

Model Lease Guaranty



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*"Should I stay or should I go?" — The monthly decision process of an uncreditworthy tenant, as immortalized by *The Clash*.¹*

I. INTRODUCTION

When an owner of commercial real property ("Landlord") signs a lease with a space tenant ("Tenant"), Landlord will care a lot about Tenant's creditworthiness. If Tenant doesn't have strong credit, Landlord will have to hold its breath at least 12 times a year to see if Tenant has decided to stay, go or even try to stay but not pay rent. To bring more certainty to its cash flow, Landlord will often demand that someone more creditworthy than Tenant guaranty Tenant's obligations. The guaranty could cover all Tenant obligations under the Lease (a "full" guaranty), or just some of them (a "partial" guaranty), or just Tenant's obligations until Tenant surrenders the premises without a fight and pays rent until then (a "good guy" guaranty). A guaranty can also go away, either all at once or gradually, or have a cap on liability.

The following Model Lease Guaranty offers template language for the three main flavors of Guaranty, plus optional language for other particular circumstances or deal structures.

¹ For details, visit <http://tinyurl.com/llyq7c4>.

This Guaranty template started, once upon a time, as a “short-form” Guaranty, in contrast to a “long-form” Guaranty. Both appeared in the first and second editions of the New York State Bar Association Commercial Leasing treatise edited by the author. Over time the Guaranties converged into this one Guaranty. The “base” Guaranty omits optional and “overkill” provisions, making most available instead as options. And after footnote removal, the “base” version takes up only about four pages.

The “base” Guaranty consists of a full Guaranty of a Tenant’s obligations under a commercial lease (the “Lease”), to be signed at the same time as the Lease. The “base” Guaranty contains a reasonable set of Guarantor waivers—though one can always add more, such as from the optional provisions after the “base” Guaranty. Blank spaces, brackets and footnotes indicate blanks to fill, options, and issues to consider.

The optional provisions after the “base” Guaranty cover partial guaranties, good-guy guaranties, limited guaranties, representations and warranties, multiple or off-shore guarantors, bells, whistles, and other “long form” (overkill) provisions that sometimes appear in Lease Guaranties. These optional provisions can make any Lease Guaranty quite long. Some may matter in some transactions. More often they just add words. They are offered here for use as needed or desired. Few serious commercial Lease Guaranties will be shorter than the “base” form offered here, though this article offers two possibilities that are even shorter than the model Guaranty.

Landlord and its counsel typically fear a court will try very hard to find a way to not enforce any Guaranty. Why? Courts often seem to believe that any Guarantor is a “fool with a pen” who calls out for the court’s special sympathies and protection. In commercial transactions, that theory usually holds no water. Still, judges seem to have gone out of their way to invalidate or limit guaranties, particularly in California, less so in New York, with other states all over the lot.

Which party does this model Guaranty favor—Landlord or Guarantor? That’s a simple question with a complicated answer. A Guaranty is supposed to achieve a very simple result for Landlord: Guarantor stands behind Tenant’s obligations, so Landlord gets the benefit of Guarantor’s credit in addition to Tenant’s, all as if Guarantor had signed the Lease instead of, or in addition to, Tenant. That is a rather simple goal. To the extent the Guaranty achieves it, the Guaranty helps Landlord meet its expectations. Guarantor cannot complain.

The courts have, however, turned Guaranties into a complex minefield by giving Guarantors a panoply of defenses, some rather counterintuitive and exotic. Any or all of these defenses can interfere with Landlord’s achieving its reasonable expectations. The defenses “favor” Guarantor. For an introduction to them, *see* Stein and Wang, *Revisiting the 24 Defenses of The Guarantor – 24 Years Later*, *The Practical Real Estate Lawyer* 9 (January 2012).

Faced with apparently boundless judicial solicitude for Guarantors, any Landlord tries to level the playing field by requiring Guarantor to waive defenses. But those waivers sometimes go so far that Landlord achieves more than its reasonable goals. Instead, Landlord burdens Guarantor with obligations and procedural burdens that unnecessarily or inappropriately exceed Tenant’s. If a Guaranty does that, it unrea-

sonably favors Landlord. This Guaranty seeks not to do that. Instead it limits the waivers to the minimum necessary to undo the damage done by the courts in their zeal to protect Guarantors.

A Guarantor should live with waivers that make Guarantor's position no worse than Tenant's, but reject waivers that put Guarantor in a worse position than if Guarantor had simply signed the lease itself. A careful Guarantor should also ask serious questions about the underlying Lease. Since Guarantor should end up with the same liability as if it had signed the Lease, Guarantor should care whether the Lease is a balanced document, reasonably negotiated for Tenant. A Lease defines a relationship far more complex than a Guaranty. Landlords want and usually achieve leases that favor Landlords, period. Guarantor will have to live with everything in the Lease. Rather than focus primarily on whether the Guaranty "favors" Landlord or Tenant, Guarantor should focus on the Lease itself. And, by delivering the extra credit support of a Guaranty, Tenant and Guarantor can in exchange sometimes obtain a more balanced Lease.

II. GENERAL COMMENTS AND ISSUES TO CONSIDER

A. *Bankruptcy Risks.* If a Guaranty covers all obligations under a Lease, this will increase the likelihood of a substantive consolidation if Tenant or Guarantor files bankruptcy. That risk terrifies securitized lenders to a point where its mitigation becomes a major obsession in the closing process. But it is a small price for Landlord to pay for the benefit of receiving credit support via the Guaranty. Some Landlords will worry about it anyway and, of course, any Lease or Guaranty (or other business transaction of any kind) could face special issues if any party to the transaction filed bankruptcy. Those issues lie beyond the scope of this model document, but Landlord's counsel should think about them in structuring and negotiating any Lease and Guaranty. Others have written about those issues at length.

B. *Bankruptcy Risks – Large Security Deposits.* If Tenant delivers a security deposit or letter of credit that exceeds one year's rent, which doesn't happen all that often, and then files bankruptcy, the bankruptcy courts may force Landlord to "disgorge" part of the large security deposit or L/C proceeds. That result makes no sense given the independence principle underlying any L/C, but bankruptcy judges may care more about unsecured creditors than about the independence principle. Landlord might protect itself, with or without a creditworthy Guarantor, by having Guarantor rather than Tenant deliver the large security deposit or L/C. The Guaranty becomes a mechanism to support an L/C or security deposit, even if the Guarantor has no credit at all. Having Guarantor rather than Tenant deliver the L/C or cash security should protect Landlord—although one can never guarantee anything in bankruptcy court. This model Guaranty does not offer special language for these circumstances, but the author can provide it on request. As is so often true in leasing, L/Cs and bankruptcy, it is not as simple as it sounds.

C. *Completion Guaranties.* This model Guaranty does not include sample language for a completion Guaranty. That type of Guaranty typically arises in ground leasing, not so much in ordinary commercial space leasing, and raises interesting and substantial questions about remedies and measures of damages. The author has a template for completion Guaranties, which is available on request and devotes

some attention to the special issues that completion Guaranties create. It will appear in the second edition of the author's book on ground leases.²

D. *Conflicts of Interest.* The interests of Guarantor and Tenant may conflict, yet the same counsel typically represents both. Counsel may want to disclose that conflict and obtain an informed waiver.

E. *Different Deals.* One can readily adapt this Guaranty to become a "partial" Guaranty or a "good guy" Guaranty, depending on the business deal. For example, a "good guy" Guarantor's liability might continue until six months after Tenant has moved out and surrendered possession of the space, rather than immediately after those events have occurred. Or the Guaranty might cover the entire Lease for two years, and then only after a default-free two years does the Guaranty convert to a mere "good guy" Guaranty—though perhaps still covering claims and issues that accrued during those first two years. A Guaranty might also in some other way "burn off" over time or limit Guarantor's exposure in other ways. This represents a business negotiation to be resolved as part of the fundamental Lease deal, best documented as part of the letter of intent or term sheet and not left for future conversation. Optional provisions offered here can help document many possible business deals.

F. *Distributions.* One could prohibit Guarantor from receiving distributions from Tenant when the Lease is in default. Such provisions rarely appear in Lease Guaranties, though, so are not offered here even as overkill options for the Guaranty. Nor would a Guaranty otherwise typically limit salary increases, bonuses, or other payments to Guarantor's principals, but some lawyers might think of that.

G. *Due Diligence.* For an entity Guarantor, Landlord should perform the same due diligence one would on a borrower or tenant—confirm its legal existence and exact name; obtain organizational documents, resolutions and consents; perhaps even obtain an opinion of counsel for, e.g., a foreign guarantor. Verify reputation and financial condition. Perform litigation search; general online searches; etc. For an individual person acting as Guarantor, check the Guarantor's address. Confirm it's a residence and not, for example, a vacant lot, motel, or office building. Does Guarantor actually own it?

H. *Enforcement.* For an offshore Guarantor, Landlord might consider having the Guaranty provide for arbitration rather than litigation if Landlord ever needs to enforce the Guaranty. Foreign courts are often more hospitable to arbitration awards than to American court judgments. Use of arbitration clauses in guaranties is, however, unusual and might create issues of inconsistency with Lease enforcement. On the other hand, the Guaranty allows Landlord to enforce the Guaranty without enforcing the Lease at all. Whether and exactly how to go down this road depends on the circumstances of a particular Guaranty, including the Guarantor's home country. As a result, this model Guaranty does not offer arbitration language, but Landlord's counsel should think about it and consult with arbitration experts. In the author's experience, no arbitration expert ever likes the arbitration language crafted by any transactional lawyer.

² See Joshua Stein, *A Guide to Ground Leases (With Forms and Checklists)*, ALI-ABA, 2005. This book went out of print several years ago. The author is slowly preparing a second edition, which he plans to self-publish. Readers may purchase electronic copies of the first edition or receive an announcement of the second by sending email to office@joshuastein.com. Readers can also preview the first edition through books.google.com.

I. *Full Recourse?* If the Guaranty covers less than all Lease obligations, consider adding language to create full liability for all Lease obligations if Guarantor or Tenant commits bad acts, such as frivolous litigation, or seeks a Yellowstone injunction³—much like the growth of nonrecourse carveouts in loan documents. This concept is, however, off market.

J. *Joinder by Spouse.* For an individual Guarantor, consider requiring Guarantor’s spouse to join in the Guaranty to avoid problems with who owns which assets, particularly in community property states. In this case, include optional language offered here for multiple Guarantors. But also consider legal restrictions on requirements for spousal joinders.⁴

K. *Not So Good?* A “good-guy” Guaranty protects Guarantor but doesn’t help Tenant. Thus, if Tenant wants the right to move out before the Lease expires by paying rent until departure and satisfying some other conditions, Tenant might prefer to obtain a termination right in the Lease. This would allow Landlord to keep the security deposit and prepaid rent, and perhaps more, rather than structure the arrangement as a good-guy Guaranty. If Tenant has meaningful assets or anticipates it will want to stay in business at another location after “walking” from this Lease before expiration, then Tenant will not want Landlord to have a claim against Tenant. This is why Tenant would prefer a termination option in the Lease instead of a simple “good-guy” Guaranty that addresses only termination of Guarantor’s liability. The Lease would, of course, remain backed by Guarantor until Tenant meets the conditions to termination, and terminates and moves out, just as contemplated under a “good-guy” Guaranty.

L. *Plain English.* This Guaranty is written in Plain English, to the extent reasonably possible. This means active voice sentences and short paragraphs. Ordinary English words replace legalese where possible. After making a point, this Guaranty does not repeat the same point in different words. It never refers to section numbers. When this Guaranty must refer to a number, it does so only once. As a result of these and other “Plain English” techniques, this Guaranty sometimes does not read like a typical legal document. A nonlawyer might read and actually understand it. And that’s a good thing.

M. *Principal.* This Guaranty assumes Guarantor is a principal of Tenant or otherwise owns or controls Tenant—or at least has some significant interest in Tenant’s business—and is somewhat creditworthy. The client should of course confirm this. If Guarantor is no more creditworthy than Tenant, then this Guaranty may, in practice, add little value, except perhaps as a club to hold over Guarantor’s head (or as a vehicle for a large security deposit or L/C, as discussed above). If Tenant’s credit declines, however, and Guarantor’s does not, this Guaranty may indeed have value.

³ A “Yellowstone” injunction, specific to New York, prevents Landlord from terminating a Lease while a court, at least in theory, quickly resolves any uncertainty about whether Tenant is actually in default. In practice, such an injunction allows any Tenant in default to remain in possession for months or years while the court does other things.

⁴ See, e.g., 15 U.S.C. §§ 1691 *et seq.*; 12 C.F.R. § 292.7(d). States may have their own rules.

N. *Security*. If Landlord obtains security for Guarantor's obligations, this Guaranty may require changes. Any security arrangements will create their own issues, which: (a) will vary by state; and (b) this model Guaranty does not consider.

III. CAVEATS

A. *Bad Dates*. If the parties engage in a mad last-minute scramble to sign and exchange documents, inconsistencies may arise regarding dates. Those inconsistencies can allow a Guarantor to try to disclaim liability under the Guaranty if, for example, the Guaranty refers to the wrong date on the Lease. And if the Guaranty is dated after the Lease, it could raise issues on consideration. As the best practice, counsel should make sure all dates align. Because that might not happen, this Guaranty refers to a Lease dated "on or about" a certain date.

B. *Defined Terms*. The "base case" Guaranty includes its own definitions for all capitalized terms. Check and adjust those definitions as appropriate. They should typically match the nomenclature and definitions in the Lease. Terms fundamentally important to the Guaranty, such as the "Guaranteed Obligations," should be defined in the Guaranty, but the wording should match the Lease to the extent appropriate. For lesser definitions, one can refer to the Lease, which avoids the risk of inconsistencies if the parties negotiate the Lease definitions but don't conform the Guaranty. After the "base case" Guaranty, optional language offered here does not always include all necessary definitions. In any case, check that every capitalized term is defined somewhere, or adjust it to match the structure of definitions in the Lease. As a matter of preference, one might want to move definitions in the Guaranty to an Exhibit, so the reader doesn't have to wade through them before reaching the Guaranty's operative language. On the other hand, this Guaranty doesn't have that many definitions to wade through.

C. *State-Specific Provisions*. This Guaranty assumes New York law governs. New York has no special state-specific provisions that must or should appear in a Guaranty except as this paragraph notes. In any other state, check for state-specific waivers or provisions. For example, use in California would require waivers of specified statutory or even constitutional provisions, sometimes in all capital letters, which may look very fierce but typically just impede comprehension and overwhelm the reader—assuming anyone actually tries to read them. Other states have other requirements. Also consider adding language (more waivers) driven by Guarantor's home state or other jurisdiction, even if the law of that state or other jurisdiction does not otherwise govern the Guaranty, because Landlord might choose to enforce the Guaranty there. As a New-York-specific provision, optional language for this Guaranty does require Guarantor to acknowledge that the Guaranty is an instrument for the payment of money only. This might give Landlord some benefits under Civil Practice Law and Rules 3213, but those benefits come with issues. The Guaranty does not strictly need to refer to 3213. If the Guaranty covers performance rather than payment, one may wish to delete the reference to 3213, though keeping it probably does no harm. Landlord may choose not to rely on this language. The optional provisions also include some language seeking confidentiality and speed in any action to enforce this Guaranty. Those are generic but not yet market standard.

IV. SHORTER-THAN-SHORT

If this model Lease Guaranty does not seem short enough, one could take an entirely different approach and try to distill the essence of a lease guaranty into just a few paragraphs. As an exercise in comparative law, here is how a “shorter-than-short” lease guaranty might look. This was designed for use in residential leasing outside New York City. No representation or warranty is made on the efficacy of this “shorter-than-short” lease guaranty, particularly in New York City.

A. *Guarantied Obligations.* Guarantor unconditionally and irrevocably guarantees to Owner that Resident shall perform and observe all its obligations under the Lease, or arising by law from Resident’s occupancy of the Premises, including Resident’s obligations to pay rent and do everything else the Lease or law requires (collectively, the “Guarantied Obligations”). Resident’s bankruptcy or other proceeding shall not reduce, limit or discharge the Guarantied Obligations.

B. *Nature of Liability.* Guarantor shall be equally and primarily liable with Resident for all Guarantied Obligations as if Guarantor had signed the Lease. Owner can sue Guarantor directly without suing Resident or applying security to cure a default. This Guaranty remains in full force and effect even if the Lease is assigned, changed, extended or renewed in any way, with or without Owner’s or Guarantor’s consent; Owner makes a claim against Guarantor or Resident; or Resident leaves.

C. *Waivers.* Guarantor waives all notices of any kind, including notices about Resident, the Lease, the Guarantied Obligations or any default. Owner doesn’t need to notify Guarantor of anything at all or deal with Resident in any particular way. Guarantor waives all defenses otherwise available to Guarantor under suretyship or guaranty law except only the defense of actual full payment and performance.

D. *Miscellaneous.* Any amendment or waiver of this Guaranty must be in writing and signed by Owner to be effective. Owner may perform credit checks and other investigations at any time on Guarantor. On request, Guarantor shall deliver a certificate satisfactory to Owner confirming the status of this Guaranty. In any action, proceeding or counterclaim relating to or arising from this Guaranty, the Lease or the parties’ relationship: (a) the parties waive jury trial; (b) Guarantor consents to New York jurisdiction; and (c) if Owner prevails, Guarantor shall pay Owner’s reasonable attorneys’ fees.⁵

This language probably delivers 95% of the practical benefit of any Guaranty. It does, however, expose Landlord to the risk that a court might decide Guarantor did not adequately waive one defense or another. In today’s world, well-represented Landlords know about those defenses and in most cases can take steps

⁵ Under New York Real Property Law § 234, any attorneys’ fees clauses in “leases of residential property” are automatically deemed mutual. As between landlord and tenant, which party (if unsuccessful in litigation) is more likely to actually pay a judgment entered against it for the other party’s attorneys’ fees? Although § 234 has led to much litigation, no available case indicates whether “leases of residential property” include guaranties of such leases. Ordinary principles of the English language suggest that a “lease” is not a “guaranty” and vice versa. But ordinary principles of the English language are not always a good guide to residential landlord-tenant jurisprudence in New York.

to prevent them. Nevertheless, no one wants to be the first commercial real estate lawyer who chopped out most of the standard provisions of a Guaranty.

If even the four paragraphs above are not short enough, one could try replacing them with this, right after Tenant's signature: "I join in, assume, and guaranty payment and performance of all obligations of Tenant, as if I had personally signed the above Lease myself." It makes the point and supports a claim, but leaves out everything else.

V. LEASE LANGUAGE BASED ON GUARANTY

The Lease should recognize the Guaranty exists. For example:

A. *Concessions to Guarantor.* To the extent Landlord agrees to any concessions to Guarantor of the types suggested in the optional provisions below, those may work better if incorporated into the Lease than if incorporated into the Guaranty, just so Landlord can't argue the concessions don't bind Landlord. For example, the Guaranty might say Landlord agrees to pay Guarantor's attorneys' fees if Guarantor prevails in litigation. But Landlord never actually signed or became a party to the Guaranty. One can easily argue that Landlord agreed to its terms by preparing and accepting the form of Guaranty, but it's still a potential issue. One could avoid it by moving any "Landlord covenants" out of the Guaranty and into the Lease. As an alternative, if the form of Guaranty is attached to the Lease, Landlord could confirm in the Lease that Landlord agrees to all the terms of the Guaranty, and will perform all Landlord obligations under the Guaranty. Broad language like that might scare a Landlord, so it may make more sense to move the substantive provisions to the Lease.

B. *Events of Default.* If a Lease contemplates a Guarantor, the Events of Default should include a few that relate to the Guaranty and the Guarantor. Tenant could negotiate a right to cure each by delivering a replacement Guaranty from a Satisfactory Guarantor⁶ within a certain time. As Landlord's starting position, the Lease should define an Event of Default to include occurrence of each of these circumstances:

1. *Guarantor Impairment.* Only for so long as this Lease requires a Guaranty to remain in effect (a "Guaranty Period"), if Guarantor fails to meet the Guarantor Financial Standard.⁷

⁶ This definition will matter. See sample definition of "Satisfactory Guarantor" offered within the optional Concessions to Guarantor later in this model document (see section XX G.). Landlord will prefer to have the right to approve any replacement Guarantor in its sole discretion. In that case Tenant's right to deliver a replacement Satisfactory Guarantor gives Tenant no comfort at all. It doesn't really justify any verbiage, legal time or printing costs.

⁷ The Lease or Guaranty should define "Guarantor Financial Standard." For inspiration, see the definition of Satisfactory Guarantor. If a Lease contains financial covenants for Guarantor, then it should have consequences for not meeting them. But must those consequences always include a premature end of the transaction? Tenant and Guarantor would argue they cannot control the risk of future Guarantor financial impairment, and it should not adversely affect the Lease and Tenant's right to occupy its space and obtain the benefit of its investment in the location. Hence, if Guarantor fails to meet the Guarantor Financial Standard, Tenant may want the right to post a letter of credit; demonstrate that Tenant's credit has improved in a way that compensates for any problems with Guarantor's credit; eliminate or trim back the Guarantor Financial Standard if Tenant has adequately performed for a certain time; or push back in other ways limited only by the ingenuity of counsel. Landlord

2. *Guarantor Insolvency.* Only in a Guaranty Period, if any Guarantor is the subject of an Insolvency Proceeding, unless involuntary and dismissed within __ days.⁸

3. *Guarantor Nonperformance.* Only in a Guaranty Period, if Guarantor fails to perform any obligation under the Guaranty, including failure to deliver any document or financial information, or fails to comply with any negative covenant in the Guaranty, and any such failure continues for __ days after notice from Landlord, or if any representation or warranty by Guarantor in the Guaranty is false or misleading in any material respect.

4. *Guarantor Termination.* Only in a Guaranty Period, if any Guarantor dies, becomes disabled,⁹ is dissolved or terminates its legal existence.¹⁰

C. *Guaranty.* The Lease should require Tenant to deliver the Guaranty, and state that Landlord would not have entered into the Lease without the Guaranty, to prevent any later issues about why the Guaranty existed.

D. *Interaction with “Good Guy” Guaranty.* A “good guy” Guaranty will allow Guarantor to terminate liability if Tenant gives, e.g., 60 days’ notice that Tenant intends to vacate and surrender the Lease. Creative and aggressive Landlords have been known to assert that mere delivery of such a notice constitutes an anticipatory breach of the Lease, immediately entitling Landlord to all remedies for an Event of Default. Although the argument has a certain dubiousness and hypertechnicality to it, Tenants and Guarantors should prevent it entirely by stating in the Lease that delivery of such a notice does not constitute an anticipatory breach. Even better, Tenant and Guarantor should try to simplify the relationship and deal structure by giving Tenant an outright termination option, under conditions like those contemplated in a good-guy guaranty, as suggested above.

E. *Notices.* In the “notices” clause of the Lease, include Guarantor as a party that must receive copies of any notices to Tenant. Guarantor and Tenant should resist any language suggesting that notice to Guarantor is just a “courtesy” and not really required.

F. *Special Tenant Rights.* If the Lease gives Tenant any pre-emptive rights, such as an expansion or purchase option or a right of first refusal or first offer, Landlord might require that any notice of exercise include Guarantor’s consent. As an alternative, the Guaranty might affirmatively say no such consent is

might suggest that an increase in Fixed Rent, rather than an Event of Default, might adequately compensate Landlord for the increased risk resulting from an impairment of Guarantor’s credit.

⁸ Guarantor or Tenant might propose that, especially for an involuntary Insolvency Proceeding, Guarantor should have a reasonable time in which to assume the Guaranty, cure all defaults, give Landlord relief from the automatic stay, and thereby prevent an Event of Default. Tenant should remember that, if Tenant is not itself subject to an Insolvency Proceeding, then Guarantor’s Insolvency Proceeding constitutes a perfectly valid and enforceable Event of Default.

⁹ Disability should perhaps not constitute an Event of Default. Incompetence or a guardianship might.

¹⁰ Tenant may want a mechanism to replace a dead or disabled Guarantor with one or more people, named or to be named, who individually or collectively meet the Guarantor Financial Standard. If Guarantor’s estate assumes the Guaranty, that might also prevent an Event of Default.

necessary and any exercise will nevertheless bind Guarantor. This model Guaranty does include language to that effect. And if the pre-emptive right involves a sale of Landlord's building, does the business deal contemplate that Guarantor will backstop Tenant's obligations regarding the sale? It may not matter, if Tenant's liability will not exceed loss of its deposit. That will depend on the circumstances of the particular deal.

VI. TENANT OR GUARANTOR?

If Guaranties present so many possible impediments to enforcement, should Landlord instead just ask Guarantor to sign the Lease, along with Tenant? Or perhaps have Guarantor alone sign the Lease instead of Tenant and then sublease to the originally intended Tenant? Would that give Landlord a stronger position against Guarantor?

The answers to those questions are not simple.

Litigation to enforce a Guaranty may turn out to be easier to pursue than litigation to enforce a Lease, especially if the Lease raises lots of complex landlord-tenant issues. The various waivers in the Guaranty may, if Landlord is lucky, eliminate issues that Tenant have raised. Depending on the procedural posture and strategy of the dispute, Landlord might be able to bring separate actions, suing Tenant in one action while also suing Guarantor in a simpler action, or at least having some possible options along those lines.

If the creditworthy Guarantor is a foreign company, Landlord may want the option of easily suing Guarantor in its home country, rather than obtaining a judgment in the United States and then trying to enforce it overseas—not always easy. If Landlord ever did try to sue Guarantor in its home country, Landlord might have better luck trying to enforce a Guaranty (an ordinary contract) rather than a Lease (which the foreign court might deem a real estate transaction that can only be enforced where the property is located). That's another reason why Landlord might well prefer a Guaranty to a direct Lease obligation.

A creditworthy Guarantor may also prefer signing a Guaranty to signing a Lease. Signing a Lease may increase Guarantor's exposure to all kinds of claims and litigation arising from the leased space—personal injury lawsuits, bills from someone providing services, and the other exposures that come from visible operation and occupancy of any real estate. If Guarantor is based overseas, it may want to minimize any argument it is “doing business” in the United States, to protect itself from high corporate tax rates and American plaintiffs and judges in unrelated lawsuits. Signing a Lease looks a lot more like “doing business” than does just signing a Guaranty.

All things considered, it might make sense for both parties to use a Guaranty rather than have a creditworthy parent company directly sign onto the Lease. Of course, that puts the burden on Landlord and its counsel to assure the Guaranty contains the waivers it needs, so Guarantor cannot assert spurious theories to escape liability. This model offers suitable language. For a foreign Guarantor, Landlord may want to add language, also offered here, by which Guarantor appoints an agent for service of process in the United States.

On the other hand, Landlord may also want to consider the business culture of Guarantor's home country. That culture, unlike the American business culture, might make it very difficult for a Guarantor to default—for example because it would cause great “shame” to Guarantor. In that case, Guarantor might be more willing to let Tenant default, and Landlord might mitigate that risk by having Guarantor actually sign the Lease. Guarantor's fear of suffering shame if it defaulted on the Lease might help protect Landlord's cash flow more than if Tenant, a mere foreign subsidiary of Guarantor, signed the Lease.

VII. CLOSING DOCUMENTS

In addition to the Guaranty, the Lease and any Lease-related documents, the transaction may require these closing documents:

- A. Consent to obtain copies of Guarantor's tax returns from tax authorities. (This requirement is atypical but not insane.)
- B. Copy of Guarantor's driver's license or passport, if an individual.
- C. Corporate documentation (formation, authorization, internal approvals, etc.) for an entity.
- D. Due diligence searches and information on Guarantors.
- E. Financial statements and (to facilitate future enforcement of a judgment) information to identify assets and liabilities. Guarantor will typically delay delivering these items until the last minute, hoping Landlord will be so anxious to close the deal that Landlord won't pay much attention or ask many questions.
- F. If multiple Guarantors exist, then an indemnification and contribution agreement among them, and suitable language in Tenant's organizational documents to address the consequences of payments under the Guaranty.
- G. Any other special arrangements to reimburse Guarantor if Guarantor needs to pay under the Guaranty, at least to the extent those arrangements go beyond Guarantor's automatic common-law claims against Tenant.
- H. Opinion of counsel, in rare and special cases, relating to corporate matters but not enforceability.¹¹ A Landlord might more likely obtain an opinion for an “unusual” Guarantor such as a governmental entity, a nonprofit, a small business investment company, a credit union or other financial institution, a foreign entity, an entity subject to special regulatory restrictions, or the like. Even in an ordinary partner-

¹¹ The general absence of opinions of counsel in leasing transactions, including Guaranties, does not seem to have produced an epidemic of invalid or unauthorized Leases or Guaranties.

ship, a partner may lack authority to sign a guaranty on behalf of the partnership unless the partnership agreement expressly allows it.

I. Waiver of conflicts, if necessary, reflecting the fact that the same counsel represents both Tenant and Guarantor, whose interests may conflict.

VIII. POST-SIGNING ADMINISTRATION

Once the Lease transaction has closed and the Guaranty is in place, the existence of a Guaranty requires Landlord to consider a few special matters in administering the Lease and otherwise. Some of these administrative suggestions apply to all legal documents, not just Guaranties.

A. *Amendments, Etc.* If Landlord and Tenant agree to amend (or extend, etc.) the Lease, Landlord should insist that Guarantor consent and confirm the continued effectiveness of the Guaranty, and also acknowledge that the Lease and the Guaranteed Obligations have been redefined to include the changes to which Guarantor consented. That's true even though the Guaranty waives any requirement for Guarantor consent.

B. *Change of Address; Other Notices.* If Landlord receives a notice of a change of Guarantor's address, Landlord should update its records. If any other notice arrives from Guarantor, Landlord should pay attention. And if Guarantor or Landlord moves, it should remember to send a change of address notice. If Guarantor appointed a corporate service company as its agent for the Guaranty, Guaranty should also notify that company of the new address.

C. *Lines of Communication.* Aside from administering the words of the Guaranty, Landlord would be well advised to maintain good relations and lines of communication with Guarantor and Tenant. If Landlord ever needs anything from them, it will help if Landlord readily knows who to call; has spoken to them before, and recently; and has handled any of their previous requests in an expeditious and reasonable way.

D. *Loan Closings.* For a future mortgage loan on the property, Landlord or its lender may (should) require an estoppel certificate from Guarantor, not just Tenant. Landlord should handle that as part of the closing process. It may take longer than an ordinary tenant estoppel certificate.

E. *Reporting.* Obtain periodic financial statements, estoppel certificates, litigation searches, credit check updates, background investigation updates, etc. If Guarantor authorized Landlord to obtain copies of tax returns from the tax authorities, periodically exercise that right. If Landlord anticipates a sale or refinancing, Landlord may wish to pay particular attention to enforcing Guarantor's reporting obligations.

F. *Termination of Guarantor.* Landlord should check periodically that Guarantor has not died, become disabled, filed bankruptcy, liquidated, lost its corporate (or other entity) status, or taken any other action that would constitute a Lease default or limit the utility of the Guaranty. If one of these events does

occur, Landlord may have a relatively short time in which to act to protect itself. If a Guarantor dies, for example, Landlord may need to file a claim relatively quickly in Guarantor's estate. The Lease may, as suggested above, give Landlord certain rights and remedies upon Guarantor's death, etc.

G. *Workout Negotiations.* If the transaction gets into trouble and Landlord and Tenant sign a pre-negotiation agreement, Guarantor should also sign it. Guarantor should participate in any workout discussions, as Guarantor may be the most likely source of a financial solution to the problem.

IX. BASE CASE: FULL GUARANTY OF LEASE

GUARANTY¹²

This **GUARANTY** (the "Guaranty") is made as of _____, 201__ (the "Guaranty Date") by _____, a _____, whose address is _____ (with its successors and assigns, "Guarantor"),¹³ for the benefit of _____, whose address is _____ (with its successors and assigns, "Landlord"). This Guaranty uses terms before defining them. An Index of Defined Terms follows the signatures. Guarantor signs and delivers this Guaranty based on these facts:

A. Landlord is about to enter into a _____ Lease (as further defined below, the "Lease") with _____ (with its successors and assigns, "Tenant"), dated on or about the Guaranty Date.¹⁴

B. The Lease initially demises premises consisting of _____ (as modified from time to time in accordance with the Lease or by agreement between Landlord and Tenant, the "Premises").

C. Guarantor directly or indirectly owns a substantial percentage¹⁵ of the equity interests of Tenant, or is a principal of Tenant.

D. The Lease will therefore benefit Guarantor.

E. Landlord would not enter into the Lease unless Guarantor signed this Guaranty.

¹² One might adjust the title of the document, to prevent confusion, misunderstandings, and bad assumptions about the Guaranty's scope. For example, it could be a Full Guaranty, Lease Guaranty, Limited Guaranty or Good-Guy Guaranty. On the other hand, such gradations may invite arguments and theories about what the guaranty was "really" intended to cover. Those issues don't arise if it's just a "Guaranty" and someone has to read it to figure out what it means. As a psychological matter, Guarantor may derive comfort from a more limited title for the document.

¹³ If multiple Guarantors exist, they will typically sign the same document rather than each sign a separate Guaranty. This prevents needless multiplication of documents and can simplify enforcement. The optional provisions after this model Guaranty include some for multiple Guarantors.

¹⁴ One could also identify the leased premises here, but it seems unnecessary. It should suffice to identify the Lease.

¹⁵ One could specify the percentage as a matter of extra care, but it seems unnecessary and just creates extra work. And what if the percentage is inaccurate?

NOW, THEREFORE, in exchange for \$100 and other valuable consideration,¹⁶ receipt of which Guarantor acknowledges, and to induce Landlord to enter into the Lease, Guarantor agrees:

A. *Definitions.* Any term defined in the Lease has the same meaning in this Guaranty, except as expressly modified or superseded here.¹⁷ This Guaranty also uses these terms:

1. “Guarantied Obligations” means all liabilities and obligations of Tenant under the Lease,¹⁸ in each case whether or not Tenant’s notice or cure period, if any, has ended.¹⁹ If a Guarantied Obligation arises only after notice to Tenant but Landlord cannot legally give notice to Tenant, then Landlord may at its option instead notify Guarantor. The Guarantied Obligation shall then be determined, for this Guaranty, as if Landlord had notified Tenant. If the Lease gives Tenant a right to contract, expand, extend or renew, or to acquire the Premises or an interest in Landlord, then the “Guarantied Obligations” include Tenant’s obligations from an exercise of that right, whether or not Guarantor consents.²⁰
2. “Insolvency Law” means Title 11, United States Code, or other or successor state or federal statute on assignment for benefit of creditors, appointment of a receiver [(excluding one appointed at the request of a Leasehold Mortgagee)]²¹ or bankruptcy, composition, insolvency, moratorium, reorganization, trustee appointment or similar matters.
3. “Insolvency Proceeding” means any proceeding (or appointment), voluntary or involuntary, under Insolvency Law.

¹⁶ If Guarantor delivers the Guaranty separately, well after the Lease closing, then issues could arise on consideration. In those cases one may need to do more than recite consideration, instead explaining for example that Landlord agreed to accept the Guaranty in exchange for a Lease amendment or a forbearance in Lease enforcement. In any case, Landlord’s counsel should make sure Landlord can satisfy ordinary contractual requirements for delivery of consideration.

¹⁷ The “base case” Guaranty contains all its own definitions, so one can delete the previous sentence, using it only when additional defined terms have crept into the document. One may, however, prefer to delete some lesser definitions in this document and rely on definitions in the Lease. In that case, one would keep this sentence. One might also adjust defined terms to match those in the Lease (e.g., “Attorneys’ Fees” rather than “Legal Costs”).

¹⁸ This language works for a full guaranty. Some Landlords like to add a laundry list of “Guarantied Obligations,” such as obligations to pay rent, escalations, utilities, and construction costs; to comply with law; to provide insurance; to remove liens; etc. This seems unnecessary. What is unclear or inadequate about referring to “all” obligations under the Lease? If Landlord wants to include a list, or if the Guaranty is just a partial guaranty of the Lease, please see the menu of “Guarantied Obligations” offered below for a partial guaranty. If Landlord leaves something out by mistake, does that implicitly diminish the scope of “Guarantied Obligations”? And what about performance obligations that Guarantor cannot perform? For example, what if a performance obligation requires a special license that Tenant has but Guarantor does not? Landlord would typically not care about these questions or their answers.

¹⁹ One could state that the Guaranty of “all” obligations ends on a Termination Date, in which case it could become a broad form of good-guy Guaranty and require some conforming changes. Sample language appears in the optional provisions below.

²⁰ Not everything in this sentence would apply in a typical space lease. Trim as appropriate.

²¹ Add this bracketed language for a ground lease.

4. “Landlord Remedies” means Landlord’s rights and remedies under the Lease or law, including Insolvency Law, including any right to terminate the Lease, evict Tenant, collect damages for default and apply or not apply any security deposit or letter of credit Tenant delivered.

5. “Lease” means: (a) the Lease, as initially defined above, as amended,²² assigned, extended or renewed from time to time,²³ whether or not with Guarantor’s consent; and (b) Tenant’s obligations to Landlord under law regarding the Premises. The “Lease” shall be defined without regard to any: (i) Insolvency Proceeding; (ii) resulting limitation, modification, reinstatement, rejection or termination of the Lease or Tenant’s obligations; or (iii) exercise of Landlord Remedies.

6. “Legal Costs” means Landlord’s actual reasonable costs of collection and legal representation for any actual or threatened: (a) Tenant default under any Guaranteed Obligation; (b) Guarantor default or Landlord claim under this Guaranty; or (c) Proceeding. Those costs include reasonable²⁴ attorneys’ fees, disbursements and other charges billed by Landlord’s attorneys, court costs and costs of process servers, private investigators and all other personnel whose services are charged to Landlord in connection with Landlord’s receipt of legal services.²⁵

7. “Proceeding” means any action, arbitration, counterclaim, litigation or other proceeding on, arising out of or relating to interpretation or enforcement of this Guaranty or the Lease, including a Tenant or Guarantor Insolvency Proceeding and any exercise of Landlord Remedies.²⁶

²² One expects to also see “modified.” But is “modified” any different from “amended”? “Extended” and “renewed” may in fact be different concepts, hence both appear.

²³ Typically, a Guaranty supports not only the original Lease but amendments, extensions, renewals, and so on, whether or not the Lease provides for them. At least that’s what it says. If Guarantor does not in fact control Tenant (or stops controlling Tenant because Tenant assigns to a third party), Guarantor may want to limit the Guaranty to cover just the original Lease, not any future transactions, or perhaps not any renewals, extensions or expansions. In that case, Landlord will want to state that any future amendment, etc., does not vitiate Guarantor’s liability for the original Lease. Instead, Guarantor merely has no incremental liability (or benefit) as a result of the amendment, etc. In any event, counsel should make sure Guarantor understands the scope of its potential liability. For an unsophisticated or forgetful Guarantor, this could require written advice to Guarantor.

²⁴ A court will often infer the word “reasonable” whether or not the parties include it, but if it’s not there Guarantor will ask for it and Landlord will typically agree. So here it is. And perhaps it creates an unnecessary hook on which Tenant can hang issues in a Proceeding. But the hook is there anyway, in all likelihood.

²⁵ Landlord may want to add: “If Landlord uses in-house counsel, “Legal Costs” shall include the estimated value of the time of those attorneys based on billing rates of Landlord’s outside counsel.”

²⁶ Guarantor will want to limit this definition to anything arising from the Guaranty, so it excludes anything arising from the Lease or Landlord Remedies under the Lease. That argument may make sense if the Guaranty covers less than all obligations under the Lease. But if the Guaranty covers all Tenant obligations under the Lease, then it would include Tenant’s obligations regarding any Proceeding or exercise of Landlord Remedies.

8. “Tenant” means: (a) Tenant as defined above; (b) any estate created through a Tenant Insolvency Proceeding; (c) any liquidator, receiver or trustee of Tenant or any of its property; (d) any similar person or officer, appointed in any Insolvency Proceeding or otherwise and (e) any heir, successor or assign of Tenant.

B. *Guaranty of Guaranteed Obligations.* Guarantor absolutely, irrevocably and unconditionally guarantees Tenant’s timely payment [and performance]²⁷ of all Guaranteed Obligations. Guarantor covenants that Tenant will pay [and perform]²⁸ all Guaranteed Obligations when and as the Lease requires.²⁹ If Tenant does not do that, then Guarantor shall.³⁰ For any Guaranteed Obligation, Guarantor shall pay all damages³¹ and losses that Landlord suffers and the Lease or governing law entitles Landlord to recover, including Landlord’s Legal Costs, because Tenant fails timely to pay or perform. Guarantor’s liability under this Guaranty is primary, not secondary, in the full amount of the Guaranteed Obligations, including interest, default interest, late fees³² and costs and fees (including Legal Costs) relating to the Guaranteed Obligations. Any unpaid Guaranteed Obligation shall bear interest from the date it accrues until the date paid, both before and after entry of judgment, at the higher of: (a) the interest rate that applies after default under the Lease; or (b) the judgment rate. If Landlord obtains a judgment against Tenant for any Guaranteed Obligation, then Guarantor shall on Landlord’s demand pay it and Landlord’s Legal Costs of collecting it.

C. *Landlord’s Exercise of Landlord Remedies.* Landlord may enforce this Guaranty against Guarantor independently of, and with or without enforcing, any Landlord Remedy, and without regard to any event in any Proceeding with Tenant. Any Guaranteed Obligation and Guarantor’s primary personal liability for it shall not decrease if: (a) Tenant abandons, surrenders or vacates the Premises or is subject to an Insolvency Proceeding; (b) Landlord exercises any Landlord Remedy or enforces this Guaranty; (c) Landlord fails to do so or delays in doing so; (d) Landlord obtains a judgment against anyone; (e) the Lease ends; or (f) any other circumstance occurs except actual payment and performance.³³ Nothing in this paragraph limits Landlord’s obligation to credit Guarantor for any sums actually collected on account of the Guaranteed Obligations.

²⁷ Landlord may not care about performance, just payment. Performance raises issues about access. Landlord may prefer to cure any performance defaults and send a bill. In that case, delete all references to the Guaranty covering performance. Limit it to payment.

²⁸ See previous comment.

²⁹ Guarantor may ask that if Tenant does not pay or perform, Landlord will give Guarantor notice, and then Guarantor will have, e.g., 30 days to cause Tenant to pay or perform before Guarantor must.

³⁰ What about nonmonetary obligations that require access to the Premises? Does Landlord implicitly allow Guarantor to enter the Premises for that purpose? Or does Guarantor need to work out access with Tenant, the party with the right to possession? Though these questions are interesting, they would seem to be Guarantor’s problems rather than Landlord’s. If Landlord worries about them, Landlord may want to address them, but it seems unnecessary, especially in a “short form” Guaranty.

³¹ One could include a list of damages; for example: “direct, indirect, incidental, and consequential.” That seems excessive. “Damages” probably includes all “damages,” although one might have also thought “interest” includes “post-petition interest” (in a subordination agreement as it applies after a borrower bankruptcy) and one would have been wrong.

³² If the Lease and hence the Guaranteed Obligations do not already provide for a late fee and default interest, consider providing for them in the Guaranty.

³³ Adjust if the business deal contemplates a Termination Date for the Guaranty.

D. *No Offset.* The Guaranteed Obligations are not subject to counterclaim, deduction, defense, offset or reduction of any kind, including any arising or purportedly arising under the Lease or from the landlord-tenant relationship under the Lease, except actual payment or performance. If Landlord holds a security deposit: (a) Landlord need not apply it toward the Guaranteed Obligations; (b) Landlord may continue to hold or apply it, in accordance with the Lease, as Landlord determines; and (c) it does not limit the Guaranteed Obligations.³⁴ If Landlord holds a letter of credit, Landlord may draw on it or not, in Landlord's sole discretion subject to the terms of the Lease.

E. *Changes in Lease.* Without notice to or consent by Guarantor, in Landlord's discretion and without prejudice to Landlord or in any way limiting or reducing Guarantor's liability under this Guaranty, Landlord may but shall have no obligation to: (a) grant extensions of time, renewals or other modifications; (b) amend the Lease by agreement with Tenant; (c) accept or make compositions or other arrangements or file or not file a claim in any Insolvency Proceeding; and (d) otherwise deal with Tenant and anyone else related to the Lease as Landlord sees fit. Guarantor's liability under this Guaranty shall continue even if Tenant's obligations under the Lease are altered or terminated in any way or if any Landlord Remedy is in any way impaired or suspended with or without Guarantor's or Landlord's consent. A Lease assignment, even with Landlord's consent, does not limit this Guaranty.³⁵

F. *Waivers of Rights and Defenses.* Guarantor waives any right to require Landlord to proceed against Tenant or anyone else or pursue any Landlord Remedy for Guarantor's benefit. Landlord may exercise in its sole discretion any right or remedy against anyone without impairing this Guaranty. Guarantor waives diligence and every demand, protest, presentment and notice, including notice of acceptance, accrual, creation, dishonor, extension, modification, nonpayment, protest or renewal of any Guaranteed Obligation.

G. *Nature of Guaranty.* This is a guaranty of payment, not collection. Guarantor's liability is not conditioned or contingent on the Lease's enforceability or validity. If any Guaranteed Obligation is or becomes void or unenforceable, Guarantor's liability under this Guaranty shall continue as if all Guaranteed Obligations were and remained legally enforceable.

H. *Miscellaneous.* Guarantor waives any defense because Landlord failed to obtain or perfect any security interest. The parties waive jury trial in any proceeding.³⁶ Nothing in this Guaranty may be amended, terminated or waived without Landlord's written consent. This Guaranty contains all (and supersedes all prior) agreements between the parties on the matters this Guaranty covers. In entering into this

³⁴ Guarantor and Tenant may think Landlord should first use the security deposit before claiming under the Guaranty. Landlord will of course feel otherwise and will note that if Landlord does apply the security deposit, then Tenant and Guarantor will have an immediate obligation to replenish it, so they shouldn't care.

³⁵ Tenant and Guarantor may negotiate for a release of liability if an assignment meets certain tests. See suggested concessions to Guarantor at section XX.

³⁶ Particularly outside New York, a jury trial waiver often appears in **ALL CAPITAL LETTERS, BOLD TYPE**. Any jury trial waiver could also include this language: "Neither party shall seek to consolidate any Proceeding involving this Guaranty with any Proceeding in which jury trial has not been waived." Although that language seems right, it is not market standard.

Guaranty, Guarantor does not rely on any representation, promise or other assurance by Landlord. Nothing Landlord said or did, except entering into the Lease, in any way induced Guarantor to enter into this Guaranty. The words “include” or “including” shall be interpreted as if followed by “without limitation.” Landlord may give notice under this Guaranty in accordance with the notice procedures in the Lease.³⁷

I. *Additional Documents.* Guarantor shall within 10 days after Landlord’s request sign and deliver a certificate as Landlord reasonably requests directed to such addressee(s) as Landlord reasonably requires confirming: (a) this Guaranty and its continued status and validity; (b) the fact that it has not been waived or amended; (c) the current identity of Guarantor, Landlord and Tenant; (d) whether Guarantor has received notice of assignment; (e) whether Guarantor has any defenses and, if so, what they are; (f) if an attornment occurs under any nondisturbance agreement signed by Tenant, then the new landlord will also be entitled to the benefit of this Guaranty but not be bound by any amendment or waiver of this Guaranty made by Landlord without the requisite mortgagee consent; (g) Guarantor knows of no facts inconsistent with any simultaneous estoppel certificate delivered by Tenant; and (h) other matters as Landlord reasonably requires. So long as Tenant is not in default under the Lease, Landlord shall not request more than two such certificates in any calendar year.³⁸ Landlord may from time to time without notice as Landlord deems appropriate: (a) obtain updated credit reports or other information on Guarantor; and (b) investigate Guarantor and Guarantor’s credit, property and background.

IN WITNESS WHEREOF, Guarantor has executed this Guaranty as of the Guaranty Date.³⁹

GUARANTOR

 _____, in his or her individual and personal capacity
 Residence Address:⁴⁰

³⁷ Should those procedures allow email notices? Cautious lawyers say no, because of potential issues of proof. Those same lawyers often regret their caution the first time they need to give a formal notice under the document in question. Pressure for verifiable notices by email will probably continue to build.

³⁸ The preceding sentence is optional but reflects a common concession by Landlord.

³⁹ Break the signature page so it will at least include this paragraph of text. The previous page can be a “short page” ending with, e.g., “No Further Text on This Page.” The signature page could then include language like: “Signature Page for Guaranty Signed by _____ for Lease [Dated _____] Between _____ and _____.” Marc Dreier’s contribution to this Model Guaranty is duly noted.

⁴⁰ To underscore the “personal” nature of the Guaranty, Landlord might ask Guarantor to provide its social security number and driver’s license information, plus a copy of the latter. If the Guaranty includes blanks for those items, Landlord should make sure Guarantor fills them in; leaving them blank could invite theories and claims. Guarantor will generally procrastinate about providing any of this information, and will try not to provide it at all by forgetting about it. If Landlord wants it, Landlord’s counsel should insist on obtaining it well before closing, and tracking its absence on the closing checklist.

GUARANTOR

_____, a _____

By: _____, a _____, its _____

By:

Name:

Title:

ACKNOWLEDGMENT⁴¹

STATE OF _____)
) **ss:**
COUNTY OF _____)
)
)

On the _____ day of _____ in the year 201__, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

⁴¹ Use the right acknowledgment. Although a guaranty will not always include an acknowledgment, their use has become more prevalent. An acknowledgment can mitigate issues of proof, though probably not likelihood of fraud. After all, why would a fraudster stop at the signature block? A requirement for an acknowledgment will create logistical and procedural issues for an offshore Guarantor. Those issues will often require lead time, and sometimes a trip to the United States Consulate, to handle correctly. In many countries, having a document notarized entails an expensive, tedious and lengthy visit to a public official called a “notary.” Counsel may also need to educate any Guarantor that Guarantor can’t sign the Guaranty and then send it to counsel with the expectation that counsel will notarize it.

X. PARTIAL GUARANTY

For a partial guaranty, change the definition of “Guaranteed Obligations” in the base Guaranty to capture only whatever Tenant obligations Guarantor has agreed to guaranty. This will represent a business negotiation in each case. Landlord can always suggest reasons why the Guaranty should cover just about any Tenant obligation. See, for example, the expansion of nonrecourse carveouts in real estate financing.

Any attempt to limit the Guaranty to certain “Guaranteed Obligations” could cause disputes over line drawing. For example, if the Guaranty covers Tenant’s construction obligations, does that also cover some maintenance and repairs? If it relates to Tenant’s end of term obligations, does that only mean obligations that specifically arise at the end of the term, or also Tenant’s obligations to be in general compliance with the Lease at the end of the term? Guarantor might argue for a limited reading of “obligations at the end of the term.” One can mitigate these issues by referring to specific Lease provisions or by foreseeing them and trying to prevent them.

The Guaranteed Obligations might also reduce over time, potentially to zero, if Guarantor and Tenant meet certain conditions. Language to that effect follows the menu of Guaranteed Obligations.

Menu of Guaranteed Obligations. For defining the “Guaranteed Obligations” under a partial Guaranty, consider this menu, but bear in mind that many of these items are “off market,” assuming it is possible to define “market”:

- A. “Guaranteed Obligations” means these obligations of Tenant under the Lease:⁴²
 1. *Construction.* Tenant’s obligations under Lease Section ____, including Tenant’s obligations under Section ____ to remove mechanics’ and other liens.⁴³
 2. *Contests.* Tenant’s obligation to pay or perform any Contested Matter if Tenant’s Contest fails.
 3. *Demolition.* Tenant’s obligation not to commence or perform any demolition or construction except as the Lease allows.

⁴² This Guaranty defines the Lease, once, in a manner that disregards any Tenant Insolvency Proceeding. One doesn’t need to keep saying that.

⁴³ Try to create and refer to suitable defined terms in the Lease rather than Section references, which will inevitably become wrong as the parties negotiate the Lease.

4. *Deposits.* Tenant's obligations to make, replenish or increase any deposit the Lease requires.

5. *End of Term.* Tenant's obligation to surrender possession of the Premises when and as the Lease requires, and in the condition the Lease requires, at the end of the Term (including any premature end because of an Event of Default or a surrender of the Premises) and Tenant's obligation under the Lease to indemnify Landlord, or otherwise make any payment to Landlord on account of Tenant's breach of any obligation under the Lease on those matters.

6. *Environmental Matters.* Tenant's obligations under Lease Section ____.

7. *Expenses.* Tenant's obligations under the Lease to pay utilities, management fees and operating expenses for the Premises.

8. *Insurance.* Tenant's obligations to maintain insurance under Lease Section ____, and if Tenant fails to perform those obligations then this Guaranteed Obligation shall include an obligation to pay any amounts that an insurance carrier would have paid if Tenant had performed its obligations to maintain insurance.⁴⁴

9. *Judgment.* Payment of any judgment Landlord obtains against Tenant for breach of any Guaranteed Obligation.

10. *L/C.* Tenant's obligation to maintain, extend and replace the L/C from time to time.

11. *Legal Costs.* Payment of Landlord's Legal Costs in enforcing the Guaranteed Obligations against Tenant or Guarantor.

12. *Liens.* Tenant's obligations regarding mechanics' and similar liens.

13. *Rent.* Tenant's obligation to pay all "Rent," which means any and all payments that the Lease requires Tenant to make as Fixed Rent, Additional Rent, interest, default interest, late charges, per diem damages or administrative fees, holdover rent, or otherwise, and any and all damages and other sums otherwise payable by Tenant under the Lease or for or on account of Tenant's default under the Lease or Lease termination or in any Tenant Insolvency Proceeding.⁴⁵ "Rent" also includes any payments Tenant must legally make for use, occupancy or possession of the Premises (after the Lease ends), or in substitution for any payments under the Lease, or otherwise under the terms of the Lease, or after its rejection or premature termination. Rent and any damages for

⁴⁴ Guarantor should try to limit the Guaranteed Obligations to payment of premiums, arguing that Landlord should maintain its own backup coverage in any case. Landlords typically reject that argument.

⁴⁵ The remaining language in this subparagraph sometimes appears in Guaranties but probably adds words without adding value.

nonpayment of Rent shall be calculated without regard to any deferral, limitation or reduction that might apply under 11 U.S.C. § 502(b)(6) or otherwise in a Tenant Insolvency Proceeding.⁴⁶

14. *Subleases.* Tenant's obligation not to enter into below-market or statutory subleases, as provided for in Lease Section ____.

15. *Limitation of Liability.* Notwithstanding anything to the contrary in this Guaranty, the aggregate dollar amount of the Guaranteed Obligations, and Guarantor's liability for the Guaranteed Obligations, shall never exceed the sum of: (a) \$_____ ⁴⁷ plus (b) Landlord's Legal Costs in enforcing the Guaranteed Obligations against Tenant and Guarantor.

16. *Application of Payments.* To the extent Tenant makes any payment under the Lease, Landlord shall credit it as Landlord determines. For example, Landlord may credit it first against any Tenant obligation under the Lease that does not also constitute a Guaranteed Obligation, regardless of how Tenant characterized the payment.

XI. GOOD-GUY GUARANTY

For a Good-Guy Guaranty, one could start with either a partial Guaranty (mix and match as suggested above) or a full Guaranty ("all" means "all" Lease obligations). Either way, one would then say liability ends on a "Termination Date," subject however to Landlord's rights on Recovered Payments.

Definitions

A. "Tenant Occupant" means Tenant and any person occupying or claiming any Premises by or through Tenant, except to the extent Landlord has agreed in writing that such person may remain after the Lease ends.⁴⁸

B. "Termination Date" means the date [__ days after the date] when Tenant has met these conditions: (a) all Tenant Occupants have vacated the Premises and delivered possession of the entire

⁴⁶ For a partial Guaranty or good-guy Guaranty, Guarantor should worry that this very broad definition of Rent will capture too much. Any Lease typically says that if Tenant commits an Event of Default and the Lease terminates, then Tenant owes damages based on an acceleration of some component of rent that would otherwise become due after termination. A partial or "good guy" Guarantor will want to avoid liability for those damages.

⁴⁷ One could express this as a multiple of the monthly Fixed Rent at the time of determination, or in some other formulaic way. One could also have a fixed number, but adjust it based on CPI.

⁴⁸ This language covers nondisturbance agreements and pick-up leases. If a Subtenant is in default beyond cure periods under its Sublease, then it will typically lose nondisturbance protection. Landlord may want any such bad Subtenant to constitute a Tenant Occupant. If Tenant enters into subleases without nondisturbance protection, Tenant should remember that if any such subtenant remains, or fails to deliver the required surrender documentation, no Termination Date can occur. Tenant should keep this in mind when: (a) negotiating Subtenant nondisturbance protections in the Lease; (b) evaluating possible Subtenants; and (c) writing Subleases and Sublease guaranties.

Premises⁴⁹ in the condition the Lease requires; (b) Tenant has given Landlord at least ___ days prior written notice of Tenant’s intention to do so⁵⁰; (c) all Tenant Occupants have surrendered the Lease under surrender documentation in form and substance reasonably satisfactory to Landlord⁵¹; (d) Tenant has performed all its Lease obligations arising from any construction Tenant initiated; and (e) all Rent accrued under the Lease to date has been paid, and all other obligations of Tenant accrued to date under the Lease (excluding any obligations calculated in whole or in part by any reference to obligations accruing or arising after the Termination Date) have been paid or performed.⁵²

XII. REPRESENTATIONS AND WARRANTIES

Many legal documents require the obligor to make representations and warranties to confirm facts about itself, the real property in question and other matters. One could argue that in most cases—at least for a “full” Guaranty of all obligations under the Lease—representations and warranties don’t give the obligee much incremental benefit. Still, the obligor just might go to the trouble of confirming they are correct and disclosing any inaccuracies. Guaranties typically do not include representations and warranties, but of course they sometimes do. If Landlord wants to include them, here is some sample language.

Representations and Warranties. Guarantor acknowledges, represents and warrants as follows, and acknowledges that Landlord is relying on these assurances in entering into the Lease and accepting this Guaranty.⁵³

A. *Accuracy of Facts.* The recitals of this Guaranty are correct.

B. *Authority to Contract.* Guarantor has full power, authority and legal right to execute, deliver and perform its obligations under this Guaranty. Guarantor has taken all necessary actions to authorize this Guaranty, and has duly authorized, executed and delivered it.

⁴⁹ For a large space, Tenant might seek some wiggle room on the “entire” Premises. For example, if a Subtenant remains in a corner of one floor, Tenant might still have the right to achieve a Termination Date for three other floors, all vacant. Or Tenant’s holdover exposure might be limited to just the subleased space, or in some other way.

⁵⁰ This notice requirement does not always apply. If a good-guy Guaranty does contemplate Tenant or Guarantor will give prior notice of Tenant’s departure, what happens if Tenant doesn’t move out as scheduled? Often Landlord will establish draconian per diem damages, but this seems excessive as long as Tenant moves out reasonably soon after the scheduled date, and otherwise goes away in peace.

⁵¹ Guarantor may want to attach a required form of Surrender Agreement, to prevent any future discussions or uncertainty if Tenant ultimately decides to surrender.

⁵² Guarantor can reasonably object to this clause “d,” as it is unnecessary to create the incentives that a good-guy guaranty is supposed to create, and exposes Guarantor to potentially open-ended liability even after giving up and surrendering the Premises—the desired behavior that this Guaranty sought to incentivize. Landlord will feel otherwise, probably strongly.

⁵³ Sometimes the corporate representations and warranties about Guarantor will also cover Tenant. For a partial Guaranty, that represents a backhanded expansion of the scope of the Guaranty. For a full Guaranty, it doesn’t matter. The menu of representations and warranties offered here is fairly typical for any transactional document. The fact that most Guaranties don’t include these representations and warranties does not seem to have caused terrible problems for holders of Guaranties. One could include the same representations and warranties in the Lease. Whether the representations and warranties appear in the Guaranty or the Lease, one can easily expand them without limit beyond those suggested here.

C. *Formation.* Guarantor is an entity duly organized, validly existing and in good standing under the laws of an American state.

D. *Guarantor's Financial Statements.* Guarantor's most recent financial statements delivered to Landlord on or before the Guaranty Date⁵⁴ were prepared in accordance with sound accounting practices consistently applied. They correctly depict Guarantor's financial condition as of their date. Since then, no material adverse change has occurred in Guarantor's condition. Guarantor is solvent. Delivery of this Guaranty on the Guaranty Date does not render Guarantor insolvent.

E. *Lease Representations and Warranties.* Tenant's representations and warranties in the Lease are correct in all material respects.⁵⁵

F. *No Conflict.* The execution, delivery and performance of this Guaranty will not violate any provision of any law, regulation, judgment, order, decree, determination or award of any court, arbitrator or governmental authority, or of any mortgage, indenture, loan or security agreement, lease, contract or other agreement, instrument or undertaking to which Guarantor is a party or that purports to bind Guarantor or any of its assets.

G. *No Legal Action Pending.* "Legal Action" means any litigation, arbitration, investigation or administrative proceeding of or before any court, arbitrator or governmental authority: (a) regarding this Guaranty or (b) against or affecting Guarantor's property or assets. No Legal Action is pending or, to Guarantor's knowledge, threatened against Guarantor or any of its assets. Guarantor shall notify Landlord of any future Legal Action within five days after Guarantor becomes aware of it.

H. *No Misstatements.* No information, exhibit or report that Guarantor gave Landlord in connection with this Guaranty contained as of its date, or, if there is no such date, the Guaranty Date, any material misstatement of fact or omitted to state a material fact or any fact necessary to make any statement in it not materially misleading.

I. *No Third Party Consent.* Guarantor's execution of, and payment and performance under, this Guaranty are not contingent on any unobtained consent, license, permit, approval or authorization of, exemption by, notice or report to, or registration, filing or declaration with any person or governmental authority.

⁵⁴ The parties may want to identify those financial statements by date. Add them to the closing checklist. Guarantor, especially if weak, will typically not rush to deliver financial statements, hoping Landlord will be "so pregnant" by the time of signing that Landlord will pay no attention to them.

⁵⁵ This represents a "grab," a backhanded expansion of the Guaranty. See earlier comments on having Guarantor make representations and warranties about Tenant corporate matters. As a comment going in the other direction, Landlord might expand the various representations and warranties to cover not only Guarantor but also Tenant.

J. *Tax Returns.* Guarantor has filed all tax returns it must legally file, except to the extent any deadline(s) have been validly extended. Guarantor has paid all taxes due on those returns and any assessments made against it.

K. *Tenant's Financial Condition.* Guarantor is fully aware of Tenant's financial condition. Guarantor delivers this Guaranty based solely on its own independent investigation and based in no part on any representation or statement by Landlord. Guarantor is not relying on, nor expecting, Landlord to give Guarantor any information on Tenant's financial condition.⁵⁶

L. *Valid Obligation.* This Guaranty constitutes a legal, valid and binding obligation, enforceable against Guarantor in accordance with its terms.⁵⁷

XIII. MULTIPLE GUARANTORS

When multiple Guarantors exist, new issues arise. The next few paragraphs offer sample language to deal with them. Are the multiple Guarantors jointly and severally liable? (Usually yes.) Does each Guarantor make any representations or warranties about the others? (Usually, no. Each Guarantor should insist on that.) As with anything else in this model Guaranty, the appropriateness of the following language will depend on the circumstances. Also, multiple Guarantors will usually want to sign a reimbursement and indemnification agreement among themselves, a mutual-aid pact, so that if Landlord claims against one Guarantor, the other(s) must pay their share(s). The author can provide a template for such an agreement. Finally, think about how to tailor Events of Default triggered by Guarantor-related events. If one Guarantor runs into trouble but the others are just fine, should that constitute an Event of Default? (Probably not.) What if one Guarantor fails to deliver required financial reports, but the others do timely deliver their reports? If one Guarantor dies or becomes disabled, but all the others are alive and well, should that constitute an Event of Default? (Probably not.) Of course it all depends on the relative strength of the various Guarantors.

A. *Joint and Several Liability.* If more than one person signs this Guaranty, then every signer shall be jointly and severally liable as "Guarantor" under this Guaranty. Guarantor shall indemnify Landlord on any claims arising from any dispute between or among Guarantors, plus Legal Costs. Landlord may, at its option, proceed against any one or more Guarantor(s) in any order without proceeding against other any Guarantor(s). Landlord may settle its claims against Guarantor(s) without, as a result, impairing Landlord's rights against any other Guarantor(s).

B. *Notices and Service.* Each Guarantor irrevocably appoints each Guarantor as its agent for receipt of notices and service of process. If Landlord gives any notice to any Guarantor, or serves any process

⁵⁶ This proposition may seem rather obvious, but the California courts once decided that a holder of a Guaranty has an obligation to inform Guarantors about financial risks relating to their principals.

⁵⁷ And what if Guarantor is lying about this? Does it change anything? If the Guaranty is not enforceable, then neither is this paragraph.

on any Guarantor, then Landlord shall be deemed to have given that notice or served that process on all Guarantors.⁵⁸

C. *Counterparts.* This Guaranty may be executed in counterparts.⁵⁹ If any Guarantor fails to execute this Guaranty, that does not limit any other Guarantor's liability.

XIV. GUARANTOR FINANCIAL MATTERS

If Guarantor's credit motivated Landlord to enter into the Lease, what happens if Guarantor's credit later suffers? Nothing, usually. Landlord makes its decision at Lease inception, signs the Lease and then lives with the risk that Guarantor will suffer financial reverses.

Even under those circumstances, Landlord may still want to receive regular financial reports on Guarantor. If Guarantor merely delivers summary financial statements, they don't help Landlord much if Landlord can't act on any adverse information. But Landlord might also require Guarantor to deliver identifying information for Guarantor's assets—both at inception and periodically after that—to help Landlord chase Guarantor if the transaction ever gets into trouble. As a practical matter, though, how likely will those schedules of assets be complete, informative and useful?

In a minority of cases, Landlord goes a step further and requires Guarantor to meet a certain financial standard throughout the Lease term. If Guarantor no longer meets the standard, Landlord can call an Event of Default. This makes great sense for Landlord—assuming the courts will enforce that Event of Default—but imposes on Guarantor and Tenant a risk they cannot really control, with draconian consequences.

Here is sample language.

A. *Financial Information.*⁶⁰ Within __ days after each calendar year, Guarantor shall give Landlord Guarantor's complete financial statements as of the end of that year. Within __ days after Landlord's request, made up to once a year, Guarantor shall deliver schedules of assets, identifying Guarantor's assets in reasonable detail.⁶¹ Guarantor shall file its tax returns on or before the last day (after any valid extensions) Guarantor must do so without penalty. Within 15 days after each such filing, Guarantor shall give Landlord a copy of Guarantor's complete filed tax returns. [Guarantor shall also, promptly on request, give Landlord

⁵⁸ This may make Guarantors uncomfortable. Why can't Landlord serve process on a Guarantor the same way Landlord would serve process on any other defendant in any action? Special language on service of process on Guarantor may amount to another example of irrational exuberance in trimming back a Guarantor's rights and protections.

⁵⁹ One could add: "Delivery of this Guaranty by electronic (including scanned "pdf") or facsimile transmission shall have the same effect as delivery of original signatures." Do we really need that language or will general legal principles adequately cover the issue?

⁶⁰ If Guarantor is a public company, financial reporting could raise some special issues. For example, Guarantor will not want to provide (and Landlord might not want to receive) material nonpublic information. On the other hand, any public information will usually be available online – at least as long as Guarantor remains a public company. One could limit the reporting obligations accordingly.

⁶¹ This is intended to help Landlord chase Guarantor later.

any other financial or other information on Guarantor as Landlord reasonably requests.]⁶²

B. *Guarantor Financial Standard.*⁶³ Guarantor shall, so long as this Guaranty has not been terminated or released: (a) meet the Guarantor Financial Standard; and (b) not Transfer any property or asset or take any other action if, after that Transfer or other action, Guarantor would no longer meet the Guarantor Financial Standard.⁶⁴

XV. RECOVERED PAYMENTS⁶⁵

Any holder of a Guaranty worries that Tenant will pay a Guaranteed Obligation and then soon commence an Insolvency Proceeding, persuading the court that Tenant’s payment constitutes a preference or a fraudulent transfer. Some Guaranties address that hypothetical circumstance, by allowing the beneficiary of the Guaranty to “claw back” the Guaranty as soon as the court “claws back” the payment in question. Here is some suggested language:

A. *Definition.* A “Recovered Payment” means any payment that Landlord: (a) received from Guarantor or Tenant on account of a Guaranteed Obligation or as a condition to a Termination Date; but (b) must return or “disgorge” for any reason, for example because a court decided it constituted a preference or fraudulent transfer. The Recovered Payment shall include: (a) Landlord’s reasonably projected interest and other charges on the Recovered Payment until the date of reimbursement by Guarantor and (b) Landlord’s Legal Costs in determining the existence and amount of that Recovered Payment.

B. *Landlord’s Disgorgement of Payments.* If Landlord is required to return or “disgorge” any Recovered Payment, then Guarantor’s obligations under this Guaranty shall continue and remain in full force and effect as if Landlord had never received the Recovered Payment. If Guarantor purports to revoke this Guaranty, or if this Guaranty otherwise terminates, before Landlord has a claim against Guarantor under the previous sentence, then that termination or purported revocation shall

⁶² Any obligation to deliver financial statements should also trigger obligations of confidentiality, which should appear directly in the Lease rather than require negotiation of a future confidentiality agreement. Sometimes Landlord will go a step further and require Guarantor to sign a consent (in the form the tax authorities require) so Landlord can obtain copies of Guarantor’s tax returns directly from the tax authorities. This is not market for lease guaranties, but one often sees it in some areas of commercial lending.

⁶³ This paragraph is optional depending on the business understanding, and not often seen. If this paragraph is included, one must define the Guarantor Financial Standard either in this Guaranty or in the Lease. See the definition of Satisfactory Guarantor for possible language. For a Lease of any significant term, Landlord should think about adjusting the Guarantor Financial Standard for inflation. And what happens if Guarantor fails to meet the Guarantor Financial Standard? Does that constitute an Event of Default? Is there a cure period to allow Guarantor to make more money? Must Tenant post cash security or a letter of credit? All of this belongs in the Lease, not (just) in the Guaranty.

⁶⁴ Does clause “b” give Landlord anything Landlord did not already have by requiring Guarantor to meet the Guarantor Financial Standard at all times?

⁶⁵ The first paragraph is typical and often appears in “full” guaranties. The second paragraph could be regarded as overkill. Without the second paragraph, though, Landlord has no (possible) protection from a degradation of Guarantor’s financial condition.

not limit Landlord's rights against Guarantor. Guarantor shall promptly pay Landlord the amount of any Recovered Payment. Guarantor's liability under this Guaranty shall continue until (a) all periods have expired within which Landlord could be required to make any Recovered Payment; (b) Guarantor has reimbursed all Recovered Payments; and (c) all other conditions to termination of this Guaranty have been met.

B. *Recovery Motions.* If, in any Tenant Insolvency Proceeding, any party claims Landlord must repay any Recovered Payment (a "Recovery Motion"), then Guarantor shall pay Landlord on demand an amount equal to the claimed Recovered Payment, as increased from time to time through accrual of interest and other fees (a "Recovery Security Payment"). If Guarantor pays a Recovery Security Payment and continues to perform its Guaranty obligations when and as required, then Landlord shall, at Guarantor's request, allow Guarantor to defend the Recovery Motion at Guarantor's expense (including Landlord's Legal Costs) on Landlord's behalf, all in a manner reasonably satisfactory to Landlord, provided this does not in Landlord's judgment cause Landlord to incur any cost, expense, liability or other detriment of any kind, including any adverse effect on any other actions by Landlord in the Tenant Insolvency Proceeding. To the extent Guarantor's defense succeeds, Landlord shall return the Recovery Security Payment. If the defense fails, Landlord shall apply the Recovery Security Payment to reimburse Landlord for the Recovered Payment.⁶⁶

XVI. SPECIAL MORTGAGEE PROTECTIONS

Sometimes Landlord uses a Lease as a vehicle to create a stream of high-quality payments ultimately backed by Guarantor, supporting substantial financing. In these cases, the Lease itself may purport to "demise" something that isn't really separately demisable, such as the fixtures in a store. The transaction is really just a financing backed by Guarantor. The store fixtures aren't really very good real property collateral, but the Guaranty from the corporate parent may make the transaction work. In those cases, the mortgagee will worry even more than usual about preserving and protecting the stream of incoming "rent" payments. Language offered here will help Landlord mitigate that concern. Ordinarily neither Landlord nor its typical real property mortgagee would expect to see any of this language.

Guarantor acknowledges Landlord has mortgaged or collaterally assigned (or intends to mortgage or collaterally assign) the Lease, this Guaranty, all payments and obligations arising under the Lease and this Guaranty and Landlord's entire interest in the Premises, to _____ ("Mortgagee"). Guarantor has received notice of that assignment and acknowledges its validity and effectiveness. That assignment, and any later assignment, does not require Guarantor's consent. Notwithstanding anything to the contrary in the Lease or this Guaranty:

1. *Effect on Guaranty.* Landlord's assignment of the Lease shall be deemed, without any further action by anyone, to include a collateral assignment of this Guaranty to Mortgagee or, from

⁶⁶This paragraph rarely appears, even when a Guaranty addresses possible disgorgement of payments. It is quite creative and off market. But it makes sense as a mechanism to protect Landlord if Tenant initiates a Disgorgement Motion.

and after a Foreclosure Transfer, an outright assignment to any party that acquires the Fee Estate through a Foreclosure Transfer.

2. *No Impairment.* This Guaranty may not be amended, modified or waived, in whole or in part, without Mortgagee’s prior written consent.

3. *Continuation of Guaranty.* From and after any Foreclosure Transfer, this Guaranty shall, in accordance with its terms, continue to apply to the Guaranteed Obligations for the benefit of Successor Landlord, but only until the Termination Date. Guarantor shall not assert against Successor Landlord any claim, defense, counterclaim or offset that the Lease or a separate nondisturbance agreement would prohibit Tenant from asserting against Successor Landlord.

4. *Direct Enforcement.* Mortgagee may enforce directly against Guarantor (and give notices under) this Guaranty with no need for any confirmation, consent or joinder by Landlord.

5. *Redirection Notice.* If Mortgagee so directs in writing (a “Redirection Notice”), then Guarantor shall pay to Mortgagee, as Mortgagee directs, all payments this Guaranty requires, and shall not make those payments to Landlord. Payments made to Landlord in violation of or after a Redirection Notice shall not bind Mortgagee. Any Redirection Notice shall be irrevocable unless and until Mortgagee notifies Guarantor otherwise in writing. Guarantor shall disregard any instructions from Landlord inconsistent with a Redirection Notice.⁶⁷

XVII. ENFORCEMENT

If the Guaranty goes into litigation, Landlord will want it to contain a few provisions to make that litigation go faster and better. Some of those provisions appear in the “base” model Guaranty, such as a jury trial waiver. Here are a few more provisions Landlord might add, each specific to New York

In the event of any Proceeding:

1. *Commercial Division.* If that Proceeding is heard in the New York State Supreme Court Commercial Division, then the parties consent and agree to application of the Court’s accelerated procedures, Uniform Rules for the Supreme and County Courts (currently, the Rules of Practice for the Commercial Division, Section 202.70(g), Rule 9).

2. *Confidentiality.* The parties shall promptly enter into and submit to the court (with a request to be “so-ordered”) a Stipulation and Order for the Production and Exchange of Confidential Information in the form promulgated by the Association of the Bar of the City of New York Committee on State Courts of Superior Jurisdiction.

⁶⁷ The loan documents should limit Mortgagee’s right to give a Redirection Notice. Tenant and Guarantor will not want to get involved in those limitations.

XVIII. MISCELLANEOUS – NONBUSINESS

The miscellaneous provisions that follow consist of Guaranty “boilerplate” that sometimes appears but does not seem strictly necessary. One might call these provisions “overkill,” although they will occasionally make a difference. They generally relate to weird hypothetical eventualities that rarely occur, although arguably they “could” occur and hence “should” be addressed. And that is how any type of legal document gets longer and longer—never shorter—over time and how the “base” Guaranty can easily double in length.

A. *Consent to Jurisdiction.* Any Proceeding to enforce this Guaranty may be brought in any state or federal court located in the State with subject matter jurisdiction. Guarantor irrevocably accepts and submits to the nonexclusive personal jurisdiction of each such court, generally and unconditionally for any such Proceeding. Guarantor shall not assert any basis to transfer jurisdiction of any such proceeding to another court. A final judgment against Guarantor in any Proceeding shall be conclusive evidence of Guarantor’s liability for the full amount of that judgment. Any such judgment may be enforced in any other jurisdiction, either inside or outside of the United States, by suit on the judgment. Nothing in this paragraph limits Landlord’s right to enforce this Guaranty in any court with jurisdiction.

B. *Death or Disability.* If Guarantor dies or becomes disabled or incompetent, then, whether or not Tenant is in default under the Lease, Landlord may: (a) make a present claim against Guarantor’s estate in an amount equal to Landlord’s reasonable estimate of Guarantor’s maximum full liability under this Guaranty, measured as if Tenant had defaulted under the Lease beyond applicable cure periods; and (b) require Guarantor’s executor or other personal representative to escrow that amount or any other amount Landlord reasonably determines would be appropriate to cover any possible future claims under this Guaranty.

C. *Debt Collection.* Guarantor acknowledges that none of Guarantor’s obligation(s) under this Guaranty constitute(s) a “debt” under the United States Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(5). Landlord and its counsel do not need to comply with that Act if they make any demand or start a Proceeding to enforce this Guaranty.⁶⁸

D. *Demand on Guarantor.* Whether or not Landlord has requested payment or performance of any Guaranteed Obligation from Tenant, Landlord may at its option demand that Guarantor pay or perform any Guaranteed Obligation then accrued without demanding that Tenant do so. Guarantor shall promptly comply with any such demand.

E. *Further Assurances.* Guarantor shall execute and deliver such further documents, and perform such further acts, as Landlord reasonably requests to achieve the intent of the parties as expressed in this Guaranty, provided in each case that Landlord’s requests are consistent with this Guaranty and the Lease.

⁶⁸ If this statement is inaccurate, Guarantor’s acknowledgment won’t change that. Therefore Landlord and its counsel should consider possible application of FDCPA and not rely on Guarantor.

F. *Maximum Guaranteed Amount.* Notwithstanding anything to the contrary in this Guaranty, if a court determines that Guarantor's obligations under this Guaranty would otherwise be unenforceable to any extent because of the amount of that Guarantor's liability, then notwithstanding anything else in this Guaranty to the contrary, the amount of that Guarantor's liability under this Guaranty shall be reduced to the maximum amount that is enforceable. That limitation of liability shall in no way limit anyone else's liability.

G. *Notices.* All notices, requests and demands under this Guaranty shall be given in writing at the address in the opening paragraph in accordance with the notice provisions of the Lease. Guarantor and Landlord may each change its address for notices, to any other address within the United States, by notice to the other. Notices shall become effective as the Lease states.

H. *Other Guaranties.* This Guaranty is in addition to and independent of any: (a) guaranty(ies) executed by any other person(s) and (b) other guaranties of Tenant's obligations executed by Guarantor in favor of Landlord.

I. *Reimbursement and Subrogation Rights.* Guarantor waives⁶⁹ any right to be reimbursed by Tenant for any payment(s) Guarantor makes on account of the Guaranteed Obligations. Guarantor acknowledges that Guarantor has received adequate consideration for execution of this Guaranty by Landlord's entering into the Lease, which benefits Guarantor, as a principal of Tenant. Guarantor does not require or expect, and is not entitled to, any right of reimbursement against Tenant as consideration for this Guaranty. Guarantor shall have no right of subrogation against Tenant or Landlord, and no right of contribution against any other person, unless and until: (a) that right of subrogation does not violate (or otherwise produce any result adverse to Landlord under) any Law, including any Insolvency Law; (b) all Guaranteed Obligations have been paid in full and all other performance required under the Lease has been rendered in full to Landlord; and (c) all periods within which any Person can claim against Landlord for a Recovered Payment have expired with no such claim (that deferral of Guarantor's subrogation and contribution rights, (the "Subrogation Deferral"). To the extent that a court determines Guarantor's Subrogation Deferral is void or voidable for any reason, Guarantor agrees: (a) Guarantor's rights of subrogation against Tenant or Landlord and Guarantor's right of subrogation against Tenant's assets shall at all times be junior and subordinate to Landlord's rights against Tenant and Tenant's assets; (b) Guarantor's right of contribution against any other person shall be junior and subordinate to Landlord's rights against that other person; and (c) Guarantor shall not file a claim in any Tenant Insolvency Proceeding without Landlord's consent.

J. *Scope of Lease Obligations.* Each reference to the "Lease" also includes Tenant's obligations when Tenant occupies the Premises as: (i) a "holdover tenant"; (ii) a "statutory tenant"; or (iii) as the beneficiary under any other rent regulation, mandatory arbitration or other scheme that continues the landlord-tenant relationship in a manner not contemplated by the express terms of the Lease. As of the Guaranty

⁶⁹ Guarantor will prefer merely to subordinate and defer any rights against Tenant to Landlord's rights. Language later in this paragraph on the Subrogation Deferral suggests how a subordination and deferral would look.

Date, however, nothing mentioned in clause “ii” or “iii” now applies.⁷⁰ The “Guaranteed Obligations” shall be determined without regard to any (a) Tenant Insolvency Proceeding or (b) determination or limitation that applies to Tenant in any such Insolvency Proceeding, including any limit on Landlord’s recovery under 11 U.S.C. § 502(b)(6) or any similar provision.

K. *Security.* If at any time Tenant is in default under the Lease beyond applicable cure periods, Guarantor shall, on Landlord’s written request, deliver to Landlord cash, a letter of credit or other security satisfactory to Landlord in an amount equal to 110% of Landlord’s reasonable estimate of the amount of Landlord’s claim against Tenant as a result of Tenant’s default.⁷¹

L. *Miscellaneous.* No course of dealing, trade usage, or parol or extrinsic evidence shall modify this Guaranty or waive any Landlord right. If any court decides that any provision of this Guaranty is unenforceable, then the balance of this Guaranty shall remain fully effective. This Guaranty is an instrument for the payment of money only under Civil Practice Law and Rules (“CPLR”) 3213.⁷² New York law governs this Guaranty, its interpretation and enforcement and the relationship between the parties.⁷³ Guarantor confirms that the recitals of this Guaranty are true and correct. The Lease and this Guaranty are a commercial transaction. Neither is entered into for personal, family, household or agricultural purposes. This Guaranty is executed and delivered to benefit Landlord and its successors and assigns, and no one else. This Guaranty shall bind Guarantor and its administrators, assigns, executors, heirs and successors.

XIX. DESIGNATION OF AGENT FOR SERVICE

Language like this sometimes appears, especially for foreign Guarantors.

A. *Initial Designation.* Guarantor irrevocably designates and appoints _____,⁷⁴ whose address is _____, in the Borough of Manhattan, City of New York, as Guarantor’s agent (“Agent”) to receive, accept and acknowledge, for and on behalf of Guarantor and its property: (a) demands for performance under this Guaranty or the Lease; (b) any notice regarding this Guaranty; and (c) service of any legal process, summons, notices and documents for any Proceeding, including all notices required to institute a Proceeding in any court or in any other way required to confer personal jurisdiction over Guarantor in any court (item “c” being referred to as “Service”). Service may be made on Agent in accordance with the

⁷⁰ This concept makes sense but the vast majority of Lease Guaranties seem to get by without it.

⁷¹ This is nonstandard but could enable Landlord to act aggressively against Guarantor upon default.

⁷² Delete preceding sentence for Guaranty of performance. Even for a Guaranty of payment, don’t assume it helps much.

⁷³ Guaranties often require Guarantor to waive the statute of limitations, perhaps because as long as Guarantor is waiving things, the statute of limitations seems like a good thing to add to the list. One might describe this as irrational exuberance in Guarantor waivers. Why should a Guarantor lose the benefit of a general principle of civil procedure that applies to all other obligors under all other contracts? No one expects Landlord, Tenant or any other contracting party to waive statutes of limitation. Why should Guarantor? Such waivers may not be enforceable anyway, but that’s not a reason for Guarantor to accept them.

⁷⁴ Counsel should generally hesitate to accept this appointment as it can only produce grief. Guarantor should appoint a corporate service company and then make sure the corporate service company always has Guarantor’s correct address.

procedures of the court where the Proceeding is pending. Service or demand on Agent shall constitute good and sufficient service and demand on Guarantor for all purposes, including to obtain personal jurisdiction over Guarantor and its property, wherever located, for any Proceeding.

B. *Preservation of Agent's Status; Replacement of Agent.* Guarantor shall take all actions necessary to continue Agent's designation in full force and effect. If Agent becomes unable to act as Agent for any reason, then Guarantor shall forthwith irrevocably designate a replacement Agent satisfying the requirements of this paragraph that would apply to any replacement Agent. Upon written notice to Landlord (but no more often than once every six months), Guarantor may substitute in place of Agent any one other person. If Agent changes its address, then Guarantor or Agent shall promptly notify Landlord. Agent must always have a full-time business office in [New York City].

C. *Means of Service.* Guarantor irrevocably consents and agrees to Service in any Proceeding by mailing copies of such Service by registered or certified mail, postage prepaid or by third party overnight delivery service such as FedEx,⁷⁵ to Agent as described above or to Guarantor at Guarantor's address stated in this Guaranty or to any other address of which Guarantor shall have given notice to Landlord or to Agent. Service in accordance with this paragraph on Guarantor or Agent shall constitute valid and effective personal service on Guarantor. Any such Service shall be effective upon dispatch as evidenced by the receipt from the Postal Service or delivery service. Any failure of Agent to notify Guarantor of any Service shall not impair or affect the validity of that Service or any judgment rendered in any Proceeding based on it.

D. *No Limit on Landlord.* Nothing in this Guaranty or the Lease limits Landlord's right to (a) bring any Proceeding in any court where Landlord could otherwise validly do so; (b) serve process in any way law allows; or (c) give notice in any way this Guaranty allows.

XX. CONCESSIONS TO GUARANTOR

When a Guarantor negotiates a Guaranty, Guarantor may want to seek concessions to prevent unexpected or uncontrollable liability, particularly given that many Guaranty forms seem to go quite far in imposing broad obligations on Guarantor. Here are provisions a Guarantor might add to a Guaranty along these lines. In rare cases, Landlord might include some such concessions in the first draft Guaranty. These provisions all work better in the Lease itself, because Landlord signs the Lease but not the Guaranty, but: (a) Landlord can say in the Lease that Landlord agrees to its obligations under the form of Guaranty attached as an exhibit; and (b) Guarantor will want to protect itself from a Lease amendment that might eliminate these Guarantor protections.

⁷⁵ Language like this often appears in Guaranties. But the rules of Civil Procedure do provide reasonable means of serving process. A careful Landlord will probably not rely on language like this paragraph anyway. And a careful Guarantor will argue, legitimately, that this entire paragraph represents another example of a Landlord's irrational exuberance in trimming a Guarantor's rights in a way that goes beyond waivers of case law principles that unreasonably prevent a Landlord from achieving its reasonable expectations as the result of obtaining a Guaranty. On balance, the author disfavors this paragraph, but recognizes that many Guaranties include similar language.

A. *Assignment to Guarantor.* Tenant may assign this Lease to Guarantor without Landlord's consent, provided that: (a) Guarantor assumes this Lease by an instrument reasonably satisfactory to Landlord; (b) at the time of assignment, Guarantor cures all monetary Defaults; (c) with reasonable diligence after the assignment, Guarantor cures all nonmonetary Defaults; and (d) Tenant (assignor) and Guarantor (assignee) deliver an Estoppel Certificate and a waiver of any claims against Landlord.⁷⁶

B. *Confidentiality.* To the extent that this Guaranty or the Lease requires delivery to Landlord of any information about Guarantor, Landlord shall maintain the confidentiality of that information, in accordance with the same procedures Landlord would employ for its own information that it desired to keep confidential.⁷⁷

C. *Mutual Attorneys' Fees.* If Guarantor prevails in any Proceeding with Landlord, then Landlord shall pay Guarantor's Legal Costs.⁷⁸

D. *New Lease.*⁷⁹ If (a) Landlord terminates the Lease for an Event of Default; and (b) Guarantor fully pays and performs all defaulted obligations of Tenant under the Lease (not merely the Guaranteed Obligations under this Guaranty⁸⁰), within 15 days after Lease termination, then upon full completion of all that payment and performance Guarantor shall have the right (the "New Lease Option") to enter into a new lease for the Premises with Landlord for what would have been the remaining Term of the Lease, on the executory terms of the Lease as it existed before termination (a "New Lease"). To exercise the New Lease Option, Guarantor must, within five Business Days after Lease termination: (x) notify Landlord that Guarantor exercises the New Lease Option, which notice must be accompanied by payment of all sums due under the Lease at termination; and (y) cure all existing Tenant defaults under the Lease, as if the Lease continued. If Guarantor exercises its New Lease Option then Landlord shall promptly prepare at Guarantor's expense and give Guarantor a New Lease. Guarantor shall sign and return the New Lease within five Business Days after receipt or shall be deemed to have waived the New Lease Option. Any New Lease Option shall be subject and subordinate to Tenant's claims and any possessory rights of Tenant or anyone claiming through

⁷⁶ The waiver of claims may be excessive.

⁷⁷ One can easily convert these few lines into a few pages, but the few lines say it all. In any case, Landlord will want to avoid any obligation to "enter into a confidentiality agreement" as the price of receiving financial reports down the road. Those agreements can be very difficult to negotiate, if one side or the other wants them to be difficult to negotiate.

⁷⁸ In the "base case" Guaranty, "Legal Costs" is defined to mean only Landlord's attorneys' fees. One would need to adjust that definition.

⁷⁹ This paragraph and the next one are optional and reflect concessions a Guarantor might sometimes seek. Giving a Guarantor a New Lease sounds bizarre and rarely appears. Landlords will presumably hesitate to give a New Lease to an Affiliate of a Tenant that defaulted. It may, however, actually help Landlord enforce the Guaranty by showing that the relationship is balanced and reasonable. But Landlord may prefer to decide whether to offer a New Lease only when Landlord enforces the Guaranty. It may make sense to make the New Lease Option something Landlord can choose to initiate. Moreover, Landlord might reasonably argue that if Guarantor wants a New Lease, Guarantor can achieve exactly that result by having Tenant assign the old Lease to Guarantor when Guarantor cures Tenant's defaults. Guarantor is hardly in the same position as a leasehold mortgagee, because Guarantor presumably controls Tenant whereas a leasehold mortgagee does not control its leasehold mortgagee.

⁸⁰ This parenthetical applies only if the Guaranteed Obligations consist of less than all the obligations under the Lease.

Tenant. Landlord shall make no representation, warranty or covenant of quiet enjoyment under any New Lease.⁸¹

E. *Notice and Opportunity to Cure.* Landlord shall give Guarantor notice, simultaneous with notice to Tenant, of any Tenant default for which Landlord intends to exercise Landlord Remedies. Guarantor may cure that default on Tenant's behalf. Landlord shall accept that cure from Guarantor.⁸²

F. *Preserved Defenses.* Notwithstanding anything to the contrary in this Guaranty, Guarantor does not waive, and reserves and may assert, any claim, counterclaim, defense or offset that Tenant could validly assert against Landlord arising only from: (a) Landlord's acts or omissions, including Landlord's breach of the Lease;⁸³ (b) the express terms of the Lease; or (c) Tenant's actual payment and performance in accordance with the Lease. In no event shall the Guaranteed Obligations exceed Tenant's express obligations under the Lease on the same matters (plus Legal Costs), except to the extent Tenant's obligations are diminished, limited or terminated through any: (x) Tenant Insolvency Proceeding; or (y) judicial determination that they are unenforceable, in whole or in part, for any reason except those in clauses "a" through "c" of this paragraph.

G. *Release on Assignment.* If Tenant assigns the Lease in compliance with the Lease (except an Affiliate Transaction),⁸⁴ then Landlord shall release Guarantor from this Guaranty (and return the original Guaranty marked "CANCELLED" or deliver a lost document certificate in ordinary and customary form) if Tenant or the assignee: (a) pays by certified check all Guaranteed Obligations then accrued and outstanding; (b) cures all Defaults; and (c) gives Landlord a new Guaranty in the same form as this one, signed and acknowledged by a Satisfactory Guarantor.⁸⁵ That replacement Guaranty must also cover existing undischarged Guaranteed Obligations, if any.⁸⁶ A "Satisfactory Guarantor" means a person that, based on Landlord's reasonable confirmation: (a) has a net worth at least equal to [the net worth of Guarantor] [on the Commencement Date] [at the time] [___ times then annual Fixed Rent]; (b) is a person with whom United States persons may legally do business; (c) is subject to the jurisdiction of _____ and

⁸¹ This New Lease clause may require consent from Landlord's lender.

⁸² Guarantor may also want some additional time to cure, similar to the rights of a leasehold mortgagee. That may be excessive.

⁸³ Landlord may regard clause "a" as very broad, and want to trim it back. On the other hand, if the Lease requires Landlord to do or not do something, and Landlord violates that requirement, and Tenant could have asserted a defense as a result, why shouldn't Guarantor have the same defense?

⁸⁴ The parties will need to adjust this paragraph based on the negotiated business deal. What type of assignment (and new Guarantor) will get the former Guarantor off the hook? The Lease will set conditions for the permitted assignment, such as no uncured default; completion of construction; prior notice; assumption by the assignee; and criteria the assignee must meet. Those are all beyond the scope of this model Guaranty. The conditions to any release will vary depending on the space, Tenant, Guarantor and market conditions.

⁸⁵ Rather than define a Satisfactory Guarantor, Landlord would prefer to require: "a replacement Guarantor satisfactory to Landlord in all respects, in Landlord's sole and absolute discretion, including creditworthiness." Without an objective definition of Satisfactory Guarantor, though, the right to replace Guarantor doesn't give Tenant/Guarantor anything more than they would have if the Guaranty were silent. And a "reasonable" Landlord would typically agree to a later substitution of Guarantor, absent extraordinary circumstances, so Landlord isn't really giving up much by agreeing to an objective definition of Satisfactory Guarantor.

⁸⁶ Tenant may object to this sentence. Landlord's response will depend on circumstances.

not entitled to any sovereign, diplomatic or other immunity (unless waived in a manner reasonably satisfactory to Landlord); and (d) _____.⁸⁷

H. *Termination of Guaranty.* If [at any time no undischarged Guaranteed Obligations remain or can later arise,⁸⁸] [Tenant has never been in default under the Lease, beyond applicable notice and cure periods, as of the date ____ months after the Guaranty Date,] then Guarantor's liability under this Guaranty shall terminate, subject to Landlord's rights under this Guaranty on Recovered Payments. At Guarantor's or Tenant's request, Landlord shall promptly confirm that termination of liability in writing⁸⁹ and return the original of this Guaranty marked "Cancelled" or deliver a [notarized certificate] [lost document certificate and indemnity] in customary form, reasonably satisfactory to the parties, to that effect. Landlord's failure to comply with the previous sentence shall not limit the effect of any termination of this Guaranty.

⁸⁷ Add any deal-specific criteria the Satisfactory Guarantor must meet.

⁸⁸ If Tenant could remain liable under the Lease even after it ends, Landlord should hesitate to define the circumstances under which Landlord will release Guarantor. For example, even after the Lease ends, Landlord could incur liability for which Tenant (and Guarantor) must indemnify.

⁸⁹ Landlord could argue that under these circumstances the Guaranty is a nullity and Guarantor has no need for a written confirmation. But Guarantors often want one anyway, for essentially the same reason Landlords want lien waivers from potential mechanics' lien claimants even if Tenant has delivered proof of payment.

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