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Seminar 9

**Rolling, Rolling, Keep Those Doggies Rolling:
The Issues with Limited Guarantees including Rolling Guarantees**

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I. What is a Guaranty and why do Landlords prefer to have them?

- A. A Guaranty is a contract by which the Guarantor agrees to satisfy the underlying obligation of a primary obligor to an obligee in the event that the primary obligor defaults on the underlying obligation.¹ Typically, the Guarantor of a lease is the principal, shareholder, member, owner or other party playing a key role in the tenant entity or a parent or other affiliate of the tenant.
- B. Guarantees afford a landlord the opportunity to have multiple parties to pursue in the event of a deficiency and provide additional incentive to ensure tenant's performance of the lease obligations, both of which minimize the risk to landlord.
 - 1. It is not uncommon for tenants to hold their leasehold interests in a single purpose entity or other entity which does not have substantial assets.
 - 2. It is of particular importance in these instances that a landlord obtains additional security to be certain that the lease obligations can be satisfied.
 - 3. While security deposits and letters of credit provide some protection for the landlord (and are often easier and cheaper to collect upon), tenants are often reluctant to tie-up large amounts of capital or pay the cost and go through the hassle of maintaining a letter of credit sufficient to cover the lease obligations.
- C. Ideally, a landlord will want a Guaranty to cover all leasehold obligations throughout the entire term of the lease. However, concessions may be made to reduce the exposure to the guarantor while still protecting the Landlord financially.
 - 1. For example, a landlord may agree to limit the Guaranty in duration or amount to align with the capital investment made by the landlord in connection with preparing the space for a tenant's occupancy and to cover the downtime while reletting the space in the event that the lease goes sideways.
 - 2. A landlord may be far more likely to forego a Guaranty if they have incurred little or no investment in a space prior to leasing to a particular tenant.

II. How is a Guaranty formed and what is the scope?

- A. The general rules for contract formation will apply to the creation of Guarantees (i.e. competent parties, subject matter, legal consideration, mutuality of agreement and mutuality of obligation).
 - 1. Interpretation of Guaranty provisions will vary across jurisdictions.
 - 2. Accordingly, it is important to make sure the language of your Guaranty clearly sets forth the obligations and agreements of the parties and to include any state-specific requirements with respect to enforcement and collection pursuant to the Guaranty.
- B. The scope of a Guaranty will vary depending on the circumstances. The following sets forth a summary of some common types of Guarantees:
 - 1. **Absolute Unconditional Guaranty:** The broadest form of Guaranty whereby the Guarantor promises to pay or perform all obligations, upon primary obligor's default, without contingencies.
 - 2. **Limited Guarantees:** A Guaranty may be limited with respect to payment or performance obligations only, limited in duration or in dollar amount.
 - a. **Payment Guaranty:** The Guarantor is only liable for rent payments due under the lease and is not directly obligated to perform any acts that tenant is required to do pursuant to the lease.

- b. **Fixed-Term Guaranty:** A limited Guaranty that ends on a specified date, generally, provided that tenant does not default under the lease.
- c. **Capped-Amount (Fixed or Formula-Based Amount) Guaranty:** A limited Guaranty that caps the Guarantor's liability at a specified or formulaically-determined dollar amount. Formulae typically include unamortized brokers' fees, tenant improvement allowance, and certain other costs incurred by the landlord at the beginning of the lease term, so the exposure is continually reducing over time. Fixed caps may also step-down over time and transition to a Rolling Guaranty.
- d. **Good Guy Guaranty:** A limited Guaranty that enables landlords to pursue the Guarantor to recover damages for tenant defaults until the time that tenant delivers possession to landlord. Other forms may allow landlord to have recourse against the guarantor after certain triggering events that result in damage to the landlord (much like a so-called "bad-boy" limited recourse loan guaranty), which may include failure to maintain required insurance, waste, tenant bankruptcy, fraud, and environmental contamination.
- e. **Rolling Guaranty:** A limited Guaranty in which the liability of Guarantor is typically limited to a number of years' worth of rent starting upon tenant default, which may also reduce over time or be terminated after a period of time, provided that tenant does not default under the lease or the tenant's business hits certain financial benchmarks or meets other performance metrics.

III. Rolling Guaranty Hot Button Issues/Drafting Considerations.

- A. **Hybrid Rolling and Step-Down Cap Guarantees.** As long as the tenant is performing all of its obligations under the lease after the commencement date, the landlord's risk generally declines over time, thereby justifying a reduction in the lease guarantor's liability. After a period of time without default, a Rolling Guaranty may expire, or the rolling cap may be reduced in increments over time or in one lump-sum step down. Additionally, a Rolling Guaranty payment cap may be reduced if the tenant has met certain sales, has reduced other liabilities or otherwise established a minimum net worth, or some other financial metric that correlates to a more solid tenant and lower landlord risk. Landlords and tenants often get creative on targets that warrant reduction in the guarantor's liability.
- B. **Ambiguity in Guaranteed Rent.** If the Guaranty simply provides that the guarantor of a ten-year lease guarantees the payment of five years' of fixed rent payable under the lease, an ambiguity may have just been created. It should be specifically stated whether the guarantor is obligated to pay the first five years' of rent, after which time its obligations cease, or to pay five years' worth of rent on a rolling five-year basis, so the guaranty lives-on through the entire term.
- C. **Enforcement Costs:** Applicable to all limited Guarantees, a landlord should make sure that costs of enforcing the Guaranty are not capped by the limiting language. Without an express statement, the potentially high legal costs and court fees may not be recoverable by landlord in connection with an enforcement action, so landlords should be comprehensive in the definition of guaranteed obligations to include such costs, plus interest.
- D. **What Kind of Guaranty is it really?** In practice, it is commonplace to see language in the Guaranty that results in a merger of the various forms of limited Guarantees. For example, consider that a landlord has agreed to limit the exposure of the Guarantor to twelve months after the expiration of the third year of the lease term, however, if the tenant does not vacate the premises (as required by the terms of a typical Good Guy Guaranty), then Landlord could potentially incur more costs than the Guarantor is liable, even though Landlord does not have possession of the premises to enable Landlord to release the space. Accordingly, a Landlord may want to require that tenant vacate the premises as a condition precedent to any limitation of liability. Landlords and Guarantors must carefully negotiate the terms of the Guaranty to ensure that the intentions of the parties are clearly captured.

IV. Rolling Guaranty Hot Button Issues/Cases.

A. Role of Judge vs. Jury.

1. Judge will determine meaning of contract if unambiguous.
2. If Judge determines contract term ambiguous, then jury may resolve meaning by consideration of extrinsic evidence.
3. Specific rules vary by state.

B. Focus will be on Words of the Contract.

1. Written terms of Guaranty will determine the scope. For example, Guaranty limited to initial term if that is language of contract. *665-75 Eleventh Ave. Realty Corp. v. Schlanger*, 265 A.D.2d 270 (1999).
2. Circumstances that trigger Guaranty will depend on words of contract.

C. Consideration of other evidence will depend on law of state.

1. Some states have a strong parol evidence rule that does not allow consideration of parol evidence unless contract unclear on its face. New York is an example.
2. Other states have a weak parol evidence rule that allows consideration of parol evidence to consider whether evidence clear on its face is ambiguous. California is an example.
3. Types of parol evidence considered includes:
 - a. Drafting history.
 - b. Course of performance.
 - c. Course of dealing.
 - d. Custom and practice.

V. Case summaries:

1. ***LoRicco v. Hula's New Haven, LLC*, 53 Conn. Supp. 372, 117 A.3d 1007 (Super. Ct. 2013), aff'd, 157 Conn. App. 489, 115 A.3d 531 (2015)**

Facts: Landlord LoRicco and Hula's New Haven, LLC, lessee, entered into a 10-year lease, which was guaranteed by three individuals for a rolling 12 month period. The guarantee provided that “[f]or a rolling twelve (12) month period into the future . . . the undersigned hereby jointly and severally guarantee . . . the prompt payment of all rent, and the performance of all of the terms, covenants and conditions. . . .” After missing some rental payments and being behind in payments for over a year, Hula returned the keys to LoRicco with five years remaining on the lease. LoRicco sought the balance of Hula's previously unpaid rent AND rent for the 12 months after it took possession of the leased premises.

Issue: what event triggers the start of the time period of a rolling guarantee if it is not specified in the lease?

Holding: Where the guaranty “does not expressly state what action will trigger, initiate, or start the running of the twelve month period,” the rolling guarantee's time period begins with the lessee's first failure to make payments due under the lease. The court observed that “Hula's failure to make the payments due under the lease started, initiated or began the running of the twelve month period of the guarantors' liability because that was the date when lessor became aware that he may need to impose responsibility on the guarantors.” The court further reasoned that the guarantee broadened the lessor's opportunity to collect payments due under the lease while simultaneously limiting the guarantors' liability to a twelve-month period. Because the guarantee by its own terms limited the guarantors' liability to a twelve month

span, the lessor's proposed construction, which would have held them liable for over two years of payments, was untenable.

2. *Strip Delaware L.L.C. v. Landry's Restaurants, Inc.*, 5th Dist. Stark No. 2010CA00316, 2011-Ohio-4075, 2011 WL 3587455 (August 15, 2011)

Facts: Landry's Seafood House leased restaurant property from Strip Delaware LLC, guaranteed by Landry's Seafood Restaurants on a rolling two year term. The guarantee provided that "the liability of Guarantor shall not exceed the rent payable under the Lease at the time of such default for two (2) consecutive years . . ." Landry initially defaulted on the lease in November 2006, but repossessed the leased premises a month later. After some litigation and Landry's second default in April 2008, Strip Delaware sued seeking recovery of lost rent and other damages for the period between the second default and securing a new tenant in March 2009.

Issue: Can a second breach restart the clock on a rolling guarantee's time period?

Holding: Under a rolling guaranty without an acceleration clause, "each new default by [the leasee] creates a new cause of action." Even though some of Strip Delaware's damages were incurred outside two years from the first breach, they were well within two years from the second breach, so the guarantor was liable.

3. *L & B 57th St., Inc. v. E.M. Blanchard, Inc.*, 143 F.3d 88 (1998)

Facts: L&B and EMB entered into a lease. EMB's father, Robert Blanchard, signed a standard good guy Guaranty. EMB paid a security deposit of \$193,250. Well behind on rent, EMB vacated the premises and "became judgment proof."

Issue: Can a Landlord apply a security deposit exclusively to the non-guaranteed portion of the debt?

Holding: Not without express contract provisions. In general, the security deposit is credited to the earliest arrears, i.e. the guaranteed portion of the debt.

Issue: Is a good guy guarantor liable for re-letting expenses and attorney's fees?

Holding: Not without express contract provisions. Here, the good guy Guaranty provided that the guarantor's "obligations herein shall only be applicable to the period prior to the Tenant's surrender of the vacant premises." Re-letting expenses and attorney's fees are incurred after the premises are surrendered.

4. *1407 Broadway Real Estate LLC v. Sicari*, 2009 N.Y. Slip Op 30603(U)

Facts: 1407 and Silk Denim entered into a lease. The lease contained two Guarantees, a personal Guaranty (holding the guarantor liable for all expenses up to a certain date) and a good guy Guaranty (holding guarantor liable until Silk Denim vacates the premises). Sicari signed both Guarantees, and included "Pres." next to his signature. He had been told that there would be no personal liability.

Issue: Can a lessee sign a Guaranty in his corporate capacity?

Holding: In general, no. The presence of a corporate identity next to the signature is not controlling. A Guaranty is nearly worthless if a corporation guarantees its own lease. Here, Sicari is liable because the clause is titled "Personal 'Good Guy' Guaranty."

Issue: Can the guarantor claim lack of habitability to void the lease?

Holding: It depends on the terms. Here, the Tenant contracted away the right to assert this defense in the lease, therefore the guarantor can't use this defense.

Issue: Can a Landlord apply the security deposit exclusively to the non-guaranteed portion of the debt?

Holding: In general, no. Here, the Landlord can apply the security deposit to the non-guaranteed portion of the debt because the terms allow it.

5. *174 Second Equites Corp. v. Lax*, 2012 NY Slip Op 31936(U) (Sup. Ct.)

Facts: 174 and Citispaces entered into a lease, which was guaranteed by Lax and Horowitz. The Guaranty states that "Anything herein to the contrary notwithstanding this Guaranty shall not exceed to any obligations incurred by Tenant under the Lease which accrue five (5) years after commencement date of the Lease term provided that. . ." followed by a typical good guy Guaranty clause. Citispaces defaulted 16 months into the lease, and owed a balance of \$94K.

Issue: Are the guarantors liable for the entire lease's rent or simply the past due rent?

Holding: The guarantors are liable for the entire lease's rent because they did not comply with the Guaranty's terms (to wit they defaulted before 5 years).

6. *169 Bowery, LLC v. Bowery Dev. Grp., LLC*, 2012 NY Slip Op 33282(U) (Sup. Ct.)

Facts: 169 and Bowery entered into a lease which was guaranteed by Mr. McClure. After much negotiation, the good guy Guaranty stated: "In addition to the foregoing, **in order for this provision to be effective**, Tenant must:" 1) tender at least 60 days advance notice of its intention to vacate; 2) have paid the Landlord at least \$1,044,000.00 under the lease; 3) not otherwise have been in default; 4) completed the Tenant's work on the building; and 5) provide the Landlord with reasonable assurance that there are no claims or liabilities resulting from the acts or omissions of the Tenant. Bowery breached the lease without satisfying the Guaranty's conditions.

Issue: Was McClure personally liable for unpaid rent after Bowery breached the lease?

Holding: No. The conditions necessary to trigger the Guaranty were not met. The court dryly noted that "the personal Guaranty as ultimately finalized provides very little protection for plaintiff."

7. *665-75 Eleventh Ave. Reality Corp. v. Schlanger*, 265 A.D. 2d 270 (1999)

Facts: 665-75 and Factice, Inc. entered into a lease which was guaranteed by Schlanger. The Guaranty provided that it "shall remain and continue in full force and effect as to any renewal, change or extension of the lease." The parties entered into 25 written extensions of the lease. After the final lease expired on June 30, 1995, Factice continued to rent as a month-to-month Tenant. Factice failed to pay rent from October to June.

Issue: Is the Guaranty still valid after the lease ends and the Tenant becomes a month-to-month Tenant?

Holding: No. The guarantor should not be bound beyond the express terms of his Guaranty. The Guaranty lapsed when the written lease did in June 30. This released the guarantor from liability.

8. *Lucky Jacks Entertainment Ctr., LLC v. Jopat Bldg. Corp.*, 32 So. 3d 565 (2009)

Facts: Jopat and Lucky Jacks entered into a lease which was guaranteed by Lucky Jacks' parent company, NGS. The sole purpose of the lease was to operate a video-sweepstakes gaming business. Two years into the lease, the state legislature made such businesses illegal, and Lucky Jacks breached the lease.

Issue: If the sole purpose of the lease becomes illegal, does the lease become illegal and void, or simply voidable?

Holding: The entire lease becomes void, including the Guaranty clause. Thus, NGS is not liable for the breach.

9. *New Market Acquisitions, Ltd. v. Powerhouse Gym*, 154 F. Supp. 2d 1213 (2001)

Facts: New Market and ESB (which operated a Powerhouse Gym franchise) entered into a lease which was guaranteed by Mr. Dabish. Mr. Dabish worked for Powerhouse Gym, and had granted ESB the franchise license. In addition, he signed an unlimited Guaranty on behalf of himself, his wife, his brother, and his sister-in-law. ESB fell behind on its rent, and entered into a settlement agreement with New Market. New Market sued Mr. Dabish and his family to collect the remaining amount.

Issue: Is a guarantor liable if the contracting parties settle?

Holding: By default, no. However, the terms of the Guaranty can make the guarantor liable for damages even though the contracting parties settle. Here, the Guaranty language was very unfavorable for the guarantor.

Issue: Is the guarantor liable for damages and rent which accrue after termination?

Holding: Again, the terms of the lease control, and held the guarantor liable for all damages, even after the lease is terminated.

Issue: Can the guarantor seek indemnity from the contracting party for settling?

Holding: Typically, they can. Here, however, they can't because the terms of the lease allow New Market and ESB to settle without giving notice to the Guarantor.

10. *Lo-Ho LLC v. Batista*, 62 A.D.3d 558 (2009)

Facts: Lo-Ho and Batista entered into a lease which was guaranteed by Jose DeLeon. The Guaranty only applied to "the attached lease." After the first lease expired, Lo-Ho and Batista signed an "Expansion of Lease," which required additional rent and real estate taxes. Before the term on the expansion of lease ended, Batista defaulted.

Issue: If the terms of the lease are altered, is the guarantor liable?

Holding: No. A Guaranty is to be interpreted in the strictest manner, and cannot be altered without the guarantor's consent (absent explicit authorization in the contract). Since the expansion of lease included additional terms, the Guaranty didn't cover it.

11. *Zion Factory Stores Holding v. Lawrence*, 2005 UT App. 361 (2005)

Facts: Zion and Quilts entered into a lease which was guaranteed by Quilts' two shareholders. The Guaranty expired after the second lease year. The lease prohibited any change in voting rights unless Zion authorized them. One stockholder bought out the other, without notifying Zion ("the assignment breach"). After the two year Guaranty expired, Quilts abandoned the property.

Issue: Does breaching any part of the contract invoke the Guaranty?

Holding: No. Although the assignment breached the contract, there were no damages from this breach. Quilts abandoned the property after the Guaranty expired, therefore the remaining stockholder was not personally liable.

Note: If the lease had contained an acceleration clause, then the entire rent would have been due at the assignment breach, and the Guaranty clause would have held the stockholders liable. See *Sunset Center Properties, LLC v. Associated Medical Health Services, Inc.*, 1991 Fla. App. Lexis 7919.

VI. Rolling Guaranty Sample Limiting Language

1. **Okay:** Guarantor unconditionally and absolutely guarantees to Landlord, and its successors and assigns, on a rolling one-year basis, the due, punctual and complete payment and performance by Tenant, of all of the obligations, undertakings, covenants and agreements of Tenant under the Lease and under any modification, amendment, variation or termination of the Lease. Guarantor's obligations under this Guaranty shall not exceed Tenant's obligations under the Lease for one full Lease Year.

- a. *Note: This language is really a hybrid Capped-Amount and Rolling Guaranty in that it is always limited to one-year's exposure.*
- b. *Note: This language covers all of the lease obligations, but could better express the capture of costs, fees and interest incurred in connection with landlord's enforcement efforts.*

2. **Better:** The Guarantor hereby, jointly and severally if more than one, unconditionally and irrevocably guarantees the prompt and faithful performance of all of the terms and provisions of the Lease by the Tenant and any assignee of the Tenant, including, but not limited to, the payment of all installments of rent and other sums due to Landlord thereunder in full for the first five Lease Years of the Term, and then, provided Tenant is not then in default under the Lease, continuing on a rolling one-year basis.

- a. *Note: This language is more of a traditional rolling guaranty in that the rolling obligation period takes effect after a minimum number of years without default by tenant. As above, it covers all of the lease obligations, but could better express the capture of costs, fees and interest incurred in connection with landlord's enforcement efforts.*

3. **Best:** Notwithstanding anything to the contrary contained herein, provided there is no existing Default under the Lease at the end of the _____ Lease Year, then at the commencement of the _____ Lease Year, Guarantor's liability for Rent hereunder shall not exceed an amount equal to the sum of (i) all Rent due and payable, or which has accrued but as yet has not been billed, under the Lease through the date upon which Tenant has vacated or Landlord has obtained possession of the Leased Premises, (ii) an amount equal to _____ full calendar months of Rent due and payable or which accrues under the Lease from and after the date upon which Tenant has vacated or Landlord has obtained possession of the Leased Premises, and (iii) Landlord's costs of enforcing the terms of this Guaranty, including but not limited to court costs and reasonable attorney fees.

- a. *Note: If the letter of intent was not clear, introducing the condition to vacate is often objected to if the intention is to establish a Rolling Guaranty, because the obligation to vacate is generally identified with the Good Guy Guaranty.*

VII. Sample Forms

G U A R A N T E E (Corporate Guarantor)

FOR VALUE RECEIVED, and in consideration for, and as a material inducement to _____ (the "Landlord") to make the lease of even date herewith (the "Lease") with _____ (the "Tenant"), the undersigned, _____, a _____ corporation (the "Guarantor"), unconditionally guarantees the full performance and observance of all the covenants, conditions and agreements therein provided to be performed and observed by the Tenant, the Tenant's successors and assigns, and expressly agrees that the validity of this agreement and the obligations of the Guarantor shall in no wise be terminated, affected or impaired by reason of the granting by the Landlord of any indulgences to the Tenant or by reason of the assertion by the Landlord against the Tenant of any of the rights or remedies reserved to the Landlord pursuant to the provisions of the Lease or by the relief of the Tenant from any of the Tenant's obligations under the Lease by operation of law or otherwise (including, but without limitation, the rejection of the Lease in connection with proceedings under the bankruptcy laws now or hereafter enacted); the Guarantor hereby waiving all suretyship defenses. The obligations of the Guarantor include the payment to Landlord of any monies payable by Tenant under any provisions of the Lease, at law, or in equity, including, without limitation, any monies payable by virtue of the breach of any warranty, the grant of any indemnity or by virtue of any other covenant of Tenant under the Lease.

The Guarantor further covenants and agrees that this Guaranty shall remain and continue in full force and effect as to any renewal, modification or extension of the Lease, whether or not the Guarantor shall have received any notice of or consented to such renewal, modification or extension. The Guarantor further agrees that its liability under this Guaranty shall be primary (and that the heading of this instrument and the use of the word "Guaranty(s)" shall not be interpreted to limit the aforesaid primary obligations of the Guarantor), and that in any right of action which shall accrue to the Landlord under the Lease, the Landlord may, at its option, proceed against the Guarantor, any other guarantor, and the Tenant, jointly or severally, and may proceed against the Guarantor without having commenced any action against or having obtained any judgment against the Tenant or any other guarantor. The Guarantor irrevocably waives any and all rights the Guarantor may have at any time (whether arising directly or indirectly, by operation of law or by contract or otherwise) to assert any claim against the Tenant on account of payments made under this Guaranty, including, without limitation, any and all rights of or claim for subrogation, contribution, reimbursement, exoneration and indemnity, and further waives any benefit of and any right to participate in any security deposit or other collateral which may be held by the Landlord; and the Guarantor will not claim any set-off or counterclaim against the Tenant in respect of any liability the Guarantor may have to the Tenant. The Guarantor further represents to the Landlord as an inducement for it to make the Lease, that the Guarantor owns all of the entire outstanding capital stock of the Tenant, that the execution and delivery of this Guaranty is not in contravention of its charter or by-laws or applicable state laws, and has been duly authorized by its Board of Directors.

It is agreed that the failure of the Landlord to insist in any one or more instances upon a strict performance or observance of any of the terms, provisions or covenants of the Lease or to exercise any right therein contained shall not be construed or deemed to be a waiver or relinquishment for the future of such term, provision, covenant or right, but the same shall continue and remain in full force and effect. Receipt by the Landlord of rent with knowledge of the breach of any provision of the Lease shall not be deemed a waiver of such breach.

No subletting, assignment or other transfer of the Lease, or any interest therein, shall operate to extinguish or diminish the liability of the Guarantor under this Guaranty; and wherever reference is made to the liability of the Tenant named in the Lease, such reference shall be deemed likewise to refer to the Guarantor.

All payments becoming due under this Guaranty, including, without limitation, costs of collection, and not paid when due shall bear interest from the applicable due date until received by the Landlord at the interest rate set forth in the Lease.

It is further agreed that all of the terms and provisions hereof shall inure to the benefit of the heirs, executors, administrators and assigns of the Landlord, and shall be binding upon the successors and assigns of the Guarantor.

IN WITNESS WHEREOF, the Guarantor has caused this Guaranty to be executed in its corporate name by its duly authorized representative, and its corporate seal to be affixed hereto this _____ day of _____, 20___.

GUARANTOR:
INSERT NAMES HERE

By: _____

Name: _____

Title: _____

Hereunto duly authorized

FORM OF GUARANTY

THIS GUARANTY ("Guaranty") is made as of this _____ day of _____, 20___, by _____, a _____, with offices at _____, at _____ ("Guarantor") to and for the benefit of _____, a _____, with offices at _____ ("Landlord").

RECITALS

A. _____, a _____ ("Tenant") and Landlord are parties to that certain Lease dated as of _____, 20___, as the same may be amended from time to time (collectively, the "Lease") with respect to approximately _____ rentable square feet of space on the _____ (_____) floor of the building located at _____, Massachusetts (the "Premises").

B. Guarantor, either directly or indirectly, owns 100% of the ownership interests in Tenant, and Guarantor shall derive material financial benefits from the Lease.

C. In order to induce Landlord to enter into the Lease with Tenant, Guarantor has agreed to execute and deliver this Guaranty to Landlord.

NOW, THEREFORE, in consideration of the foregoing recitals, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Guarantor hereby agrees as follows:

1. **Guaranty.** Guarantor hereby guarantees the payment when due of Base Rent, and all other additional rent, interest and charges to be paid by Tenant under the Lease and the performance by Tenant of all of the terms, conditions, covenants and agreements of the Lease, and Guarantor promises to pay all of Landlord's expenses, including reasonable attorneys' fees and disbursements, incurred by Landlord in enforcing the obligations of Tenant under the Lease and/or the obligations of Guarantor under this Guaranty. All payments required to be made by Guarantor hereunder shall be paid to Landlord in legal United States currency or tender at Landlord's address set forth below, or at such other address as Landlord may specify from time to time. Notwithstanding any other provision in this Guaranty, (a) Guarantor may assert as a defense to any payment by the Guarantor hereunder, any defense that Tenant could assert against Landlord pursuant to the Lease (provided that Guarantor may not assert the bankruptcy, insolvency, lack of authority or power, dissolution, liquidation or any other similar debtor defense of Tenant or its successors or permitted assigns as such a defense); and (b) the obligations of Guarantor hereunder shall not be greater than the obligations of Tenant under the Lease, plus any obligation of Guarantor to pay the reasonable expenses incurred by Landlord in any successful enforcement of its rights under the Lease or this Guaranty.

2. **No Release or Discharge.** This Guaranty is irrevocable, absolute, present, continuing and unconditional, and the obligations of Guarantor shall not be released, impaired, modified, limited or affected in any way by (a) any extensions of time, indulgences or modifications which Landlord may extend to Tenant in the performance of its obligations under the Lease; (b) any failure of Landlord to enforce any of the conditions of the Lease; (c) any assignment or other transfer of the Lease or this Guaranty by Landlord; (d) any assignment or other transfer of the Lease by Tenant or the sublease of all or part of the Premises by Tenant; (e) any

amendments to or modifications of the Lease; (f) the release or discharge of Tenant in bankruptcy or other creditors' proceeding; or (g) any rejection or disclaimer of Tenant. In addition, the obligations hereunder of Guarantor shall extend and apply with respect to the full and faithful performance and observance of all of the covenants, terms and conditions of Tenant to be performed (i) if the Lease shall be renewed, or its term extended, for any period beyond the date specified in the Lease for the expiration of said term, either pursuant to any option granted under the Lease or otherwise; and (ii) if Tenant holds over beyond the term of the Lease.

3. Waiver. Guarantor waives (a) notice of acceptance of this Guaranty; (b) notice of any extensions of time for performance which Landlord may grant to Tenant and to any modifications or amendments to the Lease to which Landlord and Tenant, or their successors and assigns may agree; (c) the benefit of any statute of limitations affecting Guarantor's liability under this Guaranty; (d) any right to require that any action be brought against Tenant; and (e) until this Guaranty is terminated pursuant to Section 6 below, any rights Guarantor may have against Tenant by reason of one or more payments or acts in compliance with Guarantor's obligations hereunder. Guarantor does not require any notice of Tenant's nonpayment, nonperformance or nonobservance of the covenants, terms, and conditions of the Lease, Guarantor hereby expressly waiving the right to receive such notice.

4. Subordination. Any indebtedness of Tenant to Guarantor, whether now existing or hereafter created, is hereby subordinated to this Guaranty. Any such indebtedness of Tenant to Guarantor shall, upon written demand of Landlord, be collected and received by Guarantor in trust for Landlord and shall be paid over to Landlord on account of any Tenant default, without impairing or releasing the remaining obligations of Guarantor hereunder; provided, however, that if there is no existing Tenant default under the Lease, Guarantor may apply to its own account any payments made to it on account of any indebtedness of Tenant to Guarantor.

5. Primary Obligation. This Guaranty is a primary obligation of Guarantor. If any provision of the Lease is found to be irregular, unenforceable or invalid, it shall not impair, release or be a defense to this Guaranty. Landlord may proceed against Guarantor hereunder without first proceeding against or exhausting its rights and remedies against Tenant or any other guarantor.

6. Termination. This Guaranty shall terminate and be of no further force or effect at such time as (i) Tenant has completely satisfied all of Tenant's obligations under the Lease; or (ii) Landlord has released Tenant in writing from Tenant's obligations under the Lease.

7. Agent for Service of Process. Guarantor hereby consents to the jurisdiction of the Superior Court of Middlesex County, Massachusetts, in any action, suit or proceeding which Landlord may at any time wish to file in connection with this Guaranty. Guarantor hereby agrees that any action, suit or proceeding to enforce this Guaranty shall be brought in any State or Federal Court in the Commonwealth of Massachusetts and hereby waives any objection which Guarantor may have to said venue; provided, however, that the provisions of this Section shall not be deemed to preclude Landlord from filing any such action, suit or proceeding in any other appropriate forum.

8. Enforcement of Judgment. Guarantor hereby consents to the enforcement of any judgment obtained by Landlord with respect to this Guaranty in the Commonwealth of Massachusetts or any other state or country in which Guarantor does business or maintains assets.

9. Guaranty of Payment, not of Collection. Insofar as the payment by Tenant of any sums of money to Landlord is involved, this Guaranty is a Guaranty of payment and not of collection, and shall remain in full force and effect until terminated pursuant to the terms hereof.

10. Net Worth.

a. **Covenant to Maintain Minimum Net Worth.** Guarantor acknowledges receipt of advice from Landlord to the effect that Landlord would not have executed and delivered the Lease to Tenant without (i) Guarantor's execution and delivery to Landlord of this Guaranty, and (ii) Guarantor maintaining a tangible net worth of not less than \$[TBD] (the "**Minimum Net Worth**") at all times while this Guaranty is in effect. Guarantor agrees that Guarantor shall not, at any time while this Guaranty is in effect, permit its tangible net worth, determined in accordance with sound accounting principles and practices consistently applied, to be less than the Minimum Net Worth. For purposes hereof "**tangible net worth**" shall mean the excess of total assets over total liabilities, in each case as determined in accordance with sound accounting principles and practices consistently applied, excluding, however, from the determination of total assets all assets which would be classified as intangible assets under sound accounting principles and practices consistently applied including goodwill,

licenses, patents, trademarks, trade names, copyrights, and franchises. [IF SUBSECTIONS b AND c ARE DELETED, ADD: It shall be deemed a material default by Guarantor if Guarantor fails to maintain a tangible net worth of not less than the Minimum Net Worth at all times while this Guaranty is in effect.]

b. Report of Guarantor's Financial Position. Within thirty (30) days after the end of each fiscal quarter, Guarantor shall deliver to Landlord (i) Guarantor's most recent audited financial statement, and (ii) a balance sheet of Guarantor as of a date not more than thirty (30) days prior to the date of such delivery, which balance sheet shall be certified by Guarantor's president or chief financial officer to be a fair and accurate presentation of the financial position of Guarantor as of the date of such balance sheet. In addition, on the first of January of each year while this Guaranty is in effect, Guarantor shall deliver to Landlord current bank references for Guarantor and a Dun & Bradstreet report ("D&B report") on Guarantor, if available.

c. Failure to Provide Report or Inadequate Net Worth. If Guarantor shall fail to deliver said audited financial statement and balance sheet to Landlord within the aforesaid time period or fails to deliver the annual bank references and D&B report and either of such failures shall continue for ten (10) days after delivery of notice from Landlord, or if said audited financial statement or balance sheet shall disclose that Guarantor's tangible net worth does not equal or exceed the Minimum Net Worth as of the date of such audited financial statement or balance sheet, then either of the foregoing shall constitute a default by Guarantor of a material obligation under this Guaranty.

11. Bankruptcy. It shall be deemed a material default by Guarantor hereunder if any proceeding shall be instituted by or against Guarantor pursuant to any of the provisions of (a) any Act of Congress or State law relating to bankruptcy, reorganizations, arrangements, compositions or other relief from creditors, or (b) any law in the jurisdiction in Guarantor is organized relating to bankruptcy, reorganizations, arrangements, or other such compositions to obtain relief from creditors, (except for the purposes of bona fide reorganization or reconstruction, by way of voluntary arrangement, scheme of arrangement or otherwise, and in such manner that the company resulting therefrom effectively agrees to be bound by or assume the obligations imposed under this Agreement). Guarantor shall give Landlord written notice regarding any such proceeding within two (2) business days after Guarantor first receives notice of the institution thereof.

12. Notices. Any notice, demand or other communication which either party may desire or may be required to give to the other party shall be in writing, and shall be deemed given if delivered via hand delivery or by nationally recognized overnight courier (in either case with evidence of receipt of refusal thereof) addressed to the intended recipient at its address set forth below, or to such other address as such intended recipient may have designated by notice furnished in accordance herewith:

If to Landlord: _____

Attention: _____

With a copy to: _____

Attention: _____

If to Guarantor: _____

with a copy to: _____

Except as otherwise specifically required herein, notice of the exercise of any right, option or power granted to Landlord by this Guaranty is not required to be given.

13. Governing Law. For any matter relating to procedural or substantive law, this Guaranty shall be construed and enforced according to the internal laws of the Commonwealth of Massachusetts without reference to conflict of laws.

14. Interpretation. If any provision of this Guaranty, or any paragraph, sentence, clause, phrase, or word, or the application thereof, is held invalid in any circumstance, the validity of the remainder of this Guaranty shall be construed as if such invalid part were never included herein. The headings of sections and paragraphs in this Guaranty are for convenience only and shall not be construed in any way to limit or define the content, scope, or intent of the provisions hereof. As used in this Guaranty, the singular includes the plural, and masculine, feminine and neuter pronouns are fully interchangeable, where the context so required.

15. Successors and Assigns. This Guaranty shall be binding upon, and the term "Guarantor" shall include, the successors, assigns, legal representatives and other transferees of Guarantor. This Guaranty shall also inure to the benefit of Landlord's successors, assigns, and legal representatives.

16. Joint and Several Liability. The liability of Guarantor is coextensive with that of Tenant and also joint and several, and action may be brought against Guarantor and carried to final judgment either with or without making Tenant a party thereto.

17. Due Authorization. Guarantor represents and warrants that this Guaranty has been duly authorized by all necessary corporate action on Guarantor's part, has been duly executed and delivered by a duly authorized officer, and constitutes Guarantor's valid and legally binding agreement in accordance with its terms.

18. Ratification of Guaranty. Upon reasonable request by Landlord, Guarantor shall execute a ratification of this Guaranty in form and substance reasonably satisfactory to Landlord and Guarantor acknowledging that this Guaranty is in full force and effect, including without limitation following any Transfer (as defined in the Lease) of the Lease or the execution or Transfer of any Related Lease.

19. WAIVER OF RIGHT TO JURY TRIAL. GUARANTOR HEREBY WAIVES THE RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING THAT MAY HEREAFTER BE INSTITUTED BY LANDLORD AGAINST GUARANTOR WITH RESPECT TO THIS GUARANTY.

IN WITNESS WHEREOF, Guarantor executes this Guaranty as an instrument under seal as of the day and year first written above.

< >

By: _____
Name: _____
Title: _____

GUARANTY

THIS GUARANTY ("Guaranty") is made as of this _____ day of _____, 20____, by _____, a _____ ("Guarantor") to and for the benefit of _____, a _____, with offices at _____, with offices at _____ ("Landlord").

RECITALS

A. _____, a _____ ("Tenant"), and Landlord are parties to that certain Lease dated as of _____, 200____, as the same may be further amended from time to time (collectively, the "Lease") for that certain property at _____ [*improved with an <> building containing approximately <> square feet of space, and other improvements*] (the "Premises").

B. Guarantor, either directly or indirectly, owns 100% of the ownership interests in Tenant, and Guarantor shall derive material financial benefits from the Lease. *Add if applicable or similar recital*

C. In order to induce Landlord to enter into the Lease with Tenant, Guarantor has agreed to execute and deliver this Guaranty to Landlord.

NOW, THEREFORE, in consideration of the foregoing recitals, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Guarantor hereby agrees as follows:

1. **Guaranty.** Guarantor hereby guarantees the payment when due of Base Rent, and all other additional rent, interest and charges to be paid by Tenant under the Lease and the performance by Tenant of all of the terms, conditions, covenants and agreements of the Lease, and Guarantor promises to pay all Landlord's expenses, including reasonable attorneys' fees, incurred by Landlord in enforcing the obligations of Tenant under the Lease or the obligations of Guarantor under this Guaranty. All payments required to be made by Guarantor hereunder shall be paid to Owner in legal United States currency or tender at Landlord's address set forth below, or at such other address as Owner may specify from time to time. Notwithstanding any other provision in this Guaranty, (a) Guarantor may assert as a defense to any payment by the Guarantor hereunder, any defense that Tenant could assert against Landlord pursuant to the Lease (provided that Guarantor may not assert the bankruptcy, insolvency, lack of authority or power, dissolution, liquidation or any other similar debtor defense of Tenant or its successors or permitted assigns as such a defense); and (b) the obligations of Guarantor hereunder shall not be greater than the obligations of Tenant under the Lease, plus any obligation of Guarantor to pay the reasonable expenses incurred by Landlord in any successful enforcement of its rights under the Lease or this Guaranty.

2. **No Release or Discharge.** This Guaranty is irrevocable, absolute, present, continuing and unconditional, and the obligations of Guarantor shall not be released, impaired or affected by (a) any extensions of time, indulgences or modifications which Landlord may extend to Tenant in the performance of its obligations under the Lease; (b) any failure of Landlord to enforce any of the conditions of the Lease; (c) any assignment or other transfer of the Lease by Landlord; (d) any assignment or other transfer of the Lease by Tenant or the sublease of all or part of the Premises by Tenant to the purchaser of substantially all of Tenant's assets and not otherwise; (e) any amendments to or modifications of the Lease; (f) the release or discharge of Tenant in bankruptcy or other creditors' proceeding; or (g) any rejection or disclaimer of Tenant.

3. **Waiver.** Guarantor waives (a) notice of acceptance of this Guaranty; and (b) notice of any extensions of time for performance which Landlord may grant to Tenant and to any modifications or amendments to the Lease to which Landlord and Tenant, or their successors and assigns may agree. Prior to the institution of any claim or legal proceeding against Guarantor, Landlord agrees to give Guarantor written notice of any default by Tenant pursuant to the Lease and to allow Guarantor the same period of time within which to cure such default as provided to Tenant under the terms of the Lease with respect to such default. Landlord agrees to provide contemporaneous notice to Guarantor in the event of any notification of Landlord of an alleged default by Tenant which might give rise to an obligation of Guarantor hereunder.

4. Subordination. Any indebtedness of Tenant to Guarantor, whether now existing or hereafter created, is hereby subordinated to this Guaranty. Any such indebtedness of Tenant to Guarantor shall, upon written demand of Landlord, be collected and received by Guarantor in trust for Landlord and shall be paid over to Landlord on account of any Tenant default, without impairing or releasing the remaining obligations of Guarantor hereunder; provided, however, that if there is no existing Tenant default under the Lease, Guarantor may apply to its own account any payments made to it on account of any indebtedness of Tenant to Guarantor.

5. Primary Obligation. This Guaranty is a primary obligation of Guarantor. If any provision of the Lease is found to be irregular, unenforceable or invalid, it shall not impair, release or be a defense to this Guaranty. Landlord may proceed against Guarantor hereunder without first proceeding against or exhausting its rights and remedies against Tenant or any other guarantor.

6. Termination. This Guaranty shall terminate and be of no further force or effect at such time as (i) Tenant has completely satisfied all of Tenant's obligations under the Lease, (ii) Landlord has released Tenant from Tenant's obligations under the Lease; or (iii) Tenant has exercised its right to post a letter of credit in lieu of this Guaranty as provided in Section 14 hereof.

7. Agent for Service of Process; Venue. *[Add if Guarantor does not maintain an office in the U.S.:* Guarantor acknowledges that an affiliate of Guarantor, _____, maintains an office in the United States at _____.] Guarantor hereby submits to personal jurisdiction for the enforcement of this Guaranty in the _____ (**State in which the Premises are Located**). Guarantor waives any and all personal rights to object to such jurisdiction for the purposes of litigation filed to enforce this Guaranty. In the event such litigation is commenced at any time when Guarantor does not maintain an office in the United States, Guarantor agrees that service of process may be made, and personal jurisdiction over Guarantor obtained, by service of a copy of the summons, complaint and other pleadings required to commence such litigation upon its agent. Guarantor hereby designates its agent to be: **[CT Corporation System, with an address of 1633 Broadway, New York, New York 10019.]** Guarantor agrees that this appointment of an agent for service of process is made for the mutual benefit of Guarantor and Landlord and may not be revoked without Landlord's prior written consent.

Guarantor hereby consents to the jurisdiction of either the Superior Court of _____ County, _____, in any action, suit or proceeding which Landlord may at any time wish to file in connection with this Guaranty. Guarantor hereby agrees that any action, suit or proceeding to enforce this Guaranty shall be brought in any State or Federal Court in the State of _____ and hereby waives any objection which Guarantor may have to said venue; provided, however, that the provisions of this Section shall not be deemed to preclude Landlord from filing any such action, suit or proceeding in any other appropriate forum.

8. Enforcement of Judgment. Guarantor hereby consents to the enforcement of any judgment obtained by Landlord with respect to this Guaranty in the State of _____ or any other state or country in which Guarantor does business or maintains assets.

9. Notices. Any notice, demand or other communication which either party may desire or may be required to give to the other party shall be in writing, and shall be deemed given if and when personally delivered, on the first business day after being deposited with Federal Express or other nationally recognized overnight mail carrier, or on the second business day after being deposited in the United States registered or certified mail, postage prepaid, addressed to the intended recipient at its address set forth below, or to such other address as such intended recipient may have designated by notice furnished in accordance herewith:

If to Landlord: <>

with a copy to: <>

If to Guarantor: <>

with a copy to: <>

with a copy to: <>

Except as otherwise specifically required herein, notice of the exercise of any right, option or power granted to Landlord by this Guaranty is not required to be given.

10. Governing Law. For any matter relating to procedural or substantive law, this Guaranty shall be construed and enforced according to the internal laws of the Commonwealth/State of _____ without reference to conflict of laws.

11. Interpretation. If any provision of this Guaranty, or any paragraph, sentence, clause, phrase, or word, or the application thereof, is held invalid in any circumstance, the validity of the remainder of this Guaranty shall be construed as if such invalid part were never included herein. The headings of sections and paragraphs in this Guaranty are for convenience only and shall not be construed in any way to limit or define the content, scope, or intent of the provisions hereof. As used in this Guaranty, the singular includes the plural, and masculine, feminine and neuter pronouns are fully interchangeable, where the context so required.

12. Successors and Assigns. This Guaranty shall be binding upon, and the term "Guarantor" shall include, the successors, assigns, and other transferees of Guarantor. This Guaranty shall also inure to the benefit of Landlord's successors, assigns, and legal representatives.

13. Joint and Several Liability. If more than one person or entity guarantees any or all obligations of Tenant under the Lease, Guarantor's liability for such obligations shall be joint and several with all other guarantors, regardless of the date upon which such other guaranties are executed.

14. Authority. Guarantor hereby represents and warrants that this Guaranty has been duly authorized, executed and delivered by and on its behalf and constitutes Guarantor's valid and binding agreement in accordance with the terms hereof.

15. Modifications in Writing. No modification, consent or waiver of any provision of this Guaranty, nor consent to any departure by Guarantor therefrom, shall be effective unless the same shall be in writing and signed by Landlord, and then shall be effective only in the specific instance and for the purpose for which given.

16. Cumulative Remedies. All rights and remedies of Landlord hereunder are cumulative of each other and of every other right or remedy which Landlord may otherwise have at law or in equity or under any other contract or document, and the exercise of one or more rights or remedies shall not prejudice or impair the concurrent or subsequent exercise of other rights or remedies. Any one or more successive and/or concurrent actions may be brought hereon against Guarantor either in the same action, if any, brought against Tenant or in separate actions.

17. Legal Fees and Expenses. If a lawsuit is instituted in connection with this Guaranty, then the losing party agrees to pay to the prevailing party all expenses incurred in connection with such lawsuit (including, but not limited to, reasonable attorneys' fees and costs of court).

18. WAIVER OF TRIAL BY JURY. LANDLORD AND GUARANTOR EACH HEREBY WAIVES TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER AGAINST THE OTHER ON ANY MATTER WHATSOEVER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS GUARANTY, INCLUDING ANY EMERGENCY AND OTHER STATUTORY REMEDY WITH RESPECT THERETO.

19. Release of Guaranty. Notwithstanding anything to the contrary set forth herein, Guarantor shall be released from all of its obligations hereunder in the event Tenant provides Landlord with an irrevocable standby letter of credit (the "**Letter of Credit**") from Citibank, N.A. or another national financial institution reasonably satisfactory to the Landlord in an amount equal to 125% of the then remaining installments of Base Rent during the balance of the Term of the Lease (including any extensions thereof), which amount may be reduced over time as Base Rent is paid, which letter of credit is in form and content substantially similar to the form attached as **Schedule "LC"** and is otherwise reasonably satisfactory to the Landlord. The Letter of Credit shall have a term of at least 12 months and be automatically renewed (or a reasonably satisfactory replacement Letter of Credit from a financial institution reasonably satisfactory to Landlord shall be in place in accordance with the terms hereof) at least forty-five (45) days prior to expiration of each 12 month period for additional periods of 12 months each until the 30th day following expiration of the Term (as it may be extended). The Letter of Credit shall be held by Landlord as security for the guaranteed obligations. Unless the Letter of Credit has not been extended or replaced as herein required (in which case the entire face amount thereof shall be drawn, applied to

satisfy all then past due obligations, with the balance held as security for all remaining obligations), the Landlord shall make partial draws under the Letter of Credit from time to time as shall be necessary to satisfy any and all past due obligations. Notwithstanding the foregoing, Guarantor shall not have the right to substitute the Letter of Credit for the Guaranty prior to the date which is one (1) year following the Commencement Date.

20. Ratification of Guaranty. Upon reasonable request by Landlord, Guarantor shall execute a ratification of this Guaranty in form and substance reasonably satisfactory to Landlord and Guarantor that this Guaranty shall now secure the obligations of such sublessee or assignee.

[If Guaranty is limited in time or amount, add one of the following provisions in boldface type or all caps:

21. Limitation on Guarantor's Obligations. Notwithstanding anything else to the contrary contained herein, Guarantor's obligations under this Guaranty shall be limited to (i) the sum of the unamortized portion (i.e., amortized on a straight-line basis over a 10-year term) of the Tenant Allowance (as defined in the Lease) at the time of any Event of Default by Tenant under the Lease, and (ii) all of Landlord's reasonable expenses, including reasonable attorneys' fees, incurred by Landlord in enforcing the obligations of Guarantor under this Guaranty. **FURTHER IN NO EVENT SHALL GUARANTOR HAVE ANY LIABILITY UNDER THIS GUARANTY FROM AND AFTER _____.**

NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, PROVIDED TENANT IS NOT IN MONETARY DEFAULT OR MATERIAL NON-MONETARY DEFAULT UNDER THE LEASE AS OF THE LAST DAY OF THE FOURTH (4TH) FULL LEASE YEAR (AS DEFINED IN THE LEASE) OF THE TERM, GUARANTOR'S LIABILITY UNDER THIS GUARANTY SHALL BE RELEASED COMMENCING ON THE FIRST DAY OF THE FIFTH (5TH) LEASE YEAR ("RELEASE DATE") FOR OBLIGATIONS ACCRUING AFTER THE RELEASE DATE; PROVIDED GUARANTOR SHALL REMAIN LIABLE FOR ALL OBLIGATIONS, IF ANY, ACCRUING PRIOR TO THE RELEASE DATE.

This Guaranty shall only apply to obligations of Tenant under the Lease for the first four (4) Lease Years (as defined in the Lease) of the Lease, as well as any obligations of Tenant arising under Article 1.01 (s) of the Lease.]

IN WITNESS WHEREOF, Guarantor executes this Guaranty as an instrument under seal as of the day and year first written above.

Guarantor: <>

By: _____
Name: _____
Title: _____

ⁱ The Law of Guarantees: A Jurisdiction-by Jurisdiction Guide to U.S. and Canadian Law, Friedberg, et. al., (2013) p. 503