net 15 day" payment terms, and contemplated that APS would be able to buy a certain amount of goods as an "Opening Order" pursuant to which ABDC would grant extended payment terms. (*Id*.)

A document styled "Agreement," which was signed by Meier as president of APS, granted ABDC a security interest in all of APS's assets. (Doc. No. 14 Ex. F.) In September, 2003, Meier executed an unconditional Personal Guaranty of APS's obligations. (Doc. No. 15 Ex. G.) The Personal Guaranty provides as follows:

> The undersigned [Principal(s) of Applicant], by reason of their financial interest and as an inducement for ABC to extend credit to Purchaser, hereby jointly and severally (if more than one), irrevocably, and unconditionally guarantee, as sureties, to ABC and its successors and assigns the prompt and full payment (and not

> merely the ultimate collection) and performance of all Obligations of Applicant to ABC, whether now existing or hereafter arising. The undersigned further agree that their liabilities and obligations under this guaranty shall be primary, absolute and unconditional, irrespective of, and unaffected by: (a) the genuineness, enforceability or any future amendment or change in the guaranty, any agreement between ABC and Purchaser or any other agreement to which the undersigned or Purchaser is or may become a party; (b) the absence of any action to enforce this guaranty or any other document evidencing or securing the Obligations or the waiver or consent by ABC with respect to any provision hereof or thereof; (c) the existence, value or condition of, or the failure to perfect ABC's lien on any collateral for the Obligations or any action or the absence of any action by ABC in respect thereof (including the release of any Collateral); (d) the insolvency of Purchaser; or (e) any other action or circumstance that might otherwise constitute a legal or equity discharge or defense of a surety or a guarantor. The undersigned waives any and all rights of subrogation, reimbursement, indemnification and contribution and any other rights and defenses that are or may be available to the undersigned, including defenses based upon statutes or rules of law providing for the marshaling of assets, changes in the principal obligation or those of another guarantor or surety and an inability to participate in, or the benefit of, any security for the Obligations now or hereafter held by ABC. The provision set forth at Paragraphs 5, 6, and 7 of the foregoing agreement shall be applicable to this guaranty as if set forth at length herein. <u>This guaranty is not a continuing guaranty and expires nine (9) months from date of signing.</u>

Three months later, on December 5, 2003, APS sold all of its assets to another company, RTIN Holdings, Inc. ("RTIN"). (Doc. No. 15 Ex. A at 96-102.) Under section 2.3 of the Asset Purchase Agreement, RTIN agreed to "assume [APS]'s liability to [ABDC], which amount is estimated to be [$1 million], payable by [APS] that [is] personally guaranteed by Randall Meier." (Doc. No. 14 Ex. H.) Exhibit F to the Asset Purchase Agreement lists ABDC as one of two "creditors for which Randall Meier has Guaranteed the Indebtedness." The Asset Purchase

Agreement with RTIN was signed by Randell Meier as president of APS. RTIN made some payments on account of the debt, but then filed for bankruptcy, leaving a balance of $931,576.77. (Chamberlain Decl. ¶¶ 17-18.)

The Asset Purchase Agreement provided that RTIN agreed to release Meier from his Personal Guaranty of the estimated one million dollar debt of APS to ABDC, subject to approval by ABDC. (Doc. No. 14 Ex. H.) RTIN and APS prepared a release for ABDC to sign, but ABDC refused to sign it. (*Id*. Ex. I.) On December 23, 2003, APS was dissolved. (*Id*. Ex. J.) On March 19, 2004, RTIN, under its new name, Safescript Pharmacies, Inc., filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Texas. (*In re Safescript Pharmacies, Inc.*, No. 04-60600 (Bankr. E.D. Tex.))

II. JURISDICTION

We have subject matter jurisdiction pursuant to 28 U.S.C. § 1332 (a)(1) because the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states. Venue is proper pursuant to 28 U.S.C. § 1391(a)(2). The Agreement between ABDC and APS specifically provides that it will be "construed, interpreted and enforced in accordance with the laws and regulations, as amended of the Commonwealth of Pennsylvania." (Doc. No. 14 Ex. F.) The application of Pennsylvania law is not in dispute. This being a diversity case involving questions of state law, we will follow the decisions of the highest appellate court in Pennsylvania, the Supreme Court. *See Northern Ins. Co. v. Aardvark Assocs.*, 942 F.2d 189, 193 (3d Cir. 1991).

III. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)). In considering a motion for summary judgment, "a court does not resolve factual disputes or make credibility determinations, and must view facts and inferences in the light most favorable to the party opposing the motion." *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995). The moving party bears the burden of proving that no genuine issue of material fact is in dispute. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party has carried its initial burden, to prevent summary judgment, the non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

IV. DISCUSSION

Plaintiff ABDC and Defendant Meier have filed cross-motions for summary judgment on Count I of Plaintiff's Amended Complaint (Breach of Contract). APS concedes liability on Count I.

A. Breach of Contract Action Against APS

APS has conceded that it breached its contract with ABDC. (Doc. No. 15 at 17.) Under the Uniform Commercial Code ("UCC"), "[w]hen the buyer fails to pay the price as it becomes due the seller may recover . . . the price of . . . goods accepted . . . ." 13 Pa. Con. Stat. Ann. § 2709(a)(1) (West 1999). Section 2709 therefore provides that ABDC may recover if (1) the goods were "accepted" and (2) the price remains unpaid. APS concedes that it accepted the merchandise from ABDC and did not pay for it. APS does dispute the amount of damages, as

well as liability for attorney's fees and interest.

B. Breach of Contract Action Against Meier

The parties' competing cross-motions are based on their opposing interpretations of the Personal Guaranty executed by Meier on September 2, 2003. The Personal Guaranty provides that "[t]his guaranty is not a continuing guaranty and expires nine (9) months from date of signing." (Doc. No. 15 Ex. G.) Defendant contends that the words "not a continuing guaranty" mean that Meier's guarantor liability extends only to APS' Opening Orders in the amount of $123,528.63 for its four pharmacy locations. (Doc. No. 15 at 12.) Plaintiff argues that Meier's guarantor liability extends to all APS obligations, and not merely the amount of the Opening Orders. Plaintiff points to the language in the Personal Guaranty stating that Meier agreed to "irrevocably, and unconditionally guarantee, as suret[y] . . . the prompt and full payment . . . and performance of all Obligations of [APS] to [ABDC], whether now existing or hereafter arising." (Doc. No. 15 Ex. G.) Meier further agreed that his Personal Guaranty obligation was "primary, absolute and unconditional," and would be "unaffected by . . . any amendment or change in . . . any agreement between [ABDC] and [APS]," the insolvency or APS, or "any other action or circumstance that might otherwise constitute a legal equity discharge or defense of a surety or guarantor." (*Id*.)

"Pennsylvania contract law begins with the 'firmly settled' point that 'the intent of the parties to a written contract is contained in the writing itself.'" *Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc*., 247 F.3d 79, 92 (3d Cir. 2001) (quoting *Krizovensky v. Krizovensky*, 624 A.2d 638, 642 (Pa. Super. Ct. 1993)). If the terms of a written contract are clear and unambiguous, construction of the contract is a question of law for the Court. *Id.* at 92-93.

"[G]uaranty contracts [are] subject to [the] same rules of interpretation as other agreements." *Garden State Tanning, Inc. v. Mitchell Mfg. Group Inc.*, 273 F.3d 332, 335 (3d Cir. 2001); *see also Meeting House Lane, Ltd. v. Melso*, 628 A.2d 854, 857 (Pa. Super. Ct. 1993). If the contract is unambiguous, "parol evidence of prior inconsistent terms or negotiations is inadmissible to demonstrate intent of the parties." *Beta Spawn, Inc. v. FFE Transp. Servs., Inc.*, 250 F.3d 217, 227 (3d Cir. 2001) (quoting *Harley-Davidson, Inc. v. Morris*, 19 F.3d 142, 148 (3d Cir. 1994)); *see also Gianni v. Russell & Co., Inc.*, 126 A. 791, 792 (Pa. 1924). "Where a contract provision is ambiguous, however, extrinsic evidence may be properly admitted in an attempt to resolve the ambiguity." *Beta Spawn, Inc.*, 250 F.3d at 227 (3d Cir. 2001) (quoting *In re Herr's Estate*, 161 A.2d 32, 34 (Pa. 1982)). "Contractual language is ambiguous 'if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.'" *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999) (quoting *Hutchinson v. Sunbeam Coal Co.*, 519 A.2d 385, 390 (Pa. 1986)), *see also Bohler-Uddeholm Am., Inc.*, 247 F.3d 79, 93 (3d. Cir. 2001) ("Where language is clear and unambiguous, the focus of interpretation is upon the terms of the agreement as manifestly expressed, rather than as, perhaps, silently intended. Clear contractual terms that are capable of one reasonable interpretation must be given effect without reference to matters outside the contract.") "We will not . . . distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity." Madison Const. Co., 753 A.2d at 106 (quoting *Steuart v. McChesney*, 444 A.2d 659, 663 (Pa. 1982); *see also Bohler-Uddeholm Am., Inc.*, 247 F.3d at 93 ("[I]n holding that an ambiguity is present in an agreement, a court must not rely upon a strained contrivancy to establish one; scarcely an agreement could be conceived that might not be unreasonably contrived into the

appearance of ambiguity.")

Pennsylvania law also provides that to determine whether ambiguity exists in a contract, "the court may consider 'the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning.'" *Bohler-Uddeholm Am., Inc.*, 247 F.3d at 93 (quoting *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1011 (3d Cir. 1980)). Thus, Pennsylvania law appears to create an inherent tension between two principles: "(1) a contract is not ambiguous, and thus must be interpreted on its face without reference to extrinsic evidence, 'if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends'" (quoting *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 614 (3d Cir. 1995)), and "(2) contractual terms that are clear on their face can be latently ambiguous . . . . 'Pennsylvania law permits courts to examine certain forms of extrinsic evidence in determining whether a contract is ambiguous.'" *Id.* Based upon the foregoing, when we examine a contract containing facially clear language, we must both interpret the language without using extrinsic evidence, and also examine extrinsic evidence to determine whether there is a latent ambiguity. *Id.*

The Third Circuit addressed this inherent tension in the case of *Mellon Bank N.A. v. Aetna Business Credit Inc.*, 619 F.2d 1001 (3d Cir. 1980). The Third Circuit indicated that courts may examine only certain kinds of extrinsic evidence to establish latent ambiguity in a contract. *Id.* at 1011-1014; *see also Bohler-Uddeholm Am, Inc.*, 247 F.3d at 94. The key inquiry is whether "the proffered extrinsic evidence is about the parties' objectively manifested 'linguistic reference' regarding the terms of the contract, or is instead merely about their

expectations. The former is the right type of extrinsic evidence for establishing latent ambiguity under Pennsylvania law, while the latter is not." *Bohler-Uddeholm Am., Inc.*, 247 F.3d at 94 (citing *Duquesne Light Co.*, 66 F.3d at 614.) "Put another way, a party offers the right type of extrinsic evidence for establishing latent ambiguity if the evidence can be used to support "a reasonable alternative semantic reference" for specific terms contained in the contract. *Id.* (quoting *Mellon Bank N.A.*, 619 F.2d at 1012 n.13.)

We must be careful to not "cross the 'point at which interpretation becomes alteration of the written contract.'" *Id.* (quoting *Mellon Bank N.A.*, 619 F.2d at 1011.) The Third Circuit has summarized Pennsylvania law on this point stating:

> (1) mere disagreement between the parties over the meaning of a term is insufficient to establish that term as ambiguous; (2) each party's proffered interpretation must be reasonable, in that there must be evidence in the contract to support the interpretation beyond the party's mere claim of ambiguity; and (3) the proffered interpretation cannot contradict the common understanding of the disputed term or phrase when there is another term that the parties could easily have used to convey this contradictory meaning.

Bohler-Uddeholm Am., Inc., 247 F.3d at 94.

The Personal Guaranty in the instant case clearly refers to all APS obligations to ABDC. It clearly states that Meier personally agreed to:

> irrevocably, and unconditionally guarantee, as sureties, to [ABDC] and its successors and assigns the prompt and full payment (and not merely the ultimate collection) and performance of all Obligations of Applicant to [ABDC], whether now existing or hereafter arising. The undersigned further agree that their liabilities and obligations under this guaranty shall be primary, absolute and unconditional.

(Doc. No. 14 Ex. G.) The language at the end of the Personal Guaranty stating that "[t]his guaranty is not a continuing guaranty and expires nine (9) months from date of signing" does not

contradict the prior language. On its face, Meier guaranteed any and all APC obligations to ABDC from the time he signed the Personal Guaranty for a period of nine months. Any debt that APS incurred after the expiration of the nine month period would not be guaranteed by Meier. Accordingly, we find no ambiguity on the face of the Personal Guaranty.

Addressing the question of whether a latent ambiguity exists, we must first examine whether the kind of extrinsic evidence offered by Defendant may properly be used to determine whether the Personal Guaranty is latently ambiguous. *Id.* Defendant argues that (1) the timing of the Personal Guaranty and (2) the language "not a continuing guaranty" demonstrate that the Personal Guaranty referred only to the Opening Orders. (Doc. No. 15 at 11-12.) The question here is whether this "proffered extrinsic evidence is about the parties' objectively manifested 'linguistic reference' regarding the terms of the contract, or is instead merely about their expectations. The former is the right type of extrinsic evidence for establishing latent ambiguity under Pennsylvania law, while the latter is not." *Bohler-Uddeholm Am., Inc.*, 247 F.3d at 94 (citing *Duquesne Light Co.*, 66 F.3d at 614.) Put another way, a party offers the right type of extrinsic evidence for establishing latent ambiguity if the evidence can be used to support a reasonable alternative semantic reference for specific terms contained in the contract. *Id.*[1] Clearly, extrinsic evidence of the timing of this contract does not objectively manifest a linguistic reference to terms in the contract. Accordingly, we conclude that evidence of the timing of the Personal Guaranty does not constitute the right type of extrinsic evidence that can be used to

[1]In making the distinction between proper and improper evidence of latent defect, the Third Circuit offered the example that parties who use the term "dollars" in a contract, would be permitted to offer evidence showing that they meant to refer to Canadian dollars. *Bohler-Uddeholm Am., Inc*., 247 F.3d at 94.

determine the existence of a latent defect in this contract.

The meaning of the words "continuing guaranty," on the other hand, does constitute the kind of extrinsic evidence that we are permitted to examine to determine whether the Personal Guaranty is latently ambiguous. Accordingly, we will consider whether the phrase "continuing guaranty" demonstrates that the Personal Guaranty is latently ambiguous.

Defendant argues that the phrase "continuing guaranty" contemplates "a future course of dealings between creditor and the principle debtor." (Doc. No. 15 at 11 (quoting *Robert Mallory Lumber Corp. v. B&F Assocs., Inc.*, 440 A.2d 579, 581 (Pa. 1982))). Defendant argues that language stating "this is not a continuing guaranty" demonstrates that the Personal Guaranty refers only to the Opening Orders. We cannot agree. In interpreting a contract, "effect must be given to all provisions in the contract." *Western United Life Assurance Co. v. Hayden*, 64 F.3d 833, 837 (3d Cir. 1995). Thus, "[a]n interpretation will not be given to one part of the contract which will annul another part of it.'" *Capek v. Devito*, 767 A.2d 1047, 1050 (Pa. 2001) (quoting *Cerceo v. DeMarco*, 137 A.2d 296, 298 (Pa. 1958)). Here, the Personal Guaranty expressly provides that Meier is guaranteeing "all Obligations now existing or hereafter arising." Defendant's interpretation of the Personal Guaranty would annul the provisions extending the Personal Guaranty to all future obligations. The clear meaning of the last sentence of the Personal Guaranty is that Meier's liability for APS's obligations is limited to those obligations incurred within the nine months after the signing of the Personal Guaranty. Moreover, "the proffered interpretation cannot contradict the common understanding of the disputed term or phrase when there is another term that the parties could easily have used to convey this contradictory meaning." *Bohler-Uddeholm Am., Inc.*, 247 F.3d at 94. In this case, if Meier

wished to refer to the Opening Orders only, he could easily have done this by specifically including the term "Opening Orders only" in the contract. Under the circumstances, we are satisfied that the Personal Guaranty clearly and unambiguously guarantees payment of all APS's obligations to ABDC incurred from the date of the signing of the Personal Guaranty for a period of nine months.

C. Discharge of Meier's Obligations

Defendant Meier claims that any obligations he incurred as a surety of APS's obligations were discharged by material changes in the relationship between APS and ABDC that increased his risk as a guarantor. (Doc. No. 15 at 11.) Pennsylvania law governing discharge of contracts is set forth in *Reliance Insurance Co. v. Penn Paving, Inc.*, 734 A.2d 833 (Pa. 1999). In *Reliance*, the Pennsylvania Supreme Court stated the following with regard to the discharge of guarantors under the contracts of surety:

> Cognizant of the problems posed by the three-party composition of suretyships, Pennsylvania courts have uniformly recognized that where the creditor and the debtor materially modify the terms of their relationship without obtaining the surety's assent thereto, the surety's liability may be affected. A material modification in the creditor-debtor relationship consists of a significant change in the principal debtor's obligation to the creditor that in essence substitutes an agreement on which the surety accepted liability.

Reliance Insurance Co., 734 A.2d at 838 (quoting *Cont'l. Bank v. Axler*, 510 A.2d 726, 729 (Pa. 1986)). The Supreme Court distinguished between compensated and uncompensated guarantors, holding compensated guarantors to a higher standard of discharge than uncompensated guarantors:

> Where, without the surety's consent, there has been a material modification in the creditor-debtor relationship, a gratuitous (uncompensated) surety is completely

> discharged. A compensated surety is discharged only if, without the surety's consent, there has a material modification in the creditor-debtor relationship and said modification has substantially increased the surety's risk.

Id. Meier admits that he was a "compensated surety." (Doc. No. 15 at 13.) Accordingly, we will examine the instant contract to determine whether there has been a material modification in the creditor-debtor relationship and said modification has substantially increase the surety's risk.[2]

Pennsylvania law defines a material modification in the creditor-debtor relationship as "a significant change in the principal debtor's obligation to the creditor that in essence substitutes an agreement substantially different from the original agreement on which the surety accepted liability." *J.F. Walker Co. Inc., v. Excalibur Oil Group, Inc*., 792 A.2d 1269, 1274 (Pa. 2002) (citing *Cont'l. Bank v. Axler*, 510 A.2d 726, 729 (Pa. 1986)). It also provides that:

> material modifications in the creditor-debtor relationship will not serve to discharge the surety where the surety has given prior consent to such material

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[2]Plaintiff asks us to treat Defendant Meier as an owner rather than merely a compensated guarantor. (Doc. No. 16 at 3.) Plaintiff alleges that Meier's claim that he was discharged from his Personal Guaranty fails as a matter of law because as majority owner and president of APS, Meier is deemed to have consented to any changes in the relationship between APS and ABDC. *Id.* Plaintiff cites the Restatement (Third) of Suretyship & Guaranty, § 48(2) which states:

> When the secondary obligor . . . controls the principal obliger . . ., it would be inequitable to the obligee if the principal obligor's agreement to an act by the oblige resulted in discharge of the secondary obligor. . . . [W]hen the principal obligor is controlled by the secondary obligor, it is reasonable to assume that the principal obligor's assent manifests assent by the secondary obligor. Thus, this section provides that, in these circumstances, the principal obligor's agreement to an act constitutes consent to that act by the secondary obligor.

Id. § 48(2). Defendant correctly points out that the Pennsylvania Supreme Court has treated owners/officers as compensated guarantors in *McIntyre Square Assocs. v. Evans*, 827 A.2d 446 (Pa. 2003). It did not assume that because the owners controlled the agreement that they consented to a material change or increase of risk after signing a guaranty. Rather, the court held them to the higher standard of compensated guarantors as directed by *Reliance Insurance Co. v. Penn Paving, Inc.*, 734 A.2d 833 (Pa. 1999).

> modifications as part of the surety contract. Where the surety has given such prior consent, the surety is contractually bound to accept the material modifications in the creditor-debtor relationship.

Reliance Insurance Co., 734 A.2d at 838 (quoting *Cont'l. Bank*, 510 A.2d at 730.) To determine whether a surety has consented to a material modification, the "'contract must be given effect according to its own expressed intention as gathered from all the words and clauses used, taken as a whole, due regard being had also to the surrounding circumstances.'" *Id.*

In addition, as a compensated guarantor, Meier bears the burden of proof on the issue of discharge. *See Cont'l. Bank*, 510 A.2d at 729 (Defense of discharge failed when guarantors failed to make a "threshold showing of a material modification without their consent, in the creditor-debtor . . . relationship."); *see also Pa. R. Co. v. Fid. & Deposit Co.*, 71 F.2d 526, 528 (3d Cir. 1935) (holding that to release a compensated surety, "there must have been some substantial change in the terms of the contract, and [the surety] must prove also that the change is material and prejudicial") (citations and quotations omitted).

Defendant contends that as an compensated guarantor, he was discharged because of the following material modifications in the APS-ABDC relationship: (1) ABDC's provision of extended payment terms to APS contrary to the terms of the PVA; (2) ABDC's extension of credit exceeding ABDC's credits limits; (3) the growth of APS' debt resulting from the two foregoing factors; and (4) ABDC's consent to the transfer of all APS' assets to RTIN. (Doc. No. 15 at 14.)

(1) ABDC's Provision of Extended Payment Terms

The PVA permitted an Opening Order of up to $350,000 for each of APS' four locations, payable over six months, conditioned on ABDC's prior credit approval. (Doc. No. 14 Ex. C.)

Defendant claims that the agreement was changed when the credit approval never occurred; the aggregate amount of the four Opening Orders was $123,528; the actual amount given six-month payment terms was at least $453,279.03; and the excess of $330,000 resulted from the application of extended credit terms to daily purchasing from September to November, 2003. (Doc. No. 16 at 4.) Plaintiff argues that Defendant was actually placed at less risk by the change because the PVA permitted an Opening Order of up to $350,000 for each of APS's four locations, or a total of $1,400,000, while the change resulted in extended credit of $453,279.03. (Doc. No. 16 at 7.) We agree with Plaintiff. The change resulted in Plaintiff owing $453,279.03 rather than potentially $1,400,000. We fail to see how this results in an increase of Defendant's risk.

Defendant again argues that he thought he only guaranteed the payment of the four Opening Orders. (Doc. No. 16 at 4.) However, even though those Orders were less than provided for in the PVA, the PVA nevertheless anticipated that the four Opening Orders would cost $350,000 each. Therefore, Meier's risk was not substantially increased.[3]

Defendant's argument that ABDC's never gave its credit approval does not constitute "a significant change in the principal debtor's obligation to the creditor that in essence substitutes an agreement substantially different from the original agreement on which the surety accepted liability." *J.F. Walker Co.*., 792 A.2d at 1274 (citing *Cont'l. Bank*, 510 A.2d at 729.) Accordingly, we find that Defendant fails to demonstrate a material modification in the contract

[3]It is telling that when Meier was asked during his deposition how much debt he expected APS to incur to ABDC between September 2, 2003 when he signed the Personal Guaranty, and closing, he answered "I had no expectations." (Doc. No. 15 Ex. A at 101-02.) Counsel asked the follow-up question, "So then neither exceeded them [his expectations of debt]" and he responded "I wouldn't have had any guess." (*Id*.)

in this regard.

(2) ABDC's Extension of Credit Exceeding ABDC's Credits Limits

Defendant next argues that APS's debt exceeded ABDC's internal credit limits. However, as Plaintiff points out, the agreement has no credit limits nor does Meier claim there were any. (Doc. No. 16 at 8.) Meier does not claim that he or APS were even aware of such limits. In fact, Meier testified that he "had no expectations" about the debt from APS to ABDC. (Doc. No. 15 Ex. A at 102.) In *Garden State Tanning, Inc. v. Mitchell Manufacturing*, 273 F.3d 332, 337 (3d Cir. 2001), the Third Circuit stated:

> [Guarantor] also complains that the District Court erred in refusing to admit evidence that [creditor] ignored pre-set credit limits although the unpaid invoices of [debtor] were rapidly burgeoning. Although Garden State had set an internal limit of $1 million on [debtor], this information was never conveyed to [guarantor]. Accordingly, there was no basis on which the guarantor could invoke that limit.

Similarly, Meier and APS were not aware of ABDC's internal credit limits. Accordingly, ABDC's exceeding of its internal credit limits does not constitute a material alteration of the original agreement.[4]

(3) ABDC's Consent To The Transfer Of All APS's Assets To RTIN

Meier also alleges that the agreement was modified by ABDC's consent to APS's sale of its assets to RTIN and ABDC's later customer relationship with RTIN. The Asset Purchase Agreement provided that RTIN agreed to release Meier from his Personal Guaranty subject to ABDC's approval. (Doc. No. 14 Ex. H.) However, ABDC refused to agree to Meier's release

[4]Because we find no material modification of the agreement between APS and ABDC based on the first two factors, we find it unnecessary to address the third factor (debt resulting from first two factors).

and refused to sign a document releasing Meier from his obligations to ABDC. (Doc. No. 14 Ex. I.) Defendant argues that ABDC's later relationship with RTIN constitutes approval of Meier's release. We disagree. ABDC refused to sign the Release that would have relieved Meier from all of his guaranty obligations to ABDC. In the face of this compelling evidence, we conclude that ABDC did not consent to RTIN's proposed release of Meier's obligations.

In addition, under Pennsylvania law, "material modifications in the creditor-debtor relationship will not serve to discharge the surety where the surety has given prior consent to such material modifications as part of the surety contract. 'Where the surety has given such prior consent, the surety is contractually bound to accept the material modifications in the creditor-debtor relationship." *Reliance Ins. Co.*, 734 A.2d at 838 (quoting *Cont'l. Bank*, 510 A.2d at 730.) Consequently, Meier cannot invoke any change of agreement based on RTIN's acquiring of APS because Meier consented to the change. Meier signed the documentation effecting the sale of assets from APS to RTIN. (Doc. No. 16 Ex. H.) The Third Circuit dealt with a similar situation in the case of *Garden State Tanning,* where the guarantor sold assets of the subsidiary whose debts it had guaranteed. The guarantor also sought a discharge based on modifications to the relationship. The Third Circuit rejected this argument:

> Here there is no question of consent to changes in the agreement, because the guarantor itself was the driving force in bringing about the revision. It was [guarantor] that sold the assets of [creditor's] debtor; the former parent company cannot now claim surprise or ignorance of the resulting affect on its interests.

Garden State Tanning, Inc., 273 F.3d at 336-37. In the instant case, because Meier signed the agreement effecting the sale of assets to RTIN, he cannot "claim surprise or ignorance of the resulting effect on [his] interests."

Pennsylvania law requires that compensated guarantors can only claim discharge if they can demonstrate a material modification and an increase in risk. *Reliance Ins. Co.*, 734 A.2d at 833. Meier has not shown that the sale of assets of APS to RTIN substantially increased his risk. APS was originally going to receive stock and $500,000 in cash from RTIN, but ultimately agreed to accept all stock. (Doc. No. 15 Ex. A at 138-140.) At the time, the parties valued the stock at $1.8 million. RTIN agreed to accept all of Meier's debt to ABDC. We see no evidence that Meier increased his risk through the sale of APS to RTIN.

D. Damages

Plaintiff asserts that APS's damages amount to $931,576.77. (Doc. No. 15 at 9.) Defendant disputes this amount. Defendant asserts that ABDC is not entitled to summary judgment based on the affidavit of Harry Chamberlain, the Corporate Director of Credit for ABDC, which indicates that the purchase orders that ABDC shipped to RTIN after APS sold its assets to RTIN should be included in the calculation of ABDC's damages. (Doc. No. 15 at 18.) Defendant does not dispute the amount of damages prior to the sale of APS to RTIN. However, Defendant also indicates that Mr. Chamberlain's familiarity with the debits and credits is a matter for cross-examination at trial and should not be decided in a dispositive motion. (*Id*. at 19.) Finally, Defendant adds that the asserted damages of $931,576.77 were not previously disclosed to Defendants. (*Id*.)

Plaintiff responds that while it is true that the Statements reflect orders that were shipped to APS on or after December 5, 2003, which is the date APS sold its assets to RTIN, these shipments are not included in the $931,576.77 figure. (Doc. No. 16 at 11.) This appears to be correct. The evidence reflects that the shipments to APS after December 5, 2003, amount to

$145,353.03. (Chamberlain Aff. ¶ 17.) ABDC credited APS for two payments made by ABDC by RTIN totaling $330,000.[5] (*Id*.) We agree that to the extent that any of the amounts on the APS Statements are actually RTIN's obligations, any payments by RTIN should be applied first to reduce RTIN's obligations, with the balance credited to APS.

RTIN did not specify which accounts their payments covered. Consequently, we apply the "general rule [of Pennsylvania]" that "'where neither the debtor nor the creditor directs the application of a payment, the law will apply it to the unsecured debt or to the debt which is least secured or is most precarious.'" *United States v. Am. Caramel Co.*, 172 F. Supp. 95, 100 (E.D. Pa. 1959) (quoting 70 C.J.S. Payment § 51); *see also Northampton Nat'l Bank of Easton v. Holland*, 190 A. 483, 486 (Pa. 1937) (applying "the familiar rule that where no appropriation of a payment is made by either party to specific claims, the law will apply the payment in the way most beneficial to the creditor; and therefore, to the debt which is least secured.") Similarly, the Restatement of Security, § 142(e) provides:

> Where the creditor has claims against the principal other than that upon which the surety is bound, payments to the creditor are applied according to the following rules:
> (e) where neither the principal nor the creditor seasonably manifest an intention as to the application of a payment, the payment is applied in the way most favorable to the creditor, unless under the circumstances such an application would violate a right of the surety, the principal, or another more equitable application."

Id. In the instant case, we apply the rule of applying the funds in the manner most favorable to the creditor. Accordingly, we conclude that damages in the amount of $931,576.77 are appropriate.

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[5]One payment of $80,000 was made on or about December 2003; the other in the amount of $250,000 was made on or about January 16, 2004. (Chamberlain Aff. ¶ 17.)

Defendant also alleges that the asserted damages were not disclosed during discovery. Plaintiff correctly points out that ABDC's Complaint clearly states that it sought to recover goods sold to APS and Meier's guaranty of those goods. (Doc. No. 16 at 12; Doc. No. 3 at 4.) At the time the Complaint was filed, RTIN had not yet paid anything to ABDC. Therefore, the Complaint demands $1,280,369.75. Moreover, in responding to an interrogatory regarding the $1.3 million figure, ABDC advised that this figure was "derived from the calculations shown on in the 'total AR balance' figure on document no. 10261," a document produced during discovery. (Doc. No. 16 at 12-13.)

Finally, Defendant states that he should be able to cross-examine Mr. Chamberlain on the issue of damages. However, Defendant "cannot defeat a motion for summary judgment in the mere hope cross-examination of an adverse witness will support their claim." *Langer v. Dista Prods. Co.*, No. 90 C 4596,1996 WL 526763, at *2 (N.D. Ill. Sept. 12, 1996) (citing Charles A. Wright et al., Federal Practice and Procedure § 2741 (2d. 3d. 1983); *see also Frito-Lay of Puerto Rico, Inc. v. Canas*, 92 F.R.D. 384, 392 (D.P.R. 1981) (holding that the non-movant's "suggestions that he might discover evidence to defeat [movant's] motion by . . . cross-examining . . . affiants is unavailing as a substitute for the showing required by Rule 56(c)"). Defendant's suggestion that he should be able to cross-examine Mr. Chamberlain to defeat the summary judgment is without merit. Moreover, we note that Defendant had the opportunity to depose Mr. Chamberlain during discovery and chose not to do so. Finally, Defendant does not submit any evidence, such as affidavits from former APS employees, to dispute ABDC's calculations. Accordingly, summary judgment in favor of ABDC on the issue of damages is appropriate.

E. Attorney's Fees

Defendant argues that Meier's Personal Guaranty is silent as to attorney's fees and therefore he is not liable for attorney's fees. (Doc. No. 17 at 5.) However, under the Agreement, ABDC is entitled to attorney's fees. The Agreement provides, in relevant part, that in the event of default, APS "shall pay all of [ABDC]'s collection costs and expenses whether or not suit is filed, including without limitation, all attorney's fees in addition to other sums due and owing." (Doc. No. 14 Ex. F ¶ 2). In Meier's Personal Guaranty, he agreed to unconditionally guaranty all of APS's "Obligations" which the Agreement defines as including "all of Purchaser's existing and future liabilities to [ABDC]." (*Id*. ¶ 3.) Meier's Personal Guaranty covers all obligations of APS to ABDC. Consequently, Meier also guaranteed the attorney fee obligation. *See First Bank Southeast, N.A. v. Predco*, 951 F.2d 842, 852 (7th Cir. 1992) ("Requiring [guarantor] to pay [attorney's] fees is not unfair because [guarantor is, at least in part, responsible for the expenditure of fees in the . . . proceedings, as . . . if [guarantor] had complied originally with its legal obligations under the guaranty, the [creditors] may have been paid in full and plaintiff may not have had to continue . . . [its lawsuit].") Accordingly, Defendant is liable for attorney's fees.

Defendant argues that the Personal Guaranty expired on June 2, 2004, and that Meier's obligations would not include any attorney's fees incurred after that date. We disagree. The Agreement provides that APS "shall pay all of [ABDC]'s collection costs and expenses whether or not suit is filed, including without limitation, all attorney's fees in addition to other sums due and owing." The Personal Guaranty provides that Meier "irrevocably and unconditionally" guarantees "prompt and full payment" (and not merely the ultimate collection)" of APS's obligation to ABDC. It would make little sense to permit Meier to avoid liability for attorney's

fees by forcing ABDC to retain lawyers because prompt and full payment was not made and the pursuit of ultimate collection was necessary. Moreover, the subject of this litigation is the events that occurred during the nine month period covered by Meier's Personal Guaranty. The attorney's fees here involved are inextricably intertwined with those events and result from those events. Accordingly, we find Meier is obliged to compensate ABDC for all attorney's fees and costs incurred in the collection of the debts incurred prior to June 2, 2004.

V. CONCLUSION

For the reasons set forth above, we grant Plaintiff's Motion for Partial Summary Judgment and deny Defendant's Motion for Summary Judgment.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERISOURCEBERGEN DRUG CORPORATION	:	CIVIL ACTION
	:	NO. 03-CV-6769
v.	:	
RANDELL MEIER, ET AL.	:	

ORDER

AND NOW, this 14th day of December, 2004, upon consideration of Plaintiff Amerisourcebergen Drug Corporation's Motion for Partial Summary Judgment (Doc. No. 14, No. 03-cv-06769) and Defendants Randall Meier and Advanced Pharmacy Solutions, LLC's Cross-Motion for Summary Judgment (Doc. No. 15, No. 03-cv-6769), and all papers filed in support thereof and in opposition thereto, it is ORDERED as follows:

1. The Motion of Amerisourcebergen Drug Corporation For Partial Summary Judgement is GRANTED as to liability and damages on Count I of Plaintiff's Amended Complaint.
2. Defendant Randell Meier's Cross Motion for Summary Judgement is DENIED.
3. The principal amount of damages awarded to Plaintiff and against Defendants Advanced Pharmacy Solutions, LLC and Randell Meier is $931, 576.77

IT IS SO ORDERED.

BY THE COURT:

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R. Barclay Surrick, Judge