TO: NAMWOLF Real Estate Subcommittee

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RE: Real Estate Finance Mini-Playbook: Enforcing (and Defending) the Commercial Guaranty

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This mini-playbook addresses the enforcement and defense of commercial guaranties in real estate finance.

I. Know Your Guaranty: The Type Decides Sequencing

Classify the instrument before any enforcement move. The type of guaranty controls whether the lender can sue the guarantor immediately or must first exhaust its remedies against the borrower and/or the collateral.

- **Guaranty of payment.** The guarantor is liable the moment the borrower defaults. The lender need not first sue the borrower or foreclose. Most commercial guaranties recite this.
- **Guaranty of collection.** The lender must first pursue the borrower and collateral to judgment and exhaust them before reaching the guarantor. Borrower-favorable and rare in institutional deals.

> **Sample (payment, not collection):** *"This is a guaranty of payment and performance and not of collection. Guarantor's liability is primary, and Lender may proceed against Guarantor without first proceeding against Borrower, any other guarantor, or any Collateral."*

There are scope variants that can be useful when tailoring the guaranty to the underlying transaction or parties. Types include: Full; limited or capped; burn-down that amortizes on a Debt Service Coverage Ratio (DSCR), leasing, or Loan-to-Value (LTV) milestone; completion; and springing recourse carve-out (bad-boy) that converts non-recourse debt to recourse on defined triggers.

> **Full:** *"Guarantor absolutely and unconditionally guarantees the full and prompt payment and performance of all Guaranteed Obligations, including principal, interest, default interest, fees, costs, and attorneys' fees, without limitation as to amount."*
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> **Limited or capped:** *"Guarantor's aggregate liability under this Guaranty shall not exceed $[amount] (or [__]% of the outstanding principal balance), plus costs and attorneys' fees incurred in enforcing this Guaranty against Guarantor."*
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> **Burn-down (sunset):** *"Upon Borrower's achievement of a Debt Service Coverage Ratio of at least [1.25x] for [two] consecutive calendar quarters, as certified by Lender, Guarantor's maximum liability shall reduce to [__]% of the Guaranteed Obligations; upon a DSCR of at least [1.40x] so maintained, this Guaranty shall terminate."*

II. Absolute, Unconditional, and Continuing

The goal is to ensure the guaranty is independent of the underlying loan, survives defenses that flow up from the borrower, and stays in force until the debt is paid in full.

> **Guaranty Language:** *"The obligations of Guarantor are absolute, unconditional, and continuing, are independent of the Guaranteed Obligations, and shall remain in full force until the Guaranteed Obligations are indefeasibly paid in full. Guarantor's liability shall not be affected by the invalidity, illegality, or unenforceability of the Loan Documents against Borrower."*

Note that the term indefeasibly matters. It signals payment must be final and not subject to later clawback, so a payment later avoided as a bankruptcy preference does not discharge the guarantor. It is best paired with an express reinstatement clause reviving the guaranty for any disgorged amount.

III. Suretyship Defenses and the Omnibus Waiver That Defeats Them

This is where lenders/companies lose otherwise-good claims. At common law a surety is discharged when the creditor *changes the deal or impairs the collateral without consent*. Every defense can be waived, and a well-drafted guaranty waives all of them. When enforcing, confirm no unconsented change discharged a guarantor who did not waive; when defending, and test whether the waiver actually reaches the defense.

Defense that discharges the guarantor	Waiver that preserves the claim
Amendment, extension, or renewal of the loan	*"Guarantor consents to any modification, amendment, extension, renewal, or restatement of the Loan without notice, and none shall release Guarantor."*
Release, substitution, or impairment of collateral	*"Guarantor consents to the release, substitution, or impairment of any Collateral and waives any defense based on impairment of collateral or loss of subrogation."*
Release of, or settlement with, a co-guarantor or the borrower	*"Release of or settlement with Borrower or any other guarantor shall not release Guarantor, whose liability is joint and several."*
Requirement to pursue the borrower or collateral first	*"Guarantor waives any requirement that Lender first proceed against Borrower, any other party, or any Collateral, and waives any benefit of marshaling."*
Election of remedies, one-action, and anti-deficiency defenses	*"Guarantor waives all rights and defenses under any anti-deficiency, one-action, fair-value, or foreclosure-confirmation statute, including any right to a determination of fair market value."*
Defenses that belong to the borrower	*"Guarantor waives all defenses available to Borrower other than indefeasible payment in full."*

Ensure you tailor any analysis to the applicable state law, particularly any waiver of statutory anti-deficiency protection. Several states require such a waiver to be explicit and conspicuous.

Neutralize the defenses above with a single consolidated waiver rather than clauses scattered through the guaranty. Right-size the waiver to the enforcing state.

> **Omnibus waiver:** *"Guarantor waives, to the fullest extent permitted by law: (a) all requirements that Lender first proceed against Borrower, any other guarantor, or*

> *any Collateral, and all rights of marshaling; (b) notice of acceptance, presentment, demand, protest, dishonor, default, and acceleration; (c) any defense arising from the modification, amendment, extension, renewal, or restatement of the Loan, or the release, substitution, or impairment of any Collateral or any other guarantor; (d) all rights and defenses under any anti-deficiency, one-action, fair-value, or foreclosure-confirmation statute, including any right to require a fair-value hearing or judicial confirmation of any sale; (e) all rights of subrogation, reimbursement, and contribution until the Guaranteed Obligations are indefeasibly paid in full; and (f) all defenses available to Borrower other than indefeasible payment in full."*

IV. Completion Guaranties

A completion guaranty secures performance, not just the money. The guarantor must deliver the improvements lien-free per the approved plans, specifications, and budget.

The two main constructs are performance covenant and cost-overrun indemnity. Under a performance construct, the guarantor steps into the borrower's shoes and funds and completes the project, and the lender may seek specific performance or injunctive relief. Under an indemnity or cost-overrun construct, the guarantor reimburses the lender's out-of-pocket completion and lien-clearing costs.

> **Performance covenant:** *"Guarantor unconditionally guarantees the lien-free completion of the Improvements substantially in accordance with the Plans and Specifications and the Approved Budget on or before the Completion Date. Upon an Event of Default, Guarantor shall, at its sole cost, promptly commence and diligently complete the Improvements and pay all costs of completion, including any amount by which such costs exceed the undisbursed Loan proceeds."*

> **Cost-overrun indemnity:** *"In lieu of or in addition to performance, Guarantor shall pay Lender on demand all costs Lender incurs to complete the Improvements and to discharge any mechanics' or materialmen's liens, to the extent such costs exceed the undisbursed Loan proceeds, together with interest and enforcement costs."*

Ensure your completion obligations interface with joint-venture cost-overrun waterfalls: minor overruns are funded pro rata by equity percentage, larger overruns typically revert to the sponsor as non-dilutive equity, and a sponsor's failure to fund lets the institutional investor squeeze down, fund the overrun as high-rate preferred, or enforce the completion guaranty directly.

V. Representing the Guarantor: Defenses That Survive

Even against a broad waiver, several defenses survive or turn on drafting and state law. Consider these before conceding liability.

- **Waiver gaps.** Read the waiver narrowly. A defense not clearly waived survives, and a statutory waiver that is not explicit or conspicuous where the state requires it may fail.
- **Sham guaranty.** If the guarantor is in substance the true borrower (a shell borrower with no independent assets, or a general partner already liable), California and other courts disregard the guaranty and apply the anti-deficiency protections.

- **Deficiency forfeiture.** No confirmation within a state mandated amount of days, or a blown state mandated deadline, can bar the very deficiency the guaranty depends on, unless the guarantor waived it.
- **Personal defenses.** Fraud in the inducement, lack of capacity, duress, failure of consideration, and the guaranty's own statute of limitations are personal to the guarantor and survive standard suretyship waivers.

The guaranty wins on two levers: the waivers drafted at origination and disciplined enforcement afterward. Classify the instrument to fix sequencing, make it absolute and continuing, neutralize the suretyship defenses with a precise omnibus waiver, and, whether enforcing or defending, know which defenses survive that waiver.

This memorandum is provided for educational and discussion purposes for the NAMWOLF Real Estate Subcommittee. It is not legal advice and not a substitute for review of the specific guaranty, loan documents, and current governing law.