

HOW TO CREATE A GREAT GOOD-GUY GUARANTY (WITH FORMS)



JOSHUA STEIN handles a wide range of commercial real estate transactions and regularly serves as an expert witness. He is a member of the American College of Real Estate Lawyers, the author of five books and over 400 articles on commercial real estate, and one of the most prolific contributors to *The Practical Real Estate Lawyer*. Many of his articles appear on his website, www.joshuastein.com. He received his law degree from Columbia Law School, where he was a Harlan Fiske Stone Scholar and a managing editor of the *Columbia Law Review*.

This article is based on a chapter in the author's upcoming *New Guide to Ground Leases*, to be published by Advanced Commercial Real Estate Press.¹ For more information, visit www.groundleasebook.com.

INTRODUCTION

When a landlord signs a lease with a tenant, especially a weaker one or a single-purpose entity, the landlord often requires the tenant's principal to sign a "good-guy guaranty"—a promise that if the tenant does not pay rent, it will move out, saving the landlord from years of litigation culminating in an uncollectible judgment against an assetless shell. In other words, the guarantor gives the landlord comfort that the tenant will be a "good guy."

This article offers a menu of suitable template language that an attorney can use to turn any guaranty of a lease into a good-guy guaranty. That menu has two parts: (i) the Base Case, which is the typical language one would expect to see in any good-guy guaranty; and (ii) a collection of Bells & Whistles that offers variations and extra measures.

The following discussion and accompanying template language capitalize terms that will ordinarily be defined in other documents for the transaction.

GOOD-GUY GUARANTY BASICS

Good-Guy Guaranties appear most often in space leases to small businesses. They also sometimes show up in ground lease transactions. In a ground lease, for example, Tenant might have the right to

terminate before starting Initial Development if Tenant changes its mind about the project and pays a termination fee or a walkaway payment. Landlord may want Guarantor to backstop that payment obligation and Tenant's obligation to depart peacefully and promptly. Particularly if a ground lease demises an entire existing Building, Landlord might want the extra comfort of a Good-Guy Guaranty.

For a space lease, a Guarantor's liability might, for example, continue until six months after Tenant has both moved out and given up possession (and all possessory rights) of the Premises, rather than immediately after those events have occurred. Guarantor would also have the option to pay six months of Rent in lieu of giving six months of prior Notice. Alternatively, the Guaranty might cover the entire Lease for two years and then convert to a mere Good-Guy Guaranty after a default-free two years—though still covering only any claims and issues that accrued or arose before the Good-Guy Guaranty actually terminated.

A Guaranty might burn off over time or limit Guarantor's exposure in other ways. These provisions should be negotiated as part of the fundamental deal and documented in the letter of intent or term sheet—not left for future conversation. The letter of intent or term sheet should, ideally, list the

conditions Guarantor must satisfy to terminate the Guaranty (the End Date Conditions). Optional provisions offered in the Bells & Whistles section of the Model Good-Guy Guaranty Language can help document many possible business deals.

Typically, Guarantor and Tenant must satisfy the End Date Conditions only immediately before the End Date occurs (except for any possible provision requiring prior Notice that Tenant intends to vacate the Premises). Landlord could certainly require Tenant and Guarantor to satisfy some of the End Date Conditions—such as a payment on account—when Tenant gives that Notice. Any such timing requirement must be clear in the Good-Guy Guaranty, as it would be “off market.”

Any Landlord and its counsel will often try to require Guarantor and Tenant to jump through as many hoops as possible and satisfy as many End Date Conditions as possible before an End Date can occur and Guarantor can terminate its liability. Footnotes to the Model Good-Guy Guaranty Language comment on some End Date Conditions. The Bells & Whistles offer a menu of additional End Date Conditions.

The process by which Landlords “improve” Good-Guy Guaranties with additional End Date Conditions over time is very much like the process experienced by nonrecourse carveout Guarantors in loan documents. Any Landlord’s counsel or lender’s counsel can always justify one more—or 10 more—End Date Conditions or nonrecourse carveouts. As a result of this process, at the end of the day, Guarantor may face so many End Date Conditions and limitations that the Good-Guy Guaranty becomes the practical equivalent of a full Guaranty of the Lease, because Guarantor can never escape liability by actually achieving an End Date.

End Date Conditions are often complex and intricate, spawning a remarkable amount of equally complex and intricate litigation. In fact, the termination of Good-Guy Guaranties seems to have become the main event in litigation over Lease Guaranties. In such litigation, Landlord will typically argue that somehow Guarantor missed a step or the End Date

Conditions don’t really mean what the Guarantor thought they meant. Guarantor will, on the other hand, argue it has satisfied the specific End Date Conditions as written in the Guaranty, at least as Guarantor interprets them. To prevent those differences of opinion, Guarantor should insist on plain, simple, and objective End Date Conditions that leave no room for interpretation or discussion.

If Tenant’s business does not do well, Tenant and Guarantor will probably remember only that Guarantor has the right to get out from under the Guaranty if Tenant moves out. When that starts to look like an appealing option, financial stresses may mean that Tenant and Guarantor do not hire counsel to look at, interpret, and assure compliance with the End Date Conditions in the Good-Guy Guaranty. That is all the more reason to keep the End Date Conditions simple and pitfall-free. It also, of course, underscores the importance of counsel in both the Lease negotiation (ensuring that Tenant and Guarantor understand how the End Date Conditions work, ideally in a short and simple memo delivered shortly after Lease signing) and the end game.

In negotiating a Good-Guy Guaranty, Tenant and Guarantor will try to push back against all the creativity, complexity, and sophistication of Landlord’s counsel, by reminding Landlord that a Good-Guy Guaranty was originally designed simply to assure that Tenant will be a good guy, i.e., not drag Landlord through years of litigation while Tenant occupies the Premises without paying Rent. Once the Good-Guy Guaranty has achieved that goal, it should end. Its purpose was simply to give Tenant healthy incentives to behave, to be a good guy, and not to give Landlord more general credit support for the Lease.

If Landlord’s counsel includes so many End Date Conditions that Guarantor cannot practically achieve an End Date, then counsel’s overexuberance might instead incentivize the opposite behavior. The Good-Guy Guaranty is supposed to incentivize Tenant to vacate quickly and easily. If Guarantor can never satisfy the End Date Conditions, then Guarantor has no real incentive to cause Tenant to move out. If the Good-Guy Guaranty offers no

escape route, then Guarantor may force Tenant to keep hopelessly trying to make things work (e.g., by restructuring its development project or keep operating a failing business because some income is better than no income) because Guarantor will face liability under the Guaranty either way. What was supposed to be a limited device to incentivize good behavior instead becomes a full Guaranty of the Lease creating no behavioral incentives at all.

This Model Document offers language specific to Good-Guy Guaranties, disregarding any language, including generic concessions to Guarantor, that might appear in an “ordinary” Lease Guaranty, i.e., a full Guaranty of the Lease rather than a Good-Guy Guaranty. The user will first need to find an ordinary Lease Guaranty, such as the author’s Model Lease Guaranty.² Then the user will need to add some of the language suggested here, to the extent appropriate, and make any necessary conforming adjustments.

INTERACTION WITH OTHER DOCUMENTS

Term Sheet or Letter of Intent

The possibility that Landlord might include unreasonable End Date Conditions argues for defining the End Date Conditions in any letter of intent or term sheet for a Lease, rather than waiting to see Landlord’s “standard” Good-Guy Guaranty. It is just like a careful borrower’s request that the lender include the precise wording of its “standard” nonrecourse carveouts as an exhibit to the term sheet for a commercial real estate loan before the borrower pays any application fee or deposit.

Continuation of Lease

A Good-Guy Guaranty protects Guarantor but doesn’t help Tenant. Thus, if Tenant wants the right to move out before the Lease expires by paying Rent until departure and satisfying some other conditions, Tenant might prefer to obtain a termination right in the Lease, conditioned on satisfying conditions that look much like the End Date Conditions in this Model Good-Guy Guaranty. Landlord would keep the Lease Security (cash or letter of credit) and prepaid rent, and perhaps more. Such a termination

right would replace the concept of End Date Conditions in the Guaranty.

Tenant might also prefer to have a termination option if Tenant has meaningful assets or anticipates it will want to stay in business at another location after abandoning this Lease before it expires. A termination option would prevent Landlord from having a claim against Tenant. Guarantor would guaranty the entire Lease for the Term until Tenant meets the conditions to termination and leaves.

If Tenant consists of an assetless single-purpose entity established only to hold this Lease—the typical case for a ground lease—then the discussion about continuation of Tenant’s business is not interesting. Conversely, if the parties agree to a Good-Guy Guaranty and Tenant may have assets, then Landlord will want to preserve its claims against the defaulting Tenant, even if Tenant has moved out and thus terminated Guarantor’s liability. In that case, Landlord may worry that it will lose its claims against Tenant if Tenant moves out and Landlord somehow accepts Tenant’s surrender of the Premises. To avoid that ambiguity, Landlord may also prefer a structure other than a Good-Guy Guaranty. At a minimum, Landlord will want to know the Good-Guy Guaranty and Lease are worded in a way that preserves Landlord’s claims against Tenant. The word “surrender” can be tricky.³

Whether the parties agree to a termination right or a traditional Good-Guy Guaranty, Landlord will probably want to preserve any surviving claims against Guarantor (or Tenant) that Landlord could have still asserted if the Lease had expired by its terms on the date of Tenant’s departure.

If Tenant and Guarantor do give Notice that Tenant plans to move out, Landlord may want to add draconian remedies (e.g., high per-diem use and occupancy fees) if Tenant does not move out on time. But the Lease itself may already adequately compensate Landlord. It depends in part on whether the Departure Date (as defined in the Good-Guy Guaranty) is deemed an Expiration Date for the Lease, i.e.,

whether the Good-Guy Guaranty is essentially a termination option for the Lease.

Anticipatory Breach of Lease?

A Good-Guy Guaranty will allow Guarantor to terminate liability if Tenant gives a certain amount of Notice that Tenant intends to vacate the Lease and give up possession. Creative and aggressive Landlords have been known to assert that mere delivery of such a Notice constitutes an anticipatory breach of the Lease, immediately entitling Landlord to all remedies for an Event of Default.

Although this argument has a certain dubiousness and hypertechnicality to it, Tenants and Guarantors should affirmatively preempt it by stating in the Lease that delivery of such a Notice does not constitute an anticipatory breach. Even better, Tenant and Guarantor should try to simplify the relationship and deal structure by simply allowing Tenant to terminate the Lease by satisfying the End Date Conditions, with the Good-Guy Guaranty backing Tenant's Lease obligations until that has happened.

Lease Language

Landlord may want to include language like this in the Lease:

Guarantor has delivered to Landlord a Good-Guy Guaranty referring to this Lease (the "Good-Guy Guaranty"). Occurrence of an End Date, or satisfaction of any End Date Conditions, under the Good-Guy Guaranty does not: (i) limit Tenant's liability under this Lease; (ii) constitute a surrender or acceptance of surrender of this Lease; or (iii) terminate this Lease as a contractual obligation of Tenant. Even if the End Date Conditions are satisfied, Tenant's liability under this Lease shall continue until the Scheduled Expiration Date of this Lease. If Guarantor fails to perform any obligation under the Good-Guy Guaranty, that shall constitute a Default by Tenant under this Lease, without limiting any other rights or remedies of Landlord.

Landlord may also want the right to immediately or automatically apply the Lease Security if Tenant or Guarantor delivers a Pre-Departure Notice, but that seems unnecessary.

Tenant may want to require Landlord to waive the provisions of New York Real Property Law Section 229, which would by its terms entitle Landlord to double rent if Tenant notifies Landlord that Tenant intends to move out, but then doesn't move out as scheduled.

Tenant's Internal Issues

If Landlord accepts a Good-Guy Guaranty, then Landlord may worry not only about Guarantor's credit but also about whether Guarantor can actually control Tenant's behavior. So, Landlord should understand Guarantor's role within Tenant. Does Guarantor own all of Tenant's equity? Can Guarantor call the shots within Tenant? Who makes decisions for Tenant? And what happens if any of that changes?

In the worst case, Tenant might file bankruptcy while liability under the Good-Guy Guaranty continues to pile up. Guarantor will want to make sure it can control any bankruptcy filing, as well as everything else that might lead to Tenant's orderly and quick departure from the Premises.

If Guarantor signs a Good-Guy Guaranty, then Guarantor and Landlord will want to know that any other investors in Tenant have consented to Tenant's vacating the Premises, as the Guaranty seeks to incentivize. Neither Guarantor nor Landlord will want to learn later, when Tenant is in default, that Tenant can't vacate because of possible claims (or requirements for consent) by other investors in Tenant. Reassurance can be obtained on this issue either through Tenant's organizational documents or through a separate consent, either of which would then be handled as a closing document.

This is certainly an issue Guarantor should consider. Guarantor and Tenant may argue, however, that concern over these issues represents overthinking and lies outside of the purview of Landlord and

its counsel. Moreover, if Landlord truly wishes to expend brainpower on this issue, Landlord should also ascertain and try to limit any future internal changes within Tenant that might undercut Guarantor's control of Tenant. Any such Landlord concern seems entirely excessive.

Similarly, Guarantor should consider the exposure it incurs by signing a Good-Guy Guaranty. Although a Good-Guy Guaranty assumes Guarantor fully controls Tenant, sometimes that's not true. For example, Tenant might be owned by a private equity fund, but Landlord might negotiate the Lease with Tenant's chief executive officer. That person becomes a tempting candidate to act as Guarantor under a Good-Guy Guaranty. The private equity fund should then indemnify Guarantor. That raises issues similar to those arising when a managing member signs a nonrecourse carveout guaranty for a loan. Guarantor will particularly want such an indemnity if the private equity fund should, at some point, terminate Guarantor as chief executive officer. Perhaps in that case the Lease, the Good-Guy Guaranty, and an agreement between Guarantor and the private equity fund should provide for the replacement of Guarantor.

Unlike a purely credit-driven guaranty, a Good-Guy Guaranty is not something that any creditworthy Guarantor can sensibly sign for a friend who cannot sign a Lease without a Guarantor.

Investment Structure

If Tenant's business or development project runs into trouble, Guarantor will have an incentive to achieve an End Date. Any investors in Tenant may dislike that idea. They might assert that Guarantor violated its obligations to the investors by causing an End Date to occur. Guarantor will want Tenant's organizational documents to include suitable waivers and acknowledgments. Again, these concerns mirror similar concerns arising under carveout guaranties in real estate financing.

Future Lease Amendments

If Landlord and Tenant later amend the Lease, Landlord will typically⁴ ask Guarantor to consent to the

amendment and reaffirm the effectiveness of the Guaranty. When that happens, Guarantor and its counsel should carefully review the words of the consent and reaffirmance. Ordinary anodyne words in that consent and reaffirmance (e.g., "Guarantor reaffirms its full liability under the Lease") can unintentionally turn the Good-Guy Guaranty into a full Guaranty of the Lease. That risk seems particularly high if, at the time of the Lease amendment, Guarantor is saving money and time by not checking with counsel. Therefore, counsel who negotiates the Good-Guy Guaranty may wish to advise Guarantor and Tenant to incur a few dollars in legal fees if they ever amend the Lease and Landlord asks Guarantor to sign anything.

Definitions

Below are terms that are used in this Model Good-Guy Guaranty Language, but not defined here. The other provisions of the Lease Guaranty or other documents for the transaction will need to define these terms. In all cases, confirm that all capitalized terms are defined somewhere.

- Commencement Date
- Construction
- Event of Default
- Expiration Date
- Government
- Guaranty Release
- Indemnify
- Lease Memo
- Legal Costs
- Mechanic's Liens
- Recovered Payments
- Scheduled Expiration Date
- Sublease
- Subtenant
- Term

MODEL GOOD-GUY GUARANTY LANGUAGE: BASE CASE

For a Good-Guy Guaranty, one could start with either a partial Guaranty (listing only specific Guaranteed Obligations backed by the Guaranty) or a full Guaranty (“full” means the Guaranty covers all obligations under the Lease). Either way, one would then end Guarantor’s liability on an End Date, using definitions and operative provisions below. Tenant and Guarantor should try to keep the End Date Conditions short, simple, few, and easily met. The conditions listed below, before the Bells & Whistles, represent a reasonable and limited, or at least typical, set of End Date Conditions.

1. TERMINATION

1.1. Effect of End Date. If an End Date occurs, then no further liability shall accrue under this Guaranty, [this Guaranty shall terminate, Guarantor shall have no more obligations under this Guaranty, and Landlord shall deliver a Guaranty Release⁵].⁶

1.2. Definition: End Date. An “**End Date**” means, only for this Guaranty (with no effect on the Lease or Tenant’s liability or obligations under the Lease)⁷ the first date when these conditions (the “**End Date Conditions**”) have all been met:⁸

1.2.1. Departure. All Occupants have vacated and delivered to Landlord vacant possession of the entire Premises (“**Departure**”). “**Occupant**” means Tenant and any person occupying or claiming any Premises by or through Tenant, or with Tenant’s consent or acquiescence, except Persons that Landlord has agreed in writing may remain after Tenant vacates or the Lease terminates.⁹

1.2.2. Departure Affidavit. Guarantor or Tenant has delivered to Landlord at Landlord’s current Notice address under the Lease an Affidavit of Departure and Vacancy in the form of **Exhibit ____** (a “**Departure Affidavit**”),¹⁰ signed and sworn to by Tenant and all Occupants (the date when Departure and delivery of the Departure Affidavit have occurred, the “**Departure Date**”).

1.2.3. Lease Security. Tenant has replenished any Lease Security previously applied to Rent, so Landlord holds the full amount of Lease Security the Lease contemplated. Landlord has no obligation to apply or credit any Lease Security or prepaid Rent against Guarantor’s or Tenant’s liability to Landlord, or to release any Lease Security to Tenant or Guarantor.¹¹ Guarantor may not claim any credit for the Lease Security. Landlord may continue to hold it, or may apply it, as Landlord sees fit (subject to the Lease) or as Landlord and Tenant agree.

1.2.4. Lien Claimants. Guarantor or Tenant has paid all persons entitled to file Mechanic’s Liens as a result of Construction or any other lienable activities undertaken by or for Tenant (as evidenced by final lien waivers and receipts for payment) and has paid all such liens that have been filed.¹²

1.2.5. Payments. Guarantor or Tenant has paid all [Guaranteed Obligations] [Base Rent and ____]¹³ [Rent]¹⁴ [and any holdover rent] accrued to date.¹⁵ That payment shall: (i) disregard (and need not include) any amount, such as liquidated damages, bonus value, or accelerated rent,¹⁶ calculated by reference to any date or period after the End Date has otherwise occurred; and (ii) exclude any amounts otherwise due that would not have been due if the Expiration Date of the Lease had occurred on the End Date.

1.2.6. Physical Condition. All Occupants’ trade fixtures and personal property have been removed from the Premises¹⁷ and the Premises are broom clean.¹⁸

1.2.7. Pre-Departure Notice. At least ____ days (the “**Minimum Notice Period**” and at most ____ days before the Departure Date,¹⁹ Guarantor or Tenant has Notified Landlord, in compliance with the Notice procedures in the Lease,²⁰ of the Departure Date (a “**Pre-Departure Notice**”). Any Pre-Departure Notice is irrevocable. It may not be withdrawn without Landlord’s consent.²¹ If Guarantor and Tenant fail give a timely Pre-Departure Notice, then this End Date Condition shall be deemed satisfied when the Minimum Notice Period has elapsed after the earlier of: (i) the date Guarantor or Tenant actually gives an untimely Pre-Departure Notice; and (ii) the Departure Date.²²

1.2.8. Timing Limitations. As of the [Departure Date] [date Tenant delivers the Pre-Departure Notice], at least ____ months has elapsed since the Commencement Date.

MODEL GOOD-GUY GUARANTY LANGUAGE: BELLS & WHISTLES

Over time, Landlords and their counsel have expanded the list of End Date Conditions, much as nonrecourse carveouts in loan documents have expanded over time. Good-Guy Guaranties were originally designed just to prevent Tenant from staying in possession without paying Rent. Maybe they should stop there: Once Tenant moves out, Guarantor’s liability ends, and Landlord can resolve everything else with Tenant, without involving Guarantor.

Here are examples of additional End Date Conditions that an overexuberant Landlord or its counsel may want to add to the definition of End Date and that Guarantor would ordinarily resist. All these additional End Date Conditions either: (i) are unusual and rarely seen; or (ii) should be eliminated by Guarantor if at all possible. Footnotes discuss each one. To the extent that Landlord prevails on these additional End Date Conditions, they may replace similar but kinder, gentler, or different End Date Conditions already offered in the Base Case.

Landlord may also want to give some thought to the circumstances of the particular Lease, and what Landlord will want to receive from Tenant if Tenant moves out. Each such item could support another End Date Condition.

1. TERMINATION

1.1. Additional End Date Conditions.

1.1.1. Business Property. Tenant has transferred to Landlord or its designee, through ordinary and customary documentation reasonably satisfactory to Landlord, lien-free ownership of all property used in Tenant’s business operated in the Premises, including equipment, inventory, trade fixtures, and intellectual property, including all associated goodwill, domain names, and other rights, including these items of intellectual property: ____.

1.1.2. Insurance Claims. Tenant has submitted to Tenant’s liability insurance carrier (and the carrier has acknowledged to Landlord receipt of and obligation to defend) all pending claims against Landlord or Tenant for personal injury or property damage within the scope of Tenant’s indemnities under the Lease.²³

1.1.3. Lease Memo. If the parties recorded a Lease Memo, then Tenant has released it of record or delivered to Landlord all documents necessary to accomplish that release.²⁴

1.1.4. Keys. Guarantor or Tenant has delivered to Landlord at Landlord’s current Notice address under the Lease²⁵ all keys and access devices for the Premises in Tenant’s²⁶ possession.²⁷

1.1.5. Leasing Costs. Guarantor or Tenant has paid Landlord an amount equal to the unamortized balance as of the End Date (as calculated by Landlord on a straight-line basis over the initial Term of the Lease) of these expenses Landlord incurred for the Lease: (i) brokerage commissions; (ii) value of any free rent periods occurring before the End Date; (iii) contribution to tenant improvements or other costs Tenant incurred; and (iv) cost of all construction work the Lease required Landlord to perform. Within 10 days after Guarantor's or Tenant's request (which may appear in a Pre-Departure Notice), Landlord shall give Guarantor Landlord's calculation of the amounts payable under the previous sentence.²⁸

1.1.6. Legal Costs. Guarantor has paid or reimbursed Landlord for all Legal Costs incurred in enforcing the Lease against Tenant and in enforcing this Guaranty against Guarantor.²⁹

1.1.7. No Default. As of the effective date of the Pre-Departure Notice, no [Monetary] [Event of] Default exists under the Lease [of which Landlord has Notified Tenant] [and Guarantor].³⁰

1.1.8. No Defaults. From [the Commencement Date] [effective date of the Pre-Departure Notice] until all other conditions to an End Date have been satisfied, no [Event of] Default has occurred under the Lease [of which Landlord has Notified Tenant] [and Guarantor].³¹

1.1.9. No Insolvency Proceeding. Tenant is not, and was at no previous time in the Term, subject to any Insolvency Proceeding.

1.1.10. No Proceedings. Neither Tenant nor Guarantor has, at any time in the Term, commenced any litigation or administrative proceeding against Landlord, or filed any complaint against Landlord with any Government.³²

1.1.11. No Surrender. Tenant has not asserted, orally or in writing, that Tenant's vacating of the Premises constitutes a surrender of the Lease or a termination of Tenant's contractual liability under the Lease.

1.1.12. No Waste. No Occupant has committed waste, unless fully repaired and corrected, in the Premises.

1.1.13. Physical Condition. The physical condition of the Premises, including any Construction that Tenant initiated, complies with the Lease requirements³³ that apply to delivery of the Premises back to Landlord at the end of the originally scheduled Term, including any requirements to remove any improvements or restore the Premises to their original condition.³⁴

1.1.14. Releases. Guarantor and Tenant have delivered to Landlord unconditional releases of all liability of Landlord and all Landlord Related Persons relating to or arising from the Lease or the Premises.³⁵

2. ADDITIONAL AGREEMENTS

2.1. Delayed or Failed Departure. Without limiting any other rights and remedies of Landlord, if Tenant gives a Pre-Departure Notice but, as of the Departure Date in that Notice, any End Date Condition has not been satisfied, then [Tenant and Guarantor shall pay Landlord a per diem fee of \$ ____ per day until an End Date occurs] [Tenant shall be deemed to have withdrawn the Pre-Departure Notice; the Pre-Departure Notice shall be deemed rescinded and of no force or effect; no one shall have any right to deliver any Departure Document; Guarantor shall no longer have any right to terminate liability under this Guaranty; and no End Date shall ever occur].³⁶

2.2. Guarantor's Confirmation. Guarantor confirms to Landlord that Guarantor: (i) controls Tenant's management and decision-making; and (ii) has full power and authority within Tenant to cause Tenant to satisfy all End Date Conditions, with no consent or concurrence by anyone else.³⁷

2.3. Claims After End Date. The occurrence of an End Date does not limit Guarantor's liability (if any such liability would have existed before the End Date) arising from any event that occurred before the End Date (such as an obligation to Indemnify regarding that event), but only if: (i) Tenant's liability for that matter would have survived the Expiration Date of the Lease under the express terms of the Lease; and (ii) Landlord [commences an action on account] [notifies Guarantor, in reasonable detail,] of that liability, within ___ months after the End Date. The occurrence of an End Date also does not limit Guarantor's obligations relating to Recovered Payments, payment for Construction undertaken by Tenant, or payment or discharge of Mechanic's Liens resulting from any such Construction.

2.4. Objections. If Guarantor or Tenant gives Landlord a document identified as a Pre-Departure Notice or a Departure Affidavit (a "**Departure Document**") and Landlord believes that Departure Document does not satisfy the conditions and requirements of this Guaranty that apply to the particular Departure Document, then Landlord must Notify Guarantor within five Business Days after receipt (an "**Objection Notice**"), or Landlord will be deemed to have accepted and approved the Departure Document and acknowledged it is a valid Pre-Departure Notice or Departure Affidavit, as the case may be. Any Objection Notice, to be effective, must state in reasonable detail Landlord's basis for objection and the reasonable changes in the Departure Document that would cause it to comply with this Guaranty and satisfy an End Date Condition.

MODEL GOOD-GUY GUARANTY LANGUAGE: EXHIBIT ____

AFFIDAVIT OF DEPARTURE AND VACANCY³⁸

STATE OF ____

ss:

COUNTY OF ____

Reference is made to the ____ Lease between ____ ("**Landlord**") and ____ ("**Tenant**"), dated as of ____, 202 ____, and amended only by ____³⁹ (the "**Lease**"), for premises consisting of ____ (the "**Premises**"), in the building known as ____. Definitions in the Lease (or in the ____ Guaranty signed by ____ and dated ____, 202 ____,) apply in this Affidavit (this "**Departure Affidavit**").

Tenant, being duly sworn, deposes and says, effective as of ____, 202 ____ (the "**Departure Date**"):

BASE CASE

1. *Vacating of Premises.* Tenant has voluntarily vacated and departed from the Premises. Tenant irrevocably gives up, abandons, disclaims, and releases to Landlord all of Tenant's leasehold estate and rights under the Lease, including all rights of use, occupancy, and possession.

2. *No Occupants.* No Occupant has any right to use, occupy, or possess the Premises, in whole or in part. No Occupant exists. Landlord may (at its option) freely lease the Premises to others, free of any claim by any Occupant, whether on Landlord's account or in exercising any Landlord Remedy.
3. *Personal Property.* Tenant has removed from the Premises all personal property that Tenant desires or the Lease requires Tenant to remove. Anything left in the Premises is abandoned. Landlord may dispose of it as Landlord sees fit, at Tenant's expense. Landlord has no responsibility for preserving or maintaining it.
4. *Physical Condition.* Tenant has left the Premises in the condition the Lease requires at the end of the Term, excluding any requirements on restoration or removal of tenant improvements.⁴⁰
5. *No Other Agreements.* The Lease, as affected by this Departure Affidavit, has not been amended. It contains the entire agreement between Landlord and Tenant (and defines all rights of Tenant) relating to the Premises. Landlord and Tenant have no other agreements regarding the Premises.
6. *No Waiver by Landlord.* This Departure Affidavit, or Landlord's acceptance of possession and of Tenant's physical departure from the Premises, does not: (i) constitute a surrender, cancellation, or termination of the Lease; or (ii) terminate, release, waive, or limit: (a) the Lease as a contractual obligation from Tenant to Landlord, including Tenant's obligations to Indemnify Landlord; (b) any of Tenant's obligations or liability under the Lease for its remaining stated term without regard to the occurrence of the Departure Date; or (c) Landlord's rights and remedies, including Landlord's right to recover damages from Tenant, under the Lease for its remaining stated term. Tenant's liability and obligations under the Lease shall continue through its Scheduled Expiration Date notwithstanding delivery of this Departure Affidavit. This Departure Affidavit merely confirms that Tenant has irrevocably vacated and given up possession of the Premises.⁴¹

BELLS & WHISTLES

7. *Keys.* [Enclosed with this Departure Affidavit, please find] [Tenant has delivered to ____] [Simultaneously with this Departure Affidavit, Tenant is delivering to ____]⁴² all keys, access cards, access codes, alarm codes, and other access or security devices in Tenant's possession for the Premises. Except for those items delivered with this Departure Affidavit, Tenant possesses no keys, access cards or codes, alarm codes, or other access or security devices for the Premises.⁴³
8. *Occupancy.* The only former Occupants consist of these parties: _____. All such former Occupants have joined in this Departure Affidavit below.
9. *Alarm System.* Either: (i) the Premises have no active alarm system installed; or (ii) the alarm system at the Premises has been deactivated or turned off.
10. *Utility Bills.* Tenant has attached copies of the latest utility bills for the Premises. Tenant will cooperate with Landlord as reasonably requested to transfer over utility service [, including the benefits of and credit for any existing deposits].
11. *No Claims.* Tenant has no claims against Landlord. Tenant releases Landlord and its affiliates, agents, employees, members, officers, principals, and all other related persons from any and all liability under the Lease or relating to the Premises, past, present, and future, known and unknown.⁴⁴

- 12. *No Surrender.* Tenant’s vacating of and departing from the Premises does not constitute a surrender or an offer of surrender. Landlord’s taking over of possession of the Premises, and (at Landlord’s option) seeking to relet does not constitute an acceptance of any surrender of the Premises. Tenant has not surrendered the Lease or the Premises. Landlord has not accepted any such surrender.
- 13. *Breach of Lease.* Tenant acknowledges that by vacating the Premises, Tenant has breached the Lease, an Event of Default has occurred, and Landlord is entitled to exercise all its rights and remedies against Tenant for that breach and Event of Default.
- 14. *Lease Security.* Landlord may continue to retain (and apply or not apply against Tenant’s present or future obligations or damages payable under the Lease) the full Lease Security and any prepaid Rent. Tenant will have substantial liability to Landlord under the Lease, well in excess of the Lease Security and prepaid rent. Tenant therefore consents that Landlord may retain the entire Lease Security and prepaid rent, provided that Landlord credits them against the substantial damages due Landlord.
- 15. *Intellectual Property.* Tenant assigns to Landlord all intellectual property associated with Tenant’s business operated in the Premises, including all associated goodwill, domain names, and other rights, including these items of intellectual property: _____. Tenant shall promptly upon request execute such additional assignment documentation as Landlord reasonably requests to accomplish such assignments.⁴⁵
- 16. *End Date Conditions.* All End Date Conditions in the Guaranty have been satisfied.

CONCLUSION

Any further communications on this matter must be in writing, given in compliance with the notice procedures in the Lease, and directed to Tenant (with copies to copy recipients) only at the addresses designated below. No notices or written communications shall be directed to the Premises. Tenant’s address and copy recipients are now:

_____ Addressee
_____ With a Copy to

[TENANT SIGNATURE BLOCK AND JURAT]

All Occupants confirm and join in the Departure Affidavit above.⁴⁶

[ALL OCCUPANTS SIGNATURE BLOCKS AND JURATS]

Guarantor: (i) certifies, represents, and warrants that no Occupants exist and the preceding Departure Affidavit is accurate in all respects;⁴⁷ (ii) consents to the above Departure Affidavit; and (iii) waives any claim or defense related to (the application of) Lease Security or prepaid Rent. This paragraph shall survive the Departure Date.

[GUARANTOR SIGNATURE BLOCK AND JURATS]

Notes

- 1 The author reserves the right to assert positions inconsistent with this article, which is offered for discussion only.
- 2 Joshua Stein, *Model Lease Guaranty*, *The Practical Real Estate Lawyer*, Vol. 32, No. 16, pg. 29 (ALI CLE, May 2016). That article focused on full Guaranties of leases, but also included very abbreviated optional language for Good-Guy Guaranties with equally limited commentary. The present article goes into much more depth specifically on Good-Guy Guaranties.
- 3 For example, the Lease itself (not the Guaranty) will often say that any surrender cannot become effective without Landlord's written acceptance. If an End Date Condition requires Tenant to surrender the Lease, but Landlord doesn't accept the surrender in writing, did Guarantor satisfy the End Date Condition requiring a surrender? Conversely, if Landlord wants to preserve its claims against Tenant, Landlord might find that a completed and accepted surrender of the Lease results in its termination. Hence this Model Good-Guy Guaranty Language uses the word "surrender" only to declare that Tenant's departure does not constitute a Lease surrender.
- 4 The Guaranty probably says Guarantor will be bound by Lease amendments whether or not Guarantor consents to them. Nevertheless, a careful Landlord's counsel will always request Guarantor's consent to any amendment.
- 5 Landlord might not want the Guaranty to terminate, but instead merely say that no further liability shall accrue. Guarantor will ordinarily disfavor any such nuance, arguing that if an End Date occurs then the Good-Guy Guaranty has served its purpose and should just go away. That makes sense only if the End Date Conditions include payment of all Guaranteed Obligations accrued to date. If Guarantor can achieve an End Date without actually bringing Guaranteed Obligations current, then an End Date should not terminate liability under the Guaranty and might better be called a Liability Accrual Termination Date.
- 6 If Guarantor can achieve an End Date without actually paying all amounts due under the Good-Guy Guaranty, then the document should merely state that Guarantor's liability ceases to accrue, except on account of any Mechanic's Lien regardless of when filed. If, as is more typical (unfortunately for Guarantors), an End Date requires full payment of everything due to date under the Good-Guy Guaranty, then an End Date should entitle Guarantor to a full release. Either way, Landlord may want to make exceptions for: (i) Recovered Payments; and (ii) any Tenant obligations under the Lease that would survive expiration or termination of the Lease (e.g., Indemnification and removal of liens). Both clauses (i) and (ii) are nonstandard in Good-Guy Guaranties. Instead, an End Date is supposed to be an End Date, because the Good-Guy Guaranty will have served its purpose. For any lingering claims under the Lease, Landlord should look only to Tenant.
- 7 In the case of an ordinary Good-Guy Guaranty, the Lease will continue as an agreement between Landlord and Tenant, so Landlord can enforce it against Tenant. For that reason, Tenant must replenish the Lease Security as a condition to the End Date. Landlord will reasonably expect to continue to hold the full Lease Security, to backstop Landlord's claims against Tenant. If the Lease will not continue after the End Date, then the whole deal structure should probably just give Tenant an early termination right, with a full Guaranty of the Lease. This would replace the Good-Guy Guaranty.
- 8 Tenant would try to shorten the list of End Date Conditions but will usually accept the list of End Date Conditions offered here, subject to the suggestions in footnotes. At this point in the document, Landlord might try to add: "all in a manner and pursuant to documentation reasonably satisfactory to Landlord."
- 9 This exception covers nondisturbance agreements and pick-up leases (i.e., leases that take effect after the Lease terminates or expires). If a Subtenant is in default beyond cure periods under its Sublease, then it will sometimes lose nondisturbance protection. Landlord may want any such bad Subtenant to constitute an Occupant, so Tenant would need to remove that Subtenant. Tenant should object to that idea. If Tenant enters into Subleases without nondisturbance protection, Tenant should remember that so long as any such Subtenant remains or fails to deliver the required vacate/surrender documentation, no End Date can occur. Tenant should keep this in mind when: (i) negotiating Subtenant nondisturbance protections in the Lease; (ii) evaluating possible Subtenants and their credit; (iii) writing Subleases and Sublease guaranties; and (iv) determining the scheduled expiration date of any Sublease. Tenant may also want to add a carveout for Persons in possession under pre-Commencement-Date leases with Landlord, although such Persons may automatically be deemed to occupy with Landlord's consent so fall within the existing carveout in text.
- 10 Some Good-Guy Guaranties leave the form of Departure confirmation documentation to be determined later or say it must be reasonably satisfactory to Landlord. Sample language (replacing clause (ii)):
 - (ii) Tenant has confirmed to Landlord in writing, in a document reasonably satisfactory to Landlord, that Tenant has departed from and vacated the Premises, disclaims any further rights regarding the Premises, and acknowledges and confirms such other similar matters as Landlord reasonably requires;The parties, and particularly Tenant and Guarantor, should try to attach a form instead. Otherwise, when Guarantor is trying to cut off its liability, quibbles about the form of the Departure confirmation document may result in an unjustified continuation of liability.
- 11 This End Date Condition can be negotiated as appropriate, whether in negotiating the Good-Guy Guaranty and the Lease or, later, in negotiating an early End Date. For example, Guarantor may want to require Landlord to apply the Lease Security against the Guaranteed Obligations, whether or not Tenant replenishes it, before determining Guarantor's liability and in defining the End Date Conditions. That idea violates the proposition that, even if an End Date occurs, the Lease remains in full effect as

between Landlord and Tenant, so Landlord can continue to exercise its rights and remedies against Tenant. If the Guaranty doesn't address treatment of Lease Security, Tenant and Guarantor can try to claim credit for the Lease Security in any case.

- 12 Landlord may worry that work is underway that could produce future liens. In response, Landlord may want Guarantor's liability for liens to continue until, for example, 30 days after the deadline to file liens, even though the End Date would otherwise have occurred. Landlord might also insist on third-party evidence of the scope of potential lien claimants and the potential amounts of their claims, and a confirmatory certification from Guarantor, which would survive the End Date. The parties might also agree that either: (i) Guarantor's liability will continue after the End Date just for liens; or (ii) Guarantor can provide security for future liens and still achieve an End Date.
- 13 Guarantor would prefer to limit these payment obligations to Base Rent and specified other payment obligations, such as Real Estate Taxes, but not Additional Rent, which means all other payments the Lease requires. Such a limitation should produce the incentives that a Good-Guy Guaranty seeks to produce, without imposing on Guarantor potentially massive payment burdens.
- 14 If the Good-Guy Guaranty refers to payment of all "Rent," Guarantor should scrutinize the definition of Rent to assure that its breadth matches Guarantor's expectations. Guarantor might request that Landlord first apply the Lease Security against Tenant's unpaid Rent, thus limiting Guarantor's liability to any unpaid Rent that remains. Does Rent include indemnity obligations, environmental cleanup obligations, and the like? Maybe the Guaranty shouldn't extend to those.
- 15 Guarantor will hate this subparagraph. If Guarantor satisfies all End Date Conditions but has no money and therefore cannot satisfy this particular End Date Condition, then the Guaranty would continue—and Guarantor's liability could continue to pile up—until Guarantor actually makes the payment or the Scheduled Expiration Date occurs. If it takes Guarantor a year to find the money to do that, then the End Date would be deferred by a year, so the Good-Guy Guaranty would continue to cover all Rent accruing during that year, including potentially damages calculated based on the entire remaining Lease Term. Guarantor would argue that this exposure is unnecessary to create the incentives that a Good-Guy Guaranty was originally intended to create. If Guarantor is short of cash but has been properly incentivized and has in fact caused Tenant to vacate, why should Guarantor's liability continue to pile up—potentially until the original Expiration Date of the Lease, even though Tenant has long since moved out—just because Guarantor can't pay? Landlord will feel otherwise, probably strongly, because until Guarantor has paid up, Landlord will still have to deal with a defaulted Lease and chase Guarantor. Guarantor would prefer this End Date Condition to merely require payment of Rent through the Departure Date, regardless of when Guarantor makes that payment. Or perhaps Guarantor can limit the build-up of liability after the Departure Date to a certain number of days or dollars (or at least to whatever

Rent might accrue through the original Scheduled Expiration Date), even if Guarantor can't pay. Most Good-Guy Guaranties do require Guarantor to bring payments current to achieve an End Date, so some version of this paragraph typically does appear as an End Date Condition. It is the first common End Date Condition that any Good-Guy Guarantor should try to delete. The author would prefer to categorize it as a Bell & Whistle, but it has, unfortunately for Guarantors, achieved such wide usage in Good-Guy Guaranties that it is probably market standard. It can be quite brutal for a struggling Tenant, but it forces Tenant to assess realistically whether it can remain in business. Landlord does not want Tenant to pay payroll and operating expenses but not Rent just because it can get away with that.

- 16 Many Good-Guy Guaranties expose the Guarantor to liability for accelerated Rent. That is a huge mistake. For example, during the Covid-19 pandemic, many leases were suddenly over market, at least for the moment. A typical accelerated-rent provision awards Landlord the difference between all Rent reserved under the remaining Term (as originally contemplated) and the fair-market rental value of all the space for the same period. The lower the fair market rental value at the time of Tenant Default, the more liability for Tenant. If that liability arises before an End Date occurs, then Guarantor may need to pay it to satisfy an End Date Condition. That would be very bad. Therefore, Guarantor should insist on the language in text. Landlord should generally agree to it and include it in the first draft of any Good-Guy Guaranty. Guarantor might go a step further and assure that the Guaranteed Obligations, as defined in the Guaranty, always exclude any form of accelerated rent.
- 17 This paragraph mostly relates to a space lease, where Landlord can reasonably expect Tenant to remove Tenant's "stuff" and not damage the Premises. Good-Guy Guaranties sometimes require much more, such as removal of Tenant's improvements and restoration of the Premises to its condition on the Commencement Date, which is (i) what a Landlord-friendly space lease will typically require; (ii) not very practical given the usual timing and financial issues if Tenant is in distress; and (iii) not all that important or valuable to Landlord in the typical case. See Bells & Whistles. A ground lease may sometimes justify some variation of this End Date Condition, based on the circumstances of the particular deal.
- 18 Do we know what "broom clean" means?
- 19 The parties usually agree to a prior Notice requirement, typically 90 to 180 days. The length of that period will depend on circumstances, such as how long Landlord thinks it will take to find a new Tenant. Landlord should insist that the Notice designate an actual departure date. Otherwise, Guarantor/Tenant might give the Notice immediately after signing the Lease, then potentially have the right to walk away at any time after the minimum notice period has expired. Guarantor may want the option to make a payment in lieu of Notice, but that possibility should take care of itself and not require verbiage in the Guaranty.
- 20 Given the importance of this Notice, Guarantor or Tenant may want to specify the Notice procedures here in

- the Guaranty, or through a separate Notice clause in the Guaranty. Perhaps the Notice should come from: (i) both Guarantor and Tenant; or (ii) either Guarantor or Tenant. Landlord shouldn't care, but Guarantor or Tenant might.
- 21 Without the last two sentences, a brave Tenant/Guarantor might give a Pre-Departure Notice for leverage or theatrical purposes, withdraw it, and then try to do it again later.
 - 22 The last sentence is nonstandard but reasonable. It protects Guarantor if Tenant simply moves out without remembering to give a Pre-Departure Notice. Under those circumstances, Landlord could otherwise argue an End Date can never occur. It is the leasing equivalent of terminating an employee with two weeks of pay in lieu of two weeks of notice.
 - 23 This subparagraph is nonstandard but appropriate. It results from a situation handled by the author. But what happens if the carrier decides to deny coverage? Should the Guarantor remain liable under the Guaranty? Landlord may sometimes go further and insist that an End Date does not terminate Guarantor's liability for any loss Landlord suffers because Tenant failed to maintain any Required Insurance.
 - 24 This condition to an End Date should always apply (and therefore should be part of the Base Case) but it rarely appears in Good-Guy Guaranties. So, it is relegated to Bells & Whistles.
 - 25 The parties may wish to identify a particular person or representative, at a particular address, and during a particular timeframe (business hours) who will receive these deliveries.
 - 26 Landlord might want to add "or any Occupant's." That seems unnecessarily burdensome.
 - 27 Landlord should already have sufficient keys and access devices and will soon change the locks anyway. So, this End Date Condition just creates a potential factual dispute.
 - 28 This calculation should be determinable when Guarantor signs the Guaranty. The parties could instead attach a schedule showing the required payment over time.
 - 29 How will Guarantor know? Perhaps the Legal Costs should be limited to those estimated or billed to date by Landlord or Guarantor should require Landlord to provide numbers on Guarantor's request. On the other hand, the End Date already requires Guarantor or Tenant to have made all payments required to date, so if Landlord does bill Tenant/Guarantor for Legal Costs, then Tenant/Guarantor would need to have paid them to achieve an End Date.
 - 30 This is a common End Date Condition. But any Tenant considering a Pre-Departure Notice probably will already be in Default. Tenant and Guarantor can reasonably argue that the other End Date Conditions adequately protect Landlord.
 - 31 This paragraph essentially creates a hair trigger by which Landlord can easily deny the occurrence of an End Date. Any careful Guarantor should reject the entire concept.
 - 32 What happens if an End Date occurs and Tenant later becomes subject to an Insolvency Proceeding? In that case Landlord might need to rely on ordinary Guaranty boilerplate about clawed-back payments.
 - 33 A space lease (but not a ground lease) might require Tenant to deliver the Premises back to Landlord in the same condition in which Landlord delivered the Premises on the Commencement Date. Though such a requirement sounds perfectly fair and reasonable, it could require Tenant to remove its tenant improvements and restore the Premises to vanilla box condition or even an empty shell. If the Lease requires Tenant to return the Premises in same condition in which they were delivered, this would raise issues of proof: How does anyone know exactly what Tenant must do? Any of these possibilities would severely impede Guarantor's options and practical ability to terminate liability. All of this represents another reason Tenant should insist on having no obligation to restore—or to return the Premises to Landlord in any particular condition beyond empty and broom clean—at the end of the Term, particularly a premature end resulting from a likely business failure. That issue arises primarily in space lease negotiations, not Guaranty negotiations, though the End Date Conditions do not necessarily have to match the requirements of the space lease.
 - 34 Tenant will prefer to negate any obligation to remove or restore, as it makes an End Date almost impossible to achieve. In a ground lease, Guarantor will want to assure that any such requirement does not produce a back-door completion guaranty. If Landlord and Guarantor disagree on whether Tenant has met this standard, then Guarantor will not want to risk losing the dispute and having liability continue to accrue while the dispute gets resolved. Guarantor can protect itself in three ways. First (and best), it can eliminate this End Date Condition. Second, instead of making this subparagraph an End Date Condition, Guarantor can separately guaranty Tenant's compliance with its redelivery obligations. That guaranty would survive an End Date, but compliance would not be a condition to the End Date. Third, the parties could add language like this to the end of the subparagraph:

If Tenant meets all conditions to an End Date except Landlord claims Tenant has not met the condition in this subparagraph (the "**Redelivery Obligation**"), then: (i) the End Date shall nevertheless occur but only as it relates to all Obligations except the Redelivery Obligation; and (ii) this Guaranty shall continue only as it relates to the Redelivery Obligation.

For any of these options, Guarantor and Tenant would want the right to enter the Premises to perform the Delivery Obligation if necessary. Landlord might want Tenant and Guarantor to continue paying Rent in exchange for that right.
 - 35 The contemplated release of liability could appear in the Departure Affidavit. If Landlord intends to continue the Lease and assert claims against Tenant, it seems inappropriate for Tenant to release Landlord from liability under the Lease.
 - 36 Some Good-Guy Guaranties include this bracketed language, which is punitive and excessive. At a minimum Guarantor should have a cure period, perhaps tied to a high per diem payment as suggested in the immediately

preceding bracketed language. Landlord would want to limit that cure period and how long Guarantor can preserve its termination rights by making per diem payments. Landlord may prefer to make Tenant a holdover in this case.

- 37 If Landlord cares about the issue suggested in this paragraph, then Landlord should not rely on this representation or warranty. Its existence, however, may lead the parties to consider who is the right Guarantor, and may lead Guarantor to obtain suitable consents and indemnities within the Tenant entity. Landlord also might not care about this issue at all, concluding that the issue belongs entirely to Tenant and Guarantor.
- 38 Review Lease for any special requirements or procedures that Landlord or Tenant should consider. For example, does Tenant need to formally request that Landlord try to re-let the space? Landlord will want to assure that any Departure Affidavit does not suggest that a “surrender” or “termination” of the Lease has occurred. Adjust this Departure Affidavit to reflect the End Date Conditions. For example, if an End Date Condition requires Tenant to transfer its business property to Landlord, then adjust the paragraph on disposition of Tenant’s property.
- 39 Fill in dates and titles of all amendments.
- 40 Landlord would not volunteer the exclusion at the end of this paragraph, but Tenant may insist on it, both in this Departure Affidavit and as an End Date Condition. It is ordinarily not practical to expect Tenant to restore the Premises or remove tenant improvements as a condition to an End Date. In the typical case Landlord shouldn’t care, but Landlord might still decide to go the other way and require restoration and removal of tenant improvements.
- 41 Landlord will favor this paragraph. Tenant and Guarantor may contemplate that once an End Date occurs, so too does Tenant’s liability under the Lease. The arrangement then becomes a Lease termination option for Tenant, not a Good-Guy Guaranty. The parties should probably document it accordingly.
- 42 Tenant may want clarity/certainty about the required recipient of the keys and access codes.
- 43 Landlord might want to expand this paragraph to refer to items in possession of all Occupants, not just Tenant.
- 44 Tenant might prefer to limit the release to known claims, but Landlord probably will reject that. Landlord might want a more beefed-up release. As an alternative to this paragraph, Tenant might propose:
No Waiver by Tenant. Nothing in this Departure Affidavit waives any claim, counterclaim, defense, or right of Tenant under the Lease, including any right to receive a partial or full refund of Tenant’s Lease Security, or any overpayment of Rent previously paid.
- 45 If Landlord anticipates continuing to operate Tenant’s business, then Tenant’s intellectual property may be extremely important. In that case, Landlord may want more detail and specific transfer/release documents.
- 46 Optional.
- 47 This clause may give Guarantor more contingent/future liability than Guarantor might like. It depends on the scope of the Departure Affidavit. For example, if the Departure

Affidavit includes Tenant’s certification that all End Date Conditions have been satisfied, Guarantor could remain on the hook if anything slipped through the cracks. Landlord would like that, of course. Guarantor may trim this clause back, such as by limiting it to a confirmation that no unpaid lien claimants exist.