

The logo graphic for Akerman features a dark blue background with a red square in the lower-left corner. The word "Akerman" is written in white, sans-serif font within the red square. To the right of the red square, there is a blue rectangular area with a grey triangular shape pointing downwards from its top edge.

Akerman

Good Guy Guarantees: Landlord Tenant Law Update

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LLP
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The Character of the

What you call it is what it is and how it may be enforced?
Instrument

GUARANTY (this "Guaranty") made as of October ____, 201__, by _____, an individual ("Guarantor"),

VS

LIMITED GUARANTY of COLLECTION (this "Guaranty") made as of October ____, 201__, by _____, an individual ("Guarantor"),

VS

GUARANTY of PAYMENT (this "Guaranty") made as of October ____, 201__, by _____, an individual ("Guarantor"),

VS

GUARANTY of PAYMENT and PERFORMANCE (this "Guaranty") made as of October ____, 201__, by _____, an individual ("Guarantor"),

VS

LIMITED GOOD GUY GUARANTY (the "Limited Guaranty") made as of October ____, 201__, by _____, an individual ("Guarantor"),

The Guaranteed Obligation of Space and Agreement

- Care in defining with specificity the guaranteed instrument, agreement, undertaking or contract and consideration, **reliance and contemporaneous execution and delivery**. Avoid challenge for "antecedent or previous" debt.
- Pursuant to that certain lease of **even date herewith** (the "Lease"), Landlord is leasing to _____, Inc., a New York corporation ("Tenant") the entire _____ floor in the building known and numbered as 000 Fifth Avenue, New York, New York (the "Building"), upon all of the terms, covenants, conditions, and provisions more particularly contained in the Lease. The premises demised under the Lease **from to time is hereinafter referred to as the "Premises."**

The Guaranteed Obligation of Space and Agreement

- Landlord has advised Tenant and Guarantor that **Landlord will not execute or deliver the Lease if Guarantor does not execute and deliver to Landlord this Guaranty.**
- NOW, THEREFORE, in consideration of, **and as an inducement for, the execution and delivery by Landlord of the Lease,** and for ten (\$10.00) dollars and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Guarantor covenants and agrees as follows:
 - It is a condition of the granting, execution and delivery of the Lease that Guarantor executes and delivers this Guaranty, and Guarantor deems the granting, execution and delivery of the Lease to be in Guarantor's best interests and Guarantor expects to derive substantial benefit therefrom.



Precision with respect to the Guaranteed Obligations or “Gap” & Time Period for Accumulation of Accrual of Obligations

Guarantor does hereby, on behalf of itself and its heirs, administrators, executors, successors and assigns, unconditionally and absolutely guarantee to Landlord and its successors and assigns the full and timely payment of all payment obligations contained in the Lease on Tenant's part to perform, observe or comply with **which accrue through [start date?] and including the date (the “Termination Date”) which is the later of (a) the Vacate Notice Date (as hereinafter defined) and (b) the Actual Vacate Date (as hereinafter defined) (such obligations being hereinafter referred to as the “Guaranteed Obligations”), without requiring any notice of non-payment, or proof, notice or demand whereby to charge Guarantor therefor, all of which Guarantor hereby expressly waives, and Guarantor hereby further expressly covenants and agrees that neither the obligations nor the liability of Guarantor hereunder shall in any wise be terminated or otherwise affected, modified or impaired by reason of Landlord's assertion against Tenant of, or Landlord's failure to assert against Tenant, any of the rights or remedies available to Landlord pursuant to the Lease or allowed at law or in equity.**



Precision with respect to the Guaranteed Obligations or “Gap” & Time Period for Accumulation of Accrual of Obligations

Observations – **Start of the Gap Obligations? Notice of beginning of Gap Obligations? From the beginning of the Lease whether or not Defaults?**



Additions to the Gap obligations - Layering

The Guaranteed Obligations and Guarantor's obligations and liabilities under this Guaranty shall include, but not be limited to, all use and occupancy fees and charges and/or Base Rent and additional rent **for any period that Tenant or any person or entity claiming by, through or under Tenant remains in the Premises after the expiration of the term of the Lease,** and all **costs, expenses and damages** to which Landlord is entitled under the Lease, at law or in **equity** in connection with (i) any non-payment of any of the Guaranteed Obligations and/or (ii) the failure of Tenant to deliver to Landlord possession of the Premises free and clear of all tenants, subtenants, licensees, concessionaires and other occupants claiming by, through or under Tenant, and free and clear of any rights and claims of rights of Tenant and any such other tenants, subtenants, licensees, concessionaires and other occupants claiming by, through or under Tenant.



Extension of the Gap

Obligations Period Indefinitely -

Incurable

For the purposes of this Guaranty, "Actual Vacate Date" shall mean the earliest date on which all of the following conditions are satisfied: (i) Tenant and all Tenant Parties (as such term is hereinafter defined) have: (1) vacated and delivered to Landlord possession of the Premises in accordance with the applicable provisions of the Lease; (2) vacated and delivered to Landlord possession of the Premises in **accordance with all of the applicable provisions of the Lease**, as if the Expiration Date thereunder had occurred (including, but not limited to, the **removal from the Premises and the Building of all property in which Tenant or any others (other than Landlord) have any rights, but excluding such property as Tenant is required or permitted not to remove from the Premises or the Building**);



Extension of the Gap Obligations Period Indefinitely - Incurable

(3) delivered to Landlord all keys to the Premises; (4) cured and removed from the record all violations resulting from any action or omission of Tenant or any Tenant Party; (5) substantially completed all alterations, decorations, installations, improvements, repairs, additions and other work in, to or about any portion of the Premises or Building commenced by or on behalf of Tenant or any Tenant Party, all in accordance with plans and specifications therefor approved by Landlord; (6) obtained all permits, notices, approvals, certificates and sign-offs required by all governmental authorities upon the completion of the work described in the preceding clause ;



Extension of the Gap

Obligations Period Indefinitely -

Incurable

(7) cancelled or closed all permits issued in connection with all work performed or intended to be performed by or on behalf of Tenant , regardless of whether such work commenced; (8) paid in full for all work performed by, or on behalf of, Tenant and delivered to Landlord lien waivers (in recordable form) in respect of all such work, materials and supplies for which a mechanics lien could be filed pursuant to applicable law and releases of lien (in recordable form) in respect of all such work, materials and supplies that a mechanics lien has been filed. Notwithstanding the foregoing, in no event shall the Actual Vacate Date be prior to the "Effective Date" of such certificate.


Actual Vacating and Delivery Not Ending Gap Period

In addition, and notwithstanding anything contained in this Guaranty to the contrary, (A) if the date on which all of the conditions set forth in clauses “(i)” and “(ii)” above are satisfied is after the “Effective Date” of such certificate, or (B) if the date on which all of the conditions set forth in clauses “(i)” through “(iii)” above are satisfied is after the Vacate Notice Date, **then, for the purposes of fixing the Termination Date, the “Actual Vacate Date” shall be the date which is thirty (30) days after the date on which all of the conditions set forth in clauses “(i)” through “(iii)” above are satisfied.** By executing this Guaranty, both **Guarantor and Tenant acknowledge and agree that the acceptance of possession of the Premises prior to the date fixed in the Lease as the expiration date shall in no way reduce, decrease, diminish or otherwise adversely affect the damages or other rights and remedies against Tenant to which Landlord is entitled under the Lease or at law or in equity.**



The Precondition Notice of Intention to Default or Vacate Addition

“Vacate Notice Date” shall mean the date which is sixty (60) days after the date on which Tenant gives Landlord written notice (in accordance with the applicable provisions of the Lease) of Tenant’s intention to (1) have the Premises and the possession thereof so vacated and surrendered, (2) so deliver to Landlord all keys to the Premises, and (3) so satisfy and remove all such liens and judgments. Guarantor hereby acknowledges that nothing contained in this Guaranty shall be deemed Landlord's consent to Tenant's vacating or surrendering possession of the Premises prior to the end of the term of the Lease or Landlord's waiver of Tenant's obligations or liabilities thereunder.



Absolute, Unconditional, Independent of Lease - Irrevocable

This Guaranty is a direct and independent obligation of Guarantor and is an absolute, present, unconditional, continuing and irrevocable guarantee of payment (and not merely of collection) and is not conditioned in any way upon the institution of suit or the taking of any other action or any attempt to enforce performance of, or compliance with, the obligations, covenants or undertakings of the Tenant and, without limitation, shall not be subject to any claim, counterclaim, cause of action, offset, recoupment or any other right or remedy and is in no way conditioned or contingent upon any attempt to collect from the Tenant or any other entity or to perfect or **enforce any security** or upon any other condition or contingency or upon any other action, occurrence, or circumstance whatsoever that might otherwise limit recourse by or against the Guarantor or any other person or entity (other than the full payment and satisfaction of the Guaranteed Obligations).



No Offset of Security Deposit or Invalidity of Lease under Attach

Guarantor acknowledges that this Guaranty and Guarantor's obligations and liabilities under this Guaranty are and shall at all times continue to be **absolute and unconditional** in all respects, are and shall be the **separate and independent undertaking of Guarantor without regard to the genuineness, validity, legality or enforceability of the Lease**, and shall at all times be valid and enforceable **irrespective of any other agreements or circumstances of any nature whatsoever which might otherwise constitute a defense to this Guaranty and the obligations and liabilities of Guarantor under this Guaranty or the obligations or liabilities of any other person or entity (including, without limitation, Tenant) relating to this Guaranty or the obligations or liabilities of Guarantor hereunder or otherwise with respect to the Lease or to Tenant.**

No Offset of Security Deposit or Invalidity of Lease under

Attach

Other than the defense of full payment and satisfaction of the Guaranteed Obligations, **Guarantor hereby absolutely, unconditionally and irrevocably waives any and all rights it may have to assert any defense, set-off, counterclaim or cross-claim of any nature whatsoever with respect to this Guaranty or the obligations or liabilities of Guarantor under this Guaranty or the obligations or liabilities of any other person or entity (including, without limitation, Tenant) relating to this Guaranty or the obligations or liabilities of Guarantor under this Guaranty or otherwise with respect to the Lease**, in any action or proceeding brought by the holder hereof to enforce the obligations or liabilities of Guarantor under this Guaranty. This Guaranty shall be a continuing guaranty, and shall **survive the Expiration Date (as defined in the Lease) or the sooner termination of the Lease.**

Modifications of Lease do not affect Guaranty Obligations

Guarantor further covenants and agrees that this **Guaranty shall not be affected or impaired by, and shall remain and continue in full force and effect as to, any renewal, amendment, modification or extension of the Lease, any assignment of the Lease or any interest therein or the subletting of all or portions of the Premises,** and shall cover, apply to and incorporate all of the terms, covenants, conditions and other obligations of all such renewals, amendments, modifications, extensions, assignments and sublettings (without need of any notice or consent of Guarantor thereto) regardless of who occupies the Premises or whether or not any portion of the Premises is occupied. **In furtherance of the foregoing, for the purposes of this Guaranty, "Lease" shall include all such renewals, amendments, modifications, extension, assignments and sublettings.**

Independence of Lease – Limit Increases in Obligations to be

Fair

Notwithstanding the foregoing, **if (i) the Tenant's interest in the Lease is assigned to an entity which does not control, is not controlled by, or is not under common control with, Guarantor and, after the effective date of such assignment the Lease is modified or amended by an agreement between Landlord and a "Tenant" under the Lease which does not control, is not controlled by, or is not under common control with, Guarantor (such modification or amendment being herein referred to as the "Lease Modification"), and (ii) Guarantor did not consent in writing to the Lease Modification, then, to the extent that the Lease Modification increases the net effective payment obligations of the "Tenant" under the Lease beyond the net effective payment obligations of the "Tenant" under the Lease as of the effective date of such assignment, the payment of the payment obligations of the "Tenant" under the Lease Modification to the extent that such payment obligations exceed the payment obligations of "Tenant" under the Lease as of the effective date of such assignment shall not be included in "Guaranteed Obligations"**

Protect the Guaranty – Unbundle from Lease Validity

Guarantor further covenants and agrees that this **Guaranty shall not be affected or impaired by, and shall continue in full force and effect notwithstanding:** (i) the **unenforceability of any provision of the Lease or any such renewal, amendment, modification or extension thereof, or any assignment of the Lease or any interest therein, or any sublease of all or any portion of the Premises;** (ii) **Tenant, or the individuals and/or entities that executed the Lease on behalf of Tenant, not having the power, authority and/or legal right to execute and deliver, or to perform and observe the provisions of, the Lease,** (iii) **Tenant being entitled to immunity from judicial proceedings,**

Protect the Guaranty – Unbundle from Lease Validity

(iv) any **extension of time that may be granted to Tenant** or its successors or assigns; (v) the merger or consolidation of Tenant with, or the acquisition of Tenant by, any other entity, or the **sale, divesture or other disposition of any or all of the interest of Guarantor in the Tenant or any entity that controls, is controlled by, or is under common control with, Tenant;** (vi) the voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all the assets, the marshaling of assets and liabilities, the receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, arrangement or readjustment of, or other similar proceeding affecting, the Tenant, or any of the Tenant's predecessors, or any of the Tenant's successors or assigns, or any of their assets or the **disaffirmance, rejection or postponement in any such proceeding of any of Tenant's obligations or undertakings set forth in the Lease;**



Protect the Guaranty – Unbundle from Lease Validity

(vii) any modification, reduction or other limitation of the Guaranteed Obligations that may occur pursuant to any of the proceedings, events or occurrences described in clause (vi) above; (viii) the mortgaging, pledging, encumbering or other alienation of any interest in Tenant or in any entity that controls, is controlled by, or is under common control with, Tenant, or in Tenant's interest in the Premises; (ix) the **furnishing or acceptance of additional security or any surrender, substitution or release of any security; (x) any waiver, consent, indulgence, forbearance, lack of diligence or other action, inaction, omission or any exercise or nonexercise of any right, remedy or power with respect to the Guaranteed Obligations or the Lease;**



Warrant Continuing Control

Guarantor warrants and represents that he has the legal right and capacity to execute this Guaranty **and that he/it owns approximately 37% of the voting stock of Tenant and will continue to do so throughout the term of the Lease.**

If multiple Guarantors, warrant continuation of control and substitution of additional controlling Guarantors.



If all else fails – MAKE GUARANTOR TENANT

In the event, and to the extent, **that this Guaranty shall be held ineffective or unenforceable** by any court of competent jurisdiction, then **Guarantor shall be deemed to be a tenant under the Lease with the same force and effect as if Guarantor were expressly named as a co-tenant therein with joint and several liability, except that in no event shall Guarantor's liability as a co-tenant therein exceed Guarantor's liability under this Guaranty had Guarantor not been deemed to be a tenant under the Lease.**



If all else fails – MAKE GUARANTOR TENANT

Neither the obligations nor the liabilities of Guarantor hereunder shall be released, reduced, diminished, offset or otherwise affected by the existence of, or Landlord's receipt, application, use, retention or release of, any security given for the performance, observance and compliance with any of the terms, covenants, conditions or other obligations required to be performed, observed or complied with by Tenant under the Lease, and for the purposes of Guarantor's obligations and liabilities under this Guaranty, Landlord shall be deemed not to be holding any security under the Lease and not to have applied, used or retained any security deposit.



If all else fails – MAKE GUARANTOR TENANT

No failure or delay on the part of Landlord in exercising any right, power or privilege under this Guaranty or under the Lease shall operate as a waiver of or otherwise affect any such right, power or privilege, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. **If Landlord is obligated by any bankruptcy or other law to repay to Tenant or Guarantor or to any trustee, receiver or other representative of any of them, any amounts previously paid, then this Guaranty shall be reinstated in the amount of such repayment.** Landlord shall not be required to litigate or otherwise dispute its obligations to make such repayments if it in good faith and on the advice of counsel believes that such obligation exists.

Indemnity for Costs to Defend Validity, Collect, and Enforce

In addition to the Guaranteed Obligations, Guarantor hereby covenants and agrees to pay within ten (10) days after Landlord's written demand therefor, all reasonable attorney's fees and disbursements and all litigation costs and expenses incurred or paid by Landlord in connection with (i) **attacks against the validity or enforceability of the Guaranteed Obligations or this Guaranty or the Lease**, (ii) the **enforcement of this Guaranty and collection thereunder**, and (iii) all other costs, expenses, taxes and damages Landlord may incur or pay as a result of, or incidental to, or relating to, the enforcement or **protection of Landlord's rights and remedies under this Guaranty**.



Indemnity for Costs to Defend Validity, Collect, and Enforce

Furthermore, and without creating any obligation on the part of Landlord to demand the payment by Guarantor of any of its payment obligations under this Guaranty (except as otherwise expressly provided in the preceding sentence), if Guarantor fails to pay any amount payable under this Guaranty within ten (10) days after Landlord's written demand therefor, interest on such amount shall accrue at the same rate of interest as is specified under the Lease for defaulted payments by Tenant thereunder until such amount is paid, it being agreed, however, that the provisions of this sentence shall not require (or be deemed to require) Guarantor to pay interest on such amounts payable under this Guaranty to the extent such amounts already include interest payable under the Lease.



Good Guy Guaranty Checklist

1. Define the Lease/Guaranteed Obligation/Contract with specificity
2. Define the "Obligations" and the Period or "Gap"
3. Date same as the Lease
4. Define the Control group or entity(s)
5. Require maintenance of the Control and Control monitoring in Lease and Guaranty – Define as Defaults
6. Declare the Guaranty independent of affiliation and of the Validity of Lease



Good Guy Guaranty Checklist

7. Protect the Guaranty from defenses of release, modification, security deposit, attack and invalidity of the Lease
8. Do not let the termination of the Lease end the Guaranty "Survival"
9. Do not let acceptance of the Demised Premises end the Guaranty
10. If all else fails – Substitute Guarantor for Tenant under Lease
11. Do not let application of the Security Deposit reduce the Guaranteed Obligations
12. Obtain Indemnity for enforcement, defense of Guaranty, enforcement of Lease and defense of the Lease



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