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Workshop 8

Enhance Your Credit: Lease Guaranties, Security Deposits and Other Performance Enhancements

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I. Introduction to Lease Guaranties, Security Deposits and Other Performance Enhancements

In today's retail climate, both landlords and tenants face a myriad of challenges with regard to lease performance. In addition to tenant defaults and bankruptcies, which have been on the rise for the past several years, there has also been an increase in landlord defaults, landlord bankruptcies and mortgage lender foreclosures. As a result, projects remain unfinished and tenant space build-outs have been left incomplete. Given the volatile financial climate of the retail industry, both landlords and tenants are seeking further guaranties of performance of the obligations under the lease. Landlords have several options available to them when attempting to ensure that tenants are performing their lease obligations such as paying rent and completing build-outs. These options include cash security deposits, third party lease guaranties, letters of credit, and construction bonds.

Some of these options are also available to tenants who are seeking assurances that the landlord will perform their obligations under the lease, specifically with respect to build-outs of the tenant's space and/or payment of the tenant's improvement allowance following such build-out. Tenants are requesting that landlords provide third party payment guaranties or letters of credit in an effort to secure these obligations. In addition, tenants may require that a landlord place construction funds and tenant improvement allowances in an escrow account in order to secure the landlord's obligations. Self-help rights are another point of negotiation for tenants who wish to secure the landlord's construction obligations under the lease. Tenants are now negotiating leases to include self-help build-out rights wherein the lease clearly states that the tenant may perform some or all of the landlord's obligations with respect to construction, at tenant's sole discretion, and that tenant shall have the right to offset the constructions costs and the amount of any unpaid landlord allowance from the rent due under the lease. However, while negotiating such provisions, it is important for the tenant to take into consideration the landlord's continuing responsibilities and to negotiate accordingly.

While we will not go in depth speaking about foreclosure in this workshop, it is worth mentioning that some savvy tenants have gone directly to the landlord's lender to negotiate non-disturbance agreements. These agreements seek to protect the tenant's rights with respect to landlord's construction and improvement allowance obligations by requiring that the lender honor those obligations and/ or the tenant's right to utilize self-help measures and to deduct the construction costs and the landlord improvement allowance from rent. In the event of a foreclosure, the non-disturbance agreement will ensure that the tenant is still entitled to the same protections they negotiated with the landlord and without the non-disturbance agreement; the lender may not be obligated to honor those provisions.

II. Lease Guaranties, Letters of Credit and Security Deposits

A. Guaranties

1. General Requirements

Guaranties provide assurances for performance of lease obligations for both landlords and tenants. Landlords sometimes require a creditworthy third party to execute a guaranty to secure the tenant's leasehold obligations. While it is fairly common for a landlord to require a lease guaranty to cover the tenant's obligations, tenants sometimes require that a third party execute a guaranty for specific landlord obligations under the lease such as landlord's construction obligations, or payment of the tenant improvement allowance.

The guarantor's creditworthiness should be thoroughly assessed. For example, if a guarantor is a corporation or business entity, the landlord should require evidence that all necessary corporate approvals (e.g., corporate resolution or members' consent) have been obtained to authorize the entity to execute the guaranty. The guaranty should also include a standard due authorization clause for additional protection.

While the requirements for a guaranty will vary from state to state, guaranties must generally be in writing and supported by consideration in order to comply with the statute of frauds. Failure to comply with the statute of frauds is a defense to the enforceability of the guaranty. For example, a guarantor may raise lack of consideration as a defense to the guaranty and since consideration is a requirement of the statute of frauds, the guaranty will not be enforceable. Most of the time, however, a guaranty will be executed at the same time as the lease. The execution of the lease will be sufficient to meet the requirement of consideration. There should be consideration if the guaranty is not executed contemporaneously with the lease, such as the landlord's agreement to forbear from exercising default remedies against the tenant or to temporarily reduce rent during the term of the guaranty.

In addition to the statute of frauds, counsel must also consider the effect of any fraudulent conveyance statutes in their state. For example, some fraudulent conveyance statutes provide that a transfer of assets or a contractual obligation made by a debtor is fraudulent and may be set aside by a creditor whose claim arose before the debtor made the transfer or before the obligation was incurred, if the debtor made the transfer or incurred the obligation without receiving reasonably equivalent value in exchange for the transfer or the obligation and the debtor/obligor was insolvent at the time, or was made insolvent as a result of the obligation or transfer. Therefore, even if state law does not require additional consideration if a guaranty is executed in conjunction with a lease, a creditor of the guarantor may utilize the state fraudulent conveyance statute in order invalidate a guaranty when the guarantor faces insolvency based on the basis that the guarantor did not receive reasonably equivalent value in consideration for executing the guaranty.

2. Type and Scope of Guaranty

i. Payment and Performance Guaranties

Guaranties may pertain to performance or payment obligations. A performance guaranty will be preferable to a landlord as it will ensure that the tenant is not only making payments due under the lease, but is fulfilling all of its covenants and obligations under the lease. A sample performance guaranty is attached hereto as Exhibit A and will be referenced within this section.

Guaranties may also make a distinction between a guaranty of payment and a guaranty of collection. Upon tenant's default in the payment of rent, a guaranty of payment will allow the landlord to pursue the guarantor along with the tenant while a guaranty of collection will require that the landlord exhaust all efforts to collect from the tenant prior to attempting enforce the guaranty. Counsel should be specific when drafting a guaranty of payment and expressly state that the landlord can enforce the guaranty immediately upon tenant's default and that the landlord is not obligated to exhaust its remedies against the tenant. Such a provision is included in paragraph 3 of the form of guaranty attached as Exhibit A.

Because there are several different types of guaranties, counsel drafting a guaranty should specifically set forth the obligations covered by the guaranty as well as to state that the guaranty is unconditional and irrevocable. While the laws governing guaranties vary from state to state, some states allow a guarantor to revoke the guaranty at any time with regard to future transactions, unless the guarantor waives the right to revocation.

ii. Guarantor Obligations and Caps on Liability

Counsel drafting a guaranty should always be explicit as to the obligations which are to be guaranteed. Landlords will typically want a guaranty to be drafted broadly in order to encompass all of the tenant's obligations and payments due under the lease. However, guaranties may also be drafted narrowly to only cover specific obligations as well. For example, a landlord may want a guaranty just covering the tenant's obligation to build out its premises and to pay for all construction costs. A guaranty in favor of the tenant may only cover the landlord's obligation to build out the tenant's premises and to pay the tenant's improvement allowance.

Obligations under a guaranty may be capped or limited in other ways. A guarantor may wish to limit their liability by capping the guaranty at a specific dollar amount or a fixed period of time if the tenant has not defaulted. Alternatively, the guaranty may provide for guarantor liability to "burn off" or reduce, over time if there is no event of default. The guaranty may also terminate if the tenant achieves a stated net worth, or if the tenant's sales reach a level which would increase tenant's creditworthiness. This provision could read as follows: "notwithstanding anything to the contrary contained in this guaranty, this guaranty shall automatically terminate and be null and void upon the date on which tenant delivers to landlord financial statements that are separate from those of guarantor and such financial statements indicate that tenant's net worth exceeds ten million dollars ($10,000,000)."

If a guaranty includes limitations on liability or termination provisions, these limitations must be carefully drafted so as not to have unintended consequences, particularly from the standpoint of the landlord. For example, if the guarantor's obligation is limited to twelve (12) months of minimum rent payable under the lease (e.g., $120,000), make sure that the guaranty cannot be interpreted that the guaranty terminates if the tenant pays $120,000 of minimum rent. Rather, the guaranty should state "guarantor's liability under this guaranty shall not exceed the sum of $120,000." If the amount of the guaranty is capped, the guaranty should state that the guarantor's liability is not affected by the landlord's collection of any amounts from the tenant or application of the tenant's security deposit, unless the landlord receives full payment of the amounts owed by the tenant. The

guaranty should also state that attorneys' fees and the costs of collection on the lease or the guaranty are not included within the cap, and that the guarantor remains liable for such attorneys' fees and expenses.

3. Term of Guaranty

There are several ways in which a guarantor may seek to limit the liability imposed on them by the guaranty. One way in which the guarantor may limit liability under the guaranty is to limit the time period during which the guaranty shall remain in effect, this is called the "guaranty period". Counsel drafting the guaranty on the landlord's behalf should make sure that the guaranty states that guarantor's obligations under the guaranty shall terminate at the end of the guaranty period, only as to obligations accruing or arising after the end of the guaranty period and state that the guaranty should only terminate if tenant is not then in default under the lease and if tenant has not been in default at any time during the guaranty period. The guaranty should make clear that the termination does not apply to any tenant default occurring during the guaranty period or to any event occurring during the guaranty period which, with the giving of notice or the passage of time, would constitute a tenant default under the lease. In addition, the landlord does not want a termination provision construed so as to cut off the landlord's ability to pursue the guarantor for accelerated or future rent arising from a tenant default prior to the end of the guaranty period, even though the accelerated rent covers future rent for a portion of the lease term after the guaranty period. Nor does the landlord want to give up the right to pursue the guarantor after the guaranty period for a tenant breach that occurred before the end of the guaranty period, particularly if the landlord was unaware of the breach or had not yet asserted a claim against the tenant prior to the end of the guaranty period.

Another way in which a guarantor may seek to limit its guaranty would be to terminate the guaranty based upon certain material changes to the lease. Examples include requiring that its guaranty not apply to any extension or renewal of the lease, if the lease is assigned or the leased premises are sublet, or by limiting its guaranty to the original landlord only. A sample provision is included in paragraph 1 of the form of guaranty attached as Exhibit A. If the landlord transfers its interest in the lease, the guaranty terminates (at least as to tenant obligations arising after the date the lease is transferred by landlord).

Guarantors also limit liability by including "good guy" guarantor provisions. Under a typical good guy guaranty, the guarantor will be released from liability when the tenant surrenders possession of the leased premises back to the landlord. Therefore, the guarantor's liability will be limited only to the period of time that the tenant remains in possession of the leased premises. If the tenant defaults, but the tenant promptly surrenders the premises and does not file bankruptcy or otherwise interfere with the landlord's ability to retake the premises, the guarantor will only be obligated for the rent up to the date that the tenant surrenders possession and is not obligated for future rent after the date the tenant vacates the premises, although the landlord retains its right to pursue the tenant for future rent and other damages due to the tenant's default.

4. Defenses

i. Waivers

While state laws may vary significantly, many states give guarantors and other sureties several defenses to the enforcement of the guaranteed obligations. Therefore, it is important to include in the guaranty the guarantor's waiver of these various defenses. Counsel will have to determine, based on the applicable state law, which defenses are waivable and if there are any specific requirements for a waiver to be enforceable. It is typical for a guaranty to include the guarantor's waiver of (a) any right to require the landlord to pursue any remedy against the tenant or any other person before proceeding against the guarantor or to exhaust any security for the guaranty (this waiver is particularly important as some state laws require that the creditor first proceed against the principal debtor or pursue remedies to reduce the obligations of the guarantor or to proceed against any collateral provided by the principal debtor before seeking to enforce the guaranty); (b) any right or defense based on the release or discharge of the tenant from its obligations under the lease in any bankruptcy or other similar proceeding or any rejection of the lease in a bankruptcy proceeding; (c) any right or defense arising due to the death, incapacity or disability or lack of authority of the tenant or any other person; (d) any right or defense due to tenant's assignment or transfer of the lease or sublease of all or any part of the premises (see below); (e) the benefit of any statute of limitations affecting the liability of the guarantor under the guaranty or the enforcement of the guaranty; (f) any defenses based on the lack of any demands, presentments or notices; (g) any obligation on the part of the landlord to disclose facts about the tenant that materially increase the risk to the guarantor (some state laws require that a creditor that accepts a continuing guaranty owes a duty to the guarantor to disclose facts to the guarantor if the creditor believes that the facts materially increase the risk to the

guarantor); (h) the benefits of any security held by landlord; and (i) any defenses due to amendments to the lease made after the date of the guaranty without guarantor's consent (see below).

ii. Lease Amendments Without Guarantor Consent

It is important that counsel drafting the guaranty specifically address lease amendments, while state laws vary as to effect of a lease amendment on a guaranty, in some jurisdictions, the guaranty may be rendered unenforceable if a lease is amended after execution without the guarantor's consent.

In some states the guaranty may be invalidated by any amendment to the lease; in some states the guaranty will only be invalidated by a material modification to the lease; and in some other states the guaranty will not be invalidated but the guarantor's obligation will be limited to the original obligation, meaning the scope of the guarantor's obligations may not be expanded absent an amendment to the guaranty rather than the lease. Accordingly, the guaranty should expressly state that the guarantor's obligations will not be altered or released by any modification of the lease, including any change in the size of the premises, and that the guaranty will apply to any extension or renewal of the lease and any holdover term following the end of the term of the lease. The landlord will also want the guaranty to expressly provide that the following actions by the landlord can be done without notice to the guarantor and without terminating or affecting the guarantor's obligations (i) the landlord's waiver of any terms or conditions of the lease, (ii) the landlord's consent to any matter in the lease, (iii) the landlord's grant of extensions of time to the tenant or the landlord's delay or failure to enforce the lease, or (iv) the landlord's settlement or compromise of claims of amounts due under the lease. The landlord needs the ability to compromise claims with the tenant or enter into forbearance and lease workout agreements without releasing the guarantor. However, absent a reservation of rights against the guarantor and/or obtaining the guarantor's consent to the settlement or forbearance agreement, the guarantor's liability may be released. In practice, if the landlord is contemplating entering into a material modification of the lease that arguably would increase the risk to or the obligations of the guarantor under the lease, such as consenting to an expansion of the premises or an increase in rent in consideration of some other concession granted by the landlord to the tenant, the landlord may seek the consent and agreement of the guarantor to such a material modification of the lease. (Of course, the risk to the landlord in seeking such consent or approval is that the guarantor will refuse to consent, in which event the landlord will have to rely on the waiver language in the guaranty or decide not to enter into the amendment.)

iii. Assignment and Sublease

Whether or not an assignment or sublease will be considered a modification of the lease which will discharge the guarantor depends on the language of the lease. Courts have generally held that if the lease allows the tenant to assign or sublet the premises, regardless of landlord consent, then an assignment or subletting pursuant to the terms of the lease will not be deemed a modification of the lease that would discharge the guarantor. This is because the guarantor presumably read the lease and had notice that an assignment or sublease may be possible under the lease. Conversely, if the lease prohibits an assignment or sublease but the landlord gives consent to the assignment or sublease, some courts have held that the landlord's consent constituted a modification of the lease which effectively releases the guarantor.

The guarantor should acknowledge and agree that the guaranty inures to the benefit of the parties and their successors and assigns. This provision will permit the landlord to assign the lease and the guaranty and the assignee or other successor to landlord will retain the benefits of the guaranty.

iv. Waiver of Subrogation and Subordination

A properly drafted guaranty should require the guarantor to waive any subrogation rights it has against the tenant until all of tenant's obligations under the lease are fully performed. The guaranty should also provide that the guarantor subordinates any liability or indebtedness of the tenant in favor of the guarantor to tenant's obligations to landlord under the lease. The landlord requires this waiver of subrogation and subordination from the guarantor so that, until the landlord is paid in full, the landlord can obtain a judgment against the tenant before the guarantor does so.

v. Tenant Bankruptcy

Landlords must also be mindful when it comes to past or present tenants filing bankruptcy. Certain provisions under the Bankruptcy Code allow for a "clawback" of previously-made rental payments. Thus, even if a

tenant pays its obligations in full, but subsequently files bankruptcy, the landlord may be forced by the bankruptcy court to return those rent payments.

If the landlord must return the voided payments to the tenant, the guarantor may argue that the tenant's payment of the rent obligations terminated the guaranty and that the guarantor's obligations were not automatically revived just because the landlord had to return those payments. To minimize this risk, the guaranty should expressly state that the guaranty will revive if the landlord is required to return money to the tenant. Such clause could be drafted as follows:

> Should landlord be obligated by any bankruptcy or other law to repay to tenant or to guarantor or to any trustee, receiver of other representative of either of them, any amounts previously paid, this guaranty shall be reinstated in the amount of such repayments. Landlord shall not be required to litigate or otherwise dispute its obligations to make such payments if it in good faith believes that such obligation exists.

B. Security Deposits.

1. General

The simplest and most typical way for a landlord to secure a tenant's obligations under a lease is to collect a cash security deposit at lease execution. Cash security deposits held by the landlord are the most easily accessible collateral for a landlord to reach to cover damages in the event of a tenant default. Nonetheless, landlords may have greater issues realizing and retaining cash security deposits, particularly in the event of a tenant bankruptcy, than landlords expect.

2. Size and Duration of Security Deposits

The two main factors to consider with regard to security deposits are its size and duration. Firstly, landlords should evaluate the assets of the tenant versus the obligations under the lease, as well as the landlord's costs and the time it will take to re-let the premises. Often, letters of intent will be vague with respect to the amount of a security deposit, providing terms such as "three months rent". The lease drafter will need to clarify from the person who drafted the letter of intent, whether this refers to the rent at the beginning or end of the term and whether this term covers the additional rent obligations of the tenant or just the net rent. In determining the size of the security deposit, the landlord should be aware of the limitations on the landlord's ability to retain such security deposit in the event of a tenant bankruptcy.

Secondly, landlords should consider whether they are willing to allow the security deposit to burn off in whole or in part as either the tenant proves itself to be a tenant in good standing with a successful business or as the remaining obligations outstanding under the lease diminish as the lease term gets closer to its expiration. In considering whether to grant such a return of part or all of the security deposit, the landlord should consider the terms under which the landlord would be willing to return part or all of the deposit. The deposit should be offset from rent so that the landlord does not run any risk of returning the deposit without rent being paid. The landlord should only agree to return the deposit provided that the tenant has been in good standing throughout the term, or, if negotiated, in good standing at the time the security deposit is to be returned. A landlord does not want to end up in the position of having to return a deposit to a tenant who has been a habitual late payer. In addition, prior to agreeing to release all or a portion of the security deposit, the landlord may wish to require the tenant to provide financials showing a certain net worth and/or a certain level of sales from the store showing that the business is generating enough income to sustain the rent payments. Even if the tenant does not get the landlord to release the security deposit during the initial term, the landlord may be willing to release a security deposit during any option period.

3. Lease Provisions Governing Security Deposits

Counsel drafting the security deposit provision in the lease should pay close attention to the particular state law issues governing security deposits in the jurisdiction where the shopping center is located. Many states have limitations on the uses to which a security deposit may be put. Some states allow security deposits to secure all of the tenant's obligations under the lease, but others only allow security deposits to secure "rent" obligations. In the latter states, the landlord should include all obligations, including but not limited to, net rent, common area expenses, taxes, indemnities, repairs, attorney's fees and the like in the definition of rent obligations under the lease.

Many states require that security deposits be held in a separate, interest bearing account and that the interest be provided to the tenant, although these laws are more likely to apply to residential than commercial leases. Even if state law does not require this segregation, particularly in cases of large cash security deposits, the tenant may insist that the landlord do so. A tenant with a large security deposit may want the landlord to so segregate the security deposit both so that the interest will accrue to the tenant, but also to try to protect the security deposit against claims of the landlord's creditors. It is also common that a lender would impose the same requirement on the landlord and it would be simplest to establish separate accounts at the creation of the security deposit so as to not cause any delays in the financing process.

The landlord should make sure that its lease form is clear about the circumstances and timing of when a landlord may apply a security deposit against tenant obligations under the lease, and if the landlord intends to so apply the security deposit, the landlord must carefully follow the terms of the lease in doing so.

Some states also have requirements about how and when the landlord must return the security deposit. Some states require that the landlord return the security deposit within a certain period of time following the end of the lease term or incur penalties. In addition, the lease should contain terms regarding whether or not a successor to the landlord is responsible to return the security deposit to the tenant at the end of the term. State law may govern this obligation as well as the terms of the lease. Further, both state law and contract will govern whether a foreclosing lender is responsible to return a security deposit at the end of the term. If a security deposit is sizable, the tenant will want to negotiate an agreement with the landlord's lender as to where the security deposit is held and what obligation the lender has to return the security deposit at the end of the term if the lender becomes the landlord. A typical subordination, non-disturbance and attornment agreement would provide that a lender would not be liable for the return of the security deposit unless such deposit has actually be delivered to the lender.

4. Creditor's Rights

In the event that the tenant files for bankruptcy, the landlord should be aware of its rights with regard to retaining the security deposit to make the landlord whole for its losses. If a tenant files bankruptcy and rejects the lease, the landlord's claim for damages is limited to the greater of one year of rent or 15% of the unaccelerated rent, not to exceed three years' rent (Bankruptcy Code Section 502(b)(6)). While the cash security deposit is held by the landlord, it is considered an asset of the tenant's bankruptcy estate. Thus, the fact that a landlord may have obtained a cash security deposit in excess of this cap does not mean that the landlord has a right to greater damages than bankruptcy allows. In this respect, a letter of credit, as discussed below, would be advantageous to a security deposit.

If a landlord holds a security deposit of a tenant in default which the landlord determines may be a risk to file bankruptcy, the landlord should consider whether to offset the security deposit against the amounts owed, although such an offset can risk the claim of a preference and may be subject to a clawback, if the tenant does file bankruptcy soon thereafter.

C. Letter of Credit as Security for Lease Obligations

1. General

A letter of credit is a commitment from a bank or other financial institution (the "issuer") to pay a beneficiary, e.g. the landlord, for the account of the applicant (e.g. the tenant) to pay the amount of the letter of credit to the beneficiary upon the beneficiary's draw on the letter of credit. There are two basic types of letter of credit, the standby letter of credit and the commercial letter of credit. A commercial letter of credit is generally used in sales transactions, specifically international transactions, and is intended to be drawn upon, e.g., the letter of credit will be drawn against when the seller has delivered goods to the buyer and the seller delivers to the issuing bank evidence of the seller's delivery thereof. Conversely, there is no general intent for a standby letter of credit to be drawn upon and is intended to be used as a security for the applicant's obligation to the beneficiary.

Given that letters of credit are frequently used in transactions with foreign parties, the International Chamber of Commerce has developed two sets of guidelines to use as governing law. Standby letters of credit, as discussed herein, are typically governed by the International Standby Practices (the "ISP 98"). These are frequently used in the leases and guaranties as they require a triggering event, such as an event of default, before becoming payable. Conversely, commercial letters of credit are governed by the Uniform Customs and Practices for Documentary Credits (the "UCP 600") and are most commonly used for trans-oceanic shipments of goods but can also be used in real estate purchase and sale agreements, especially those involving foreign

purchasers. It is also prudent to include the UCC laws of a chosen state to govern all matters not addressed in either the UCP 600 or ISP 98. While letters of credit are governed by the uniform commercial code, the parties can choose to adopt the ISP 98 or UCP 600 as governing.

2. Lease Provisions Concerning Letters of Credit

In addition to the letter of credit itself, the lease will include specific provisions governing the letter of credit. These lease provisions typically include the following:

(a) the letter of credit shall be delivered by tenant to landlord as collateral for the performance of all tenant's obligations under the lease and for all rent and other damages that the landlord may incur as a result of tenant's breach of its lease obligations;

(b) the letter of credit shall be a standby unconditional, irrevocable and transferrable letter of credit;

(c) the amount of the letter of credit, e.g., $1,000,000, should be specified and the letter of credit shall name the landlord as the beneficiary;

(d) the issuer of the letter of credit shall be a financial institution acceptable to the landlord in its sole discretion;

(e) the landlord may wish to specify that the offices where the letter of credit can be drawn must be located in a specific city (convenient to the landlord);

(f) the letter of credit shall not be mortgaged, assigned or encumbered by the tenant;

(g) the tenant shall cause the letter of credit to be continuously maintained in effect through a specified date, e.g., the date which is ninety (90) days after the expiration of the term of the lease; and

(h) a letter of credit is typically issued for a one-year term. Therefore, the lease should require the tenant to renew the letter of credit annually through the specified date beyond the lease expiration. In addition, if the landlord receives a notice of termination or non-renewal from the issuer, the tenant should be required to deliver a new letter of credit or certificate of renewal before the expiration date of the letter of credit.

The lease provisions should also specify when the landlord has the right to draw on the letter of credit. From the landlord's standpoint, the landlord should have the right to draw on the letter of credit, in whole or in part, at any time and from time to time upon the occurrence of specified events, e.g., if the tenant fails to perform any monetary obligation under the lease when due; or if the tenant fails to deliver a new letter of credit to landlord at least thirty (30) days before the expiration date of the letter of credit or after landlord's receipt of a notice from the issuer that the letter of credit will not be renewed; or if tenant become insolvent or files bankruptcy; or if tenant fails to perform any other covenants under the lease.

The lease should provide that proceeds from the letter of credit may be applied by the landlord against the payment of any rent or other sums due by tenant under the lease that are not paid when due and to also pay all damages landlord incurs or will incur as a result of any default by tenant under the lease. The lease may provide that any unused proceeds will be the property of landlord (which do not need to be segregated from landlord's other assets) and may be applied as security for the performance of tenant's obligations under the lease. (Note, however, this provision could be construed by a court as transforming unapplied letter of credit proceeds into a cash security deposit and, therefore, subject to statutory cap on landlord's damage claims against a bankrupt tenant for breach of a lease, under Bankruptcy Code Section 502(b)(6). Because of this risk, it may be preferable to permit landlord to make partial and multiple draws on the letter of credit so the landlord draws only the amount of the specific default. That way there will not be unapplied letter of credit proceeds held by landlord that could be treated as a cash security deposit.). The lease should also provide for restoration or replenishment of the letter of credit if the landlord partially draws on the letter of credit.

The lease should provide that landlord may, without notice to the tenant or without tenant's consent, transfer all or any part of its interest in the letter of credit to any other person, including landlord's lender and any purchaser of the property in which the leased premises are located.

If, at the time of lease execution, the issuing bank has been identified and the form of the letter of credit has been agreed to by the issuing bank, landlord and tenant, the form of the letter of credit can be attached as an exhibit to the lease.

3. Letter of Credit Provisions

The form and wording of the letter of credit itself should be carefully negotiated by the landlord, as the beneficiary. The landlord wants the conditions on the draw to be simple and to not require any additional documentation, precise wording or evidence of the occurrence of an event of default. The beneficiary does not want to be required to present a site draft in order to draw upon the letter of credit. The letter of credit should only require the beneficiary to submit a demand which identifies the letter of credit, includes the date of the draw demand, the amount of the draw, and the reason for the draw (e.g., a default by applicant has occurred under the lease) and should include a statement similar to the below:

> "I, *name and title*, hereby certify that I am authorized to execute this statement in my capacity as *title* of *Beneficiary*, and I further certify that this Beneficiary is authorized to draw on the enclosed Letter of Credit No. *XX* in accordance with the terms and conditions of the *name of underlying document* between *Applicant* and *Beneficiary* dated *xx/xx/xxxx*, pursuant to an *event of default* by *Applicant* has occurred as of the date hereof."

The demand should identify to whom the draw proceeds should be wired and the account information. The letter of credit should not require that the draw to be made by a specific, named individual, but rather that the draw may be submitted by any purported officer or representative of the beneficiary. The letter of credit should also state when the amount of the draw must be paid by the issuer, e.g., two business days after receipt of the draw request.

The beneficiary should not be required to present the original, authentic letter of credit, in case the original has been lost or destroyed. Court cases have held that a copy of a letter of credit is not allowed as a substitute for the original. Absent an agreement, the issuer does not have an obligation to issue another original. Accordingly, if the issuer requires that the beneficiary present the original letter of credit at the time it submits the draw request, the letter of credit should provide that if the original letter of credit is lost or destroyed, the issuer will replace the letter of credit upon receipt of an affidavit (that the letter of credit has been lost or destroyed) and an indemnity from the beneficiary.

4. Bankruptcy Issues

Given that the letter of credit is an agreement between the beneficiary and issuing bank, the majority of courts have held that the letter of credit is not a part of the bankruptcy estate. This is referred to as the "independence principle" and would permit a landlord to make draws as permitted by the lease even in the event of a tenant bankruptcy. Conversely, a security deposit would be considered a secured claim in a bankruptcy proceeding, and would be subject to the automatic stay as an asset of the bankruptcy estate. The landlord in this instance would be required to submit a proof of claim against the estate, which would be subject to a statutory cap. However, courts are split on the treatment of draws on the letter of credit as a credit against the cap, which would arise in the event the amount of the landlord's damages exceed the amount available in the letter of credit. The majority opinion is that any amounts drawn on the letter of credit will be deducted from the statutory cap, thereby reducing the available claim the landlord could make against the bankruptcy estate for amounts in excess of the letter of credit. However, a decision from the 5th Circuit (In Re Stonebridge Technologies, Inc., 430 F.3d 260), has held that the draw should not be counted against the cap, or be subject to the cap, specifically in the case where the landlord's claim against the estate has not been filed. Therefore, if the amount available through the letter of credit exceeds the capped amount the landlord would be available to receive from the bankruptcy estate, then the landlord may make such draws and not be subject to the statutory cap. These factors, in addition to the creditworthiness of a prospective tenant should be considered when determining whether to use a letter of credit and the amount of the letter of credit.

Given the increase in landlord bankruptcies, from the tenant's perspective, it may be preferable for the tenant to provide a letter of credit to the landlord as a security deposit instead of delivering a cash security

deposit. If the tenant provides the landlord with a cash security deposit, unless the landlord holds the cash in a trust for tenant in a separate account, rather than comingling the cash security deposit with the landlord's general funds, if the landlord files bankruptcy, the tenant may not automatically recover its security deposit. Rather, the tenant may only have a general unsecured claim in the landlord's bankruptcy case. In contrast, if the tenant has provided a letter of credit and the landlord only has the right to draw on the letter of credit if the tenant defaults under the lease, the landlord (or the bankruptcy trustee) has no right to draw on the letter of credit unless tenant defaults. If there is no tenant default and no draw, the letter of credit will eventually expire by its terms.

III. Construction Bonds, Escrow Accounts and Other Techniques to Secure Performance of Construction Obligations

A. Introduction –Landlord and Tenant Concerns

At the outset of the lease term, both the landlord and the tenant face significant risks during the initial construction period. In many cases, prior to the tenant taking possession, the space is completely remodeled to fit the specific tenant's needs. This remodel typically involves a large up-front capital investment prior to any income stream for either the landlord (rents) or the tenant (sales) begins.

Historically, security for construction obligations has been a concern for the landlord to ensure that the new tenant had both the means and the intent to make a large capital investment at the beginning of the lease term. These obligations could be secured by construction bonds, escrow accounts or simply by agreeing to pay allowances following the tenant's full performance of its construction obligations rather than performing work itself prior to the tenant beginning its build out.

In today's post-recession financial climate, where regulations on the lending industry are much more stringent, one party may have a better ability to obtain capital than the other. The party having more ready access to capital will have an advantage over the other party in making the deal. Well capitalized landlords are paying for full tenant build outs or doing turn-key deals in order to lure tenants to their properties over others or for higher rent payments, and well capitalized tenants, can make very favorable rent deals if they are willing to enter a property of a landlord who is not well capitalized and build the space out themselves.

Nonetheless, both landlords and tenants are being more cautious with regard to the other party's ability to meet these obligations and are interested in securing these construction obligations through escrow accounts, construction bonds, guaranties and letters of credit. Letters of credit and guaranties have been already discussed above and will not be repeated here.

B. Escrow Accounts

Either a landlord or a tenant may require that funds needed for build out costs or construction allowances be escrowed through the construction period. In the past, we only saw parties use such escrow accounts in leases with particularly large capital costs. Today, we see tenants, in particular, require such escrow accounts for more ordinary landlord construction allowance situations.

If the parties determine to use an escrow account, the party making the deposit should use an escrow company who will act as the escrow agent on terms acceptable to the parties. First, one needs to be comfortable with the party holding the escrow. Many title companies provide this service, but the parties should be sure that the escrow holder will actually be the title company or another creditworthy company and not a small agency with which the title company has a relationship. In addition, if the property is secured by a mortgage, the mortgage lender may require the deposit of any outstanding tenant improvement allowances to be held in a reserve account controlled by the lender and be released to either the borrower or the tenant subject to customary draw procedures. One downside to the tenant is that the draw procedures through the lender, especially on a securitized loan, may be rather arduous. One advantage would be that in the event of a foreclosure, the tenant will have some comfort that the tenant improvement funds will still be available. Alternatively, the lender could be either included as a party to the title escrow agreement or be provided with approval rights over disbursements. If the latter is chosen, the lender will seek to be named as a third-party beneficiary to the escrow agreement.

Escrow agreements can be negotiated to suit the parties' needs. Each party should review the requirements for payment carefully to make sure that they match the deal between the parties and do not create any requirements in addition to those in the lease. These requirements should also be confirmed with the escrow agent so there is no confusion later on. Escrows can be paid out in installments, for example if they are being

used to pay contractors or in a single installment if the account is being used to hold a construction allowance. The party creating the escrow will want to make sure that it retains the interest paid on the deposited monies.

The main disadvantages of escrow accounts are twofold. First, the escrow company will earn a fee for providing the service, so it adds a cost to the deal. Second, if there is a dispute between the parties as to whether the funds should be paid out, typically the escrow company will simply hold the funds until the parties work out their dispute through settlement or the courts.

C. Construction Bonds

Leases often require tenants to obtain construction bonds for tenant's work, although how often that requirement is enforced is another question. Construction bonds come in two forms, completion bonds and payment and performance bonds. Each bond serves a separate purpose, completion bonds secure against a party's financial inability to complete the project, and payment and performance bonds (actually two separate bonds) are primarily used to protect against mechanics liens and contractor defaults. Either type of bond is often written as a function of a percentage of the anticipated cost to complete the project, such as 150% of the construction costs.

If the landlord's main concern is the contractor, then simply having the requirement and then requiring the tenant to use bondable general contractors may be enough protection as a general contractor that has the experience and the financials to be bondable will be most likely pay its subcontractors and not allow subcontractors to file liens against the property. Alternatively, the landlord can require that tenants use only contractors and subcontractors from an approved list. These contractors have long term relationships with the center, and so are more likely to complete the job and not to record liens against the property.

A major issue with completion bonds in particular from both parties perspective is that the bonding company will require security for its bond, which both parties could use without needing to use a bonding company through security deposits or escrow accounts, both of which may be more economical to use.

In addition, both completion bonds and payment and performance bonds can be quite expensive, making them less attractive ways to secure performance of a tenant build out than some of the other methods we have outlined in this workshop. Bonds are more often used in development projects with more substantial costs.

D. Self-Help Rights

In development projects or high capital cost projects such as theaters or restaurants, tenants today are concerned with the higher incident of landlord defaults, landlord bankruptcies and lender foreclosures resulting in unfinished projects. In addition to the various types of security arrangements discussed above, tenants may wish to negotiate self-help rights to complete the build out of the store that the landlord started but did not or could not finish. These self-help rights can allow tenants both to finish their build-outs and in certain circumstances, the common area improvements necessary for the tenant to operate its business. The tenant will want the right to offset the cost of its exercise of its self-help right against rent to be paid under the lease and be able to seek damages for anything in excess.

Issues for the tenant to consider in exercising self-help construction rights include what work makes sense for the tenant to perform; tenants will typically not want to take on any responsibility to remediate any hazardous materials and may not want to perform structural or roof work or work outside of the tenant's premises that may be part of the landlord's construction obligations as this would open the tenant up to unnecessary liability. The terms related to self-help rights should include who will have ongoing liability for construction defects, who has ongoing repair and replacement obligations under the lease and who will benefit from any contractors or material warranties. From a landlord's perspective, the landlord will want to carefully negotiate when a tenant has a right to exercise its self-help rights, as a landlord is unlikely to want third parties building on its property, and for what costs the landlord will be willing to be responsible.

The tenant may also want the lease to provide that even if tenant performs certain work on behalf of landlord, the landlord will remain responsible for correction of any defective work (and tenant can agree to assign to landlord any contractor's or manufacturer's warranties obtained by the tenant). On the other hand, landlords will want to make sure that any exercise of the tenant's self-help rights do not void the landlord's warranties for various systems, such as the roof or the HVAC system. Lastly, the tenant will also want the lease to state that tenant's performance of landlord's work does not alter the landlord's maintenance obligations under the lease,

e.g., if the lease requires landlord to repair and replace the roof of the space, the fact that tenant installed the roof on landlord's behalf does not relieve landlord of its repair obligations going forward.

IV. Conclusion

In these economically insecure times both landlords and tenants cannot rely on many of the old assumptions about the financial stability of the parties with which they do business. Those parties with strong balance sheets and cash on hand find themselves in strong bargaining positions in the marketplace to make new retail spaces possible. As we have discussed in this workshop, for the many parties going ahead with deals with parties of which they are less sure, there are a number of options to deliver security for lease and construction obligations that can give everyone more peace of mind. Nonetheless, each type of security has its own risks and pitfalls, so the lease negotiators should keep all of the benefits and risks of each type of security in mind while drafting leases.

Exhibit A

Form of Lease Guaranty

GUARANTY, made this ___ day of ________ by ______________________ a _________________ having an office at ____ (“Guarantor”), to ______________________, a _______________________, having an office at (“Landlord”).

W I T N E S S E T H:

WHEREAS, simultaneously with the delivery of this Guaranty, Landlord is leasing to _____________________, a ____________________ **[which is a _______________ subsidiary of Guarantor]** (“Tenant”), by an agreement of lease of even date herewith (the “Lease”), certain **[insert type of premises]** premises (the “Premises”) more particularly described in the Lease, located in the building known as __________________________; and

WHEREAS, as a condition to Landlord’s entering into the Lease, Landlord requires that Guarantor execute and deliver this Guaranty;

NOW, THEREFORE, in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration, the receipt of which is hereby acknowledged, Guarantor agrees as follows:

1. Guarantor hereby absolutely, unconditionally and irrevocably guarantees to Landlord (a) the prompt and timely performance and observance by Tenant of all of the terms, covenants, conditions and agreements to be performed or observed by Tenant under the Lease during the term of the Lease, **[including any extensions or renewals thereof, and any obligations of Tenant with respect to any additional space in the Building hereafter leased by Tenant pursuant to or covered by the Lease,-delete references to renewal or expansion options that are not in the lease]** including, without limitation, the payment of rent, additional rent and other charges by Tenant at the times and in the manner provided in the Lease, and (b) the prompt payment of all damages which may arise as a result of Tenant’s failure to perform any such obligation.

2. Guarantor hereby covenants to Landlord, its successors and assigns, that if at any time during the term of the Lease or any extension and renewal thereof, Tenant shall default in the due and prompt performance of any of the covenants, terms or conditions contained in the Lease on the part of Tenant to be performed, Guarantor shall perform any such obligation and shall pay the sums to be paid thereunder in the manner and at the times specified in the Lease and shall pay all costs, expenses and damages, including, without limitation, reasonable attorneys’ fees and disbursements, incurred by Landlord as a consequence of or in connection with any such breach or non-performance of any such covenant, term or condition.

3. Guarantor acknowledges and agrees that its liability hereunder shall be primary and that Landlord may, at its option, proceed against Tenant and Guarantor, jointly and severally, or (ii) proceed against Guarantor under this Guaranty without commencing any suit or proceeding of any kind or nature whatsoever against Tenant, or without having obtained any judgment against Tenant. Guarantor hereby waives presentment and demand for payment, notice of non-payment, notice of dishonor, protest, notice of protest, non-performance or non-observance **[except that Landlord will give to Guarantor copies of any notices of default which Landlord gives to Tenant under the Lease at the same time any such notice is given to Tenant]**, notice of acceptance of this Guaranty and any other notice or demand to which Guarantor might otherwise be entitled.

4. The validity of this Guaranty and the obligations and liability of Guarantor hereunder shall not be released, impaired, diminished, modified or otherwise affected by any event, condition, circumstance, proceeding, action or failure to act, with or without notice to, or the knowledge or consent of, Guarantor, whether or not the risk to the Guarantor is increased thereby, including, without limitation: (a) any amendment, **[DELETE ALL REFERENCES TO RENEWALS, EXTENSIONS AND EXPANSION IF THERE ARE NO RENEWAL, EXTENSION OR EXPANSION OPTIONS]** renewal or extension of or addition to the Lease, or expansion by Tenant into any additional space in the Building, whether any of the foregoing is pursuant to any provision of the Lease or otherwise, (b) any modification, compromise, settlement, adjustment or extension of any obligation or liability under the Lease, (c) any waiver, consent, forbearance, action or inaction on the part of Landlord in enforcing any obligation of Tenant or Guarantor in connection with the Lease, any irregularity in or invalidity or unenforceability of the Lease or any provision thereof, or of the obligations or liability of Tenant thereunder, (e) any bankruptcy, insolvency, reorganization or other proceeding affecting Tenant or the Lease, including, without limitation, any termination or rejection of the Lease in connection with such proceedings (and any limitation of the liability of Tenant in any such proceeding shall not diminish or otherwise affect the liability of Guarantor), (f) any assignment, conveyance, mortgage, pledge, merger or other transfer, voluntarily or involuntarily (whether by operation of law or otherwise), of all or any part of the interest of the tenant under the Lease (whether or not permitted under the Lease), regardless of whether any obligations or liabilities of the assignor or transferor are released in connection therewith, (g) any failure of Landlord to mitigate damages arising from a breach, violation or default by Tenant or Guarantor, (h) any sublease or subleases of all or any part of the Premises, whether or not permitted under the Lease, (h) any disability or other defense of Tenant, (j) the receipt, application or release by Landlord of any security given for the payment, performance or observance of Tenant's obligations or liabilities under the Lease, (i) any change in the ownership of Tenant, and (j) any other circumstance or condition whatsoever which might give rise to a discharge, limitation or reduction of liability of a surety or guarantor.

5. Guarantor shall not be subrogated to any of the rights of Landlord under the Lease or to the Premises, or to any other rights of Landlord, by reason of this Guaranty or the performance by Guarantor of any of its obligations hereunder. Guarantor hereby (i) waives any right to enforce any remedy which Guarantor may have against Tenant by reason of any one or more payments or acts of performance by Guarantor, and (ii) subordinates any liability or indebtedness of Tenant now or hereafter held by Guarantor to the obligations of Tenant to Landlord under the Lease.

6**. [if any additional covenants concerning the guarantor are desired, such as covenants on financial reporting, net worth, mergers and sales of assets, or continued ownership of the stock of the Tenant, insert such covenants here; if the guarantor is an individual and personal financial statements or copies of tax returns are desired, insert the requirements here].**

7. Guarantor agrees that in any action or proceeding brought under this Guaranty, Guarantor shall waive trial by jury.

8. Guarantor represents to Landlord that:

(a) Guarantor has full power, authority and legal right to execute and deliver this Guaranty, and to perform and observe the provisions hereof, including, without limitation, the payment of all amounts payable hereunder;

(b) the execution, delivery and performance by Guarantor of this Guaranty have been duly authorized by all necessary **[[corporate][partnership][limited liability company]-none of these are applicable to an individual guarantor]]** action;

(c) the execution and delivery of this Guaranty and the performance by Guarantor hereunder do not violate Guarantor's **[certificate of incorporation or by-laws]**, or any instrument or agreement to or under which Guarantor is a party or is bound **[MODIFY APPROPRIATELY FOR PARTNERSHIP OR LLC GUARANTORS]**; and

(d) this Guaranty constitutes the legal, valid and binding obligation of Guarantor, enforceable in accordance with its terms.

9. This Guaranty constitutes the entire agreement of Guarantor with respect to the subject matter hereof, and all prior understandings and agreements, oral or written, are merged herein.

10. The provisions of this Guaranty may not be waived, modified or terminated except by an agreement in writing signed by the party against whom any such modification, termination or waiver is sought, nor shall any waiver be applicable except in the specific instance for which it is given.

11. This Guaranty shall be governed by and construed in accordance with the laws of the State of **[_______________]**.

12. The terms “hereof”, “herein” and “hereunder”, and other words of similar import, shall be construed to refer to this Guaranty as a whole, and not to any particular provision, unless expressly so stated.

13. All words or terms used in this Guaranty, regardless of the number or gender in which they are used, shall be deemed to include any other number and any other gender, as the context may require.

14. Any notice, request, demand or other communication (collectively, “notices”) which either party is required to or desires to give pursuant to this Guaranty shall be in writing and given or served by hand delivery to the person to whose attention such notice is directed or by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

(a) If to Guarantor:

Attention:

(b) If to Landlord:

Attention:

Either party may designate by a notice given pursuant to this Paragraph 14 a different or additional address to which notices shall thereafter be given. Any notice hereunder shall be deemed given when personally delivered or on the second business day after it is deposited in the United States mail.

15. Guarantor agrees that if this Guaranty is enforced, whether by any action or proceeding or otherwise, it will reimburse Landlord for all costs and expenses incurred by Landlord in connection therewith, including, without limitation, reasonable attorneys’ fees and disbursements.

16. This Guaranty shall be binding upon Guarantor and its successors and assigns, and shall inure to the benefit of Landlord and its successors and assigns.

17. All remedies available to Landlord under this Guaranty and at law or in equity are separate and cumulative remedies, and, to the extent permitted by law, no one remedy shall be deemed to be in exclusion of any other remedy.

18. If any provision of this Guaranty or any application thereof to any person or circumstance shall to any extent be held void, unenforceable or invalid, then the remainder of this Guaranty, or the application of such provision to persons or circumstances other than those as to which it is held void, unenforceable or invalid, shall not be affected thereby, and each provision of this Guaranty shall be enforceable to the fullest extent permitted by law.

19. As required under U.S. law, Landlord seeks to avoid engaging, directly or indirectly, in any transaction with persons who the U.S. Department of the Treasury has determined to be a “specially designated national” as defined in 31 C.F.R. § 500.306. Accordingly, Guarantor represents and warrants that (1) Guarantor

is not itself a specially designated national and (2) Guarantor is not acting on behalf of or in conjunction with any specially designated national. Guarantor further represents and warrants that notwithstanding anything herein to the contrary, Guarantor will not deal with, or accept funds from, a specially designated national or for the benefit of such a person in violation of U.S. law.

[IF THE GUARANTOR IS ORGANIZED IN A FOREIGN COUNTRY, AND THE BENEFICIARY AGREES TO ACCEPT A GUARANTY FROM A FOREIGN GUARANTOR, INSERT THE FOLLOWING ADDITIONAL PARAGRAPHS:

20. Guarantor hereby irrevocably and unconditionally:

(a) submits for itself and its property in any legal action or proceeding relating to this Guaranty, or for recognition and enforcement of any judgment in respect thereof, to the non-exclusive general jurisdiction of the courts of the State of New York sitting in the City of New York, or the County of __________, State of New York, the courts of the United States for the Southern District of New York or the Eastern District of New York, and appellate courts from any thereof **[change designated courts if appropriate]**;

(b) consents that any such action of proceeding may be brought in such courts and waives any objection that it may now or hereafter have to the venue of any such action or proceeding in any such court or that such action or proceeding was brought in an inconvenient court and agrees not to plead or claim the same;

(c) irrevocably and unconditionally appoints __________ (the "New York Process Agent"), with an office on the date hereof at ____________________, ________, New York, as agent to receive on its behalf and on behalf of its property, service of the summons and complaint and any other process that may be served in any such action or proceeding in any such New York State or U.S. federal court and agrees promptly to appoint a successor New York Process Agent in the State of New York (which successor New York Process Agent shall accept such appointment in writing prior to the termination, for any reason, of the appointment of the initial New York Process Agent in the State of New York) and promptly to provide written notice to Landlord of the appointment of such successor New York Process Agent. In any such action or proceeding in such New York State or U.S. federal court, such service may be made on Guarantor by delivering a copy of such process to Guarantor in care of the New York

Process Agent at such New York Process Agent's address, and a copy of such process shall be forwarded to Guarantor at its address set forth in Paragraph 14. Guarantor hereby irrevocably and unconditionally authorizes and directs such New York Process Agent to accept such service on its behalf and promptly to forward a copy of such service to it **[modify appropriately if another state is desired]**; and

(d) consents to service of process in the manner provided for notices in Paragraph 14 and agrees that nothing herein shall affect the right to effect service of process in any other manner permitted by law or shall limit the right to institute an action, suit or proceeding in any other jurisdiction.

21. To the extent that Guarantor has or hereafter may acquire any immunity (sovereign or otherwise) from any legal action, suit or proceeding, from jurisdiction of any court or from set-off or any legal process (whether service or notice, attachment prior to judgment, attachment in aid of execution of judgment, execution of judgment or otherwise) with respect to itself or any of its property, Guarantor hereby irrevocably waives and agrees not to plead or claim such immunity in respect of its obligations under this Guaranty or the Lease. Guarantor hereby agrees that the waivers set forth in this Paragraph 20 shall be to the fullest extent permitted under the U.S. Foreign Sovereign Immunities Act of 1976 and are intended to be irrevocable and not subject to withdrawal for purposes of such Act.

22. The obligations of Guarantor under this Guaranty shall, notwithstanding any judgment in a currency (the "judgment currency") other than U.S. Dollars, be discharged only to the extent that on the business day following receipt by Landlord of any sum adjudged to be so due in the judgment currency, Landlord may in accordance with normal banking procedures purchase U.S. Dollars with the judgment currency. If the amount of U.S. Dollars so purchased is less than the sum originally due in U.S. Dollars, Guarantor agrees, as a separate obligation and notwithstanding any such judgment, to indemnify Landlord against such loss.

IN WITNESS WHEREOF, Guarantor has caused this Guaranty to be duly executed the day and year first above written.

GUARANTOR:

____

By:__________________________

Title:________________________

[INSERT OUT OF STATE ACKNOWLEDGMENT FORM]