



CONTINUING GUARANTY (LIMITED AMOUNT) & GUIDE

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Sample Continuing Guaranty (Limited Amount)

1. Overview

Successful businesses are built on big ideas and long-range goals, but without sufficient capital, those dreams may never be realized. Limited start-up funds can stop a company in its tracks. Business owners often underestimate the amount of money they will need to keep their organization running, and close their doors before they've had a chance to get a market foothold. Many owners also expect their companies to turn a profit on Day 1, failing to consider expenses, competition, and the time it takes to build a customer base.

Whatever the reasons, individuals and companies often must borrow money to keep their businesses afloat. They can turn either to large financial institutions or to friends, colleagues, and relatives for support. In either case, lenders will seek assurance that the money they've lent will be paid back, one way or another. A guaranty is a way to provide such assurance. The guarantor will serve as the borrower's stand-in, liable for the borrower's debts and duties as if they were his or her own, if the borrower ever fails to repay the money borrowed.

Borrowers who find guarantors for their loans may find such loans more readily available. Lenders know that if a default occurs, they have the additional security of being able to turn elsewhere for repayment. The very fact of the guaranty may itself provide comfort. It signals to the lender that a third party has confidence in the borrower or that a business owner has confidence in his or her own company. These assurances may, in turn, make a borrower more comfortable with the loan arrangement, confident in a safety net that can prevent total default and its related credit consequences.

This package contains everything you'll need to customize and complete your continuing guaranty. A written agreement minimizes confusion, misunderstanding, and error, and clearly sets forth the parties' expectations and fulfillment obligations. In every way, this promotes successful and profitable business arrangements.

2. Dos & Don'ts Checklist

- Almost all small business lenders require guaranties, usually from the business owners personally. If your company's financial condition is strong and stable, lenders may not ask you to complete a guaranty, and these will be requested less frequently as your revenues and prospects grow.
- Before sitting down to sign, decide exactly what your goals are for the guaranty. Will the guarantor be responsible for default interest and legal fees? How and when can the guaranty be cancelled? A good agreement is one that captures the intentions of the parties accurately. Clarify the terms and conditions of your agreement before memorializing them in writing.
- Many guaranties, including the enclosed document, allow the lender to recover payment in any order it chooses. In other words, the lender can go after the assets of either the debtor or the guarantor if a default occurs. It is not required to seek money from the debtor first. This is not intuitive, and should be emphasized to whoever is guaranteeing the loan.

- The attached document is a continuing guaranty, which is not limited to a particular transaction or promissory note. Guarantors under continuing guaranties agree to secure all of the borrower's debts to the lender, regardless of how many notes or transactions generate that total amount. The enclosed form is limited in amount, which means that there is a cap on the amount for which the guarantor will ensure repayment. The lender cannot seek assurances from the guarantor for any amounts in excess of that limit.
- Allow each party to spend time reviewing the guaranty. This will reduce the likelihood, or at least the efficacy, of claims that a party did not understand any terms or know what their obligations were under the document.
- Both parties should review the guaranty carefully to ensure that **all relevant deal points** have been included. Do not assume that certain expectations or terms are agreed to if they are not stated expressly in the document.
- Guaranties, including continuing guaranties, are often used to supplement promissory notes and other loan agreements. The note is the borrower's promise to repay the money it received. The enclosed guaranty assumes the existence of those loan documents, but those documents are not included with this package.
- Sign three copies of the guaranty, one for the guarantor and one each for the parties to the original contract.
- Depending on the nature of its terms, you may decide to have your guaranty witnessed or notarized. This will limit later challenges to the validity of a party's signature.
- If your agreement is complicated, do not use the enclosed form. Contact an attorney to help you draft a document that will meet your specific needs.

3. Continuing Guaranty (Limited Amount) Instructions

The following provision-by-provision instructions will help you understand the terms of your continuing guaranty.

The numbers below (e.g., Section 1, Section 2, etc.) correspond to the provisions in the agreement. Please review the entire document before starting your step-by-step process.

- **Introduction.** Identifies the document as a guaranty. Write in the date on which the agreement is signed. Identify the parties and, if applicable, what type of organization(s) they are. Note that one party is called the "Guarantor" and the other the "Lender." The Lender is the party that loaned the money and the Guarantor is the party that is guaranteeing the Debtor's promise to pay with this agreement.
- **Recitals.** The "whereas" clauses, referred to as recitals, define the world of the agreement and offer key background information about the parties. This section is used to give background information on your arrangement and explain why each party has an interest in the guaranty being signed. Enter the name of the Debtor, who will be referred to as "Debtor" throughout the document.

- **Section 1: Guaranty of Obligations.** The Guarantor's promise that it is ensuring the repayment of the Debtor's liabilities.
- **Section 2: Continuing Guaranty.** Explains that the guaranty is not specific to a promissory note. If the Debtor incurs additional credit obligations to the Lender, the Guarantor guaranties the repayment of those loans as well.
- **Section 3: Maximum Liability of Guarantor.** This provides the upper limit of the amount that the Guarantor is willing to guaranty. Enter this maximum in the blanks provided. Note that this doesn't necessarily limit the amount that the Debtor can borrow from the Lender. It only limits the Lender's ability to recover borrowed amounts past that maximum from the Guarantor. The final bracketed clause is optional, and allows you to determine whether the maximum amount is a maximum of principal, or a maximum of all amounts. If you want it to be a maximum of all amounts, delete this clause.
- **Section 4: Consent to Lender's Acts.** Allows the Lender to do any of the listed acts without obtaining any permissions. Essentially, by signing the Guaranty, the Guarantor agrees that any of these things may happen without notice at any time.
- **Section 5: No Impairment of Obligations.** A list of things that will not cause the Guarantor's obligations to be eliminated or lessened. These are acts that in other instances might constitute a default, but they are being named here as part of the Guarantor's agreement that they will not constitute a default for its purposes.
- **Section 6: Liens and Setoffs.** Indicates that the Lender has an interest not only in the Guarantor's property that the Guarantor possesses, but in the Guarantor's property that the Lender possesses.
- **Section 7: Termination.** Allows the Guarantor to end the agreement at any time it wants. Note, however, that a termination doesn't eliminate the Guarantor's existing obligations: even after a termination, the Guarantor remains liable for any debts that were incurred before the termination date. The termination means only that the Guarantor will not be liable for additional amounts after that date. The bracketed final clause provides some extra time cushioning for the Lender. If this does not fit your agreement, delete this clause.
- **Section 8: Proceeding Against Guarantor.** Indicates that the Lender is not required to exhaust its remedies against the Debtor (or any other guarantors of the Liabilities) before requesting or demanding repayment from the Guarantor. The Lender can proceed against the Guarantor or the Debtor (or any other guarantor) in any order it chooses.
- **Section 9: Bankruptcy; Insolvency.** If the Guarantor enters bankruptcy or becomes insolvent, this provision indicates that the Guarantor will automatically be in default under the Guaranty. In the event of such a default, any amounts that the Guarantor owes to the Lender become immediately due.
- **Section 10: Financial Investigation.** The Guarantor's promise that it is entering the Guaranty based on its own knowledge and research about the Debtor and its financial stability. In other words, the Guarantor didn't enter the agreement based on anything it was told by the Lender.

- **Section 11: Subordination.** Indicates that even if the Debtor owes money to the Guarantor for separate loans or other matters, those obligations are secondary to the guaranty currently being provided. In other words, if the Debtor pays money to the Guarantor for debts the Debtor owes to the Guarantor, the Guarantor must turn that money over to the Lender to satisfy the payment of the Debtor's liabilities to the Lender.
- **Section 12: Postponement of Subrogation.** Explains that even though the Guarantor may have a claim against the Debtor if it is forced to pay off the Debtor's obligations, it will hold off on making that claim until the Lender has been paid. After the Lender has been paid, the Guarantor can seek reimbursement from the Debtor and the Lender will provide paperwork to support the Guarantor's claim.
- **(Optional) Section 13: List of Guaranties.** This is an optional provision that allows you to list any guaranties under which the Guarantor is currently obligated. If this is not something that is necessary in your situation, or about which you do not wish to have a formal agreement, delete this section. If you do remove the provision, correct the section numbers and references in the agreement.
- **Section 14: Waiver of Presentment; Demand.** Indicates that if the Debtor defaults on its payments, the Lender doesn't have to explain to the Guarantor that it is going to take action. The Lender can simply take action without providing notice.
- **Section 15: Successors and Assigns.** States that the parties' rights and obligations will be passed on to heirs or, in the case of companies, to successor organizations.
- **Section 16: Notice.** Lists the addresses to which all official or legal correspondence should be delivered. Write in a mailing address for both the Guarantor and the Lender.
- **Section 17: Collection Costs and Attorneys' Fees.** Places the responsibility for paying any costs of collecting money on the Guarantor's shoulders.
- **Section 18: No Implied Waiver.** Explains that even if the Lender allows the Guarantor to ignore or break an obligation under the guaranty, it does not mean the Lender waives any future rights to require the Guarantor to fulfill those (or any other) obligations.
- **Section 19: No Impairment.** The Guarantor's promise that it has all right and authority to make the agreement.
- **Section 20: Governing Law.** Allows the parties to choose the state laws that will be used to interpret the document. Note that this is not a venue provision. The included language will not impact where a potential claim can be brought. Please write the applicable state in the blank provided.
- **Section 21: Severability.** Protects the terms of the guaranty as a whole, even if one part is later invalidated. For example, if a state law is passed prohibiting choice-of-law clauses, it will not undo the entire document. Instead, only the section dealing with choice of law would be invalidated, leaving the remainder of the guaranty enforceable.
- **Section 22: Entire Agreement.** The parties' agreement that the document they're signing is "the agreement" about the issues involved. Unfortunately, the inclusion of this provision will not prevent a party from arguing that other enforceable promises exist, but it will provide you some protection from these claims.

- **Section 23: Headings.** Notes that the headings at the beginning of each section are meant to organize the document, and should not be considered operational parts of the agreement.

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CONTINUING GUARANTY (LIMITED AMOUNT)

This Continuing Guaranty (the "Guaranty") dated as of _____ [Date] (the "Effective Date"), is made and entered into by _____, an individual (the "Guarantor") in favor of _____, an [individual] [corporation] [limited liability company] [etc.] (the "Lender"), in light of the following:

RECITALS

WHEREAS, _____ (the "Debtor") desires to transact business with and obtain credit or a continuation of credit from the Lender; and

WHEREAS, the Lender is unwilling to extend or continue credit to the Debtor unless it receives a guaranty from the undersigned covering the Liabilities (as hereinafter defined) of the Debtor to the Lender;

WHEREAS, in order to induce Lender from time to time, in its discretion, to extend or continue credit unconditionally, the Guarantor has personally guaranteed to the Lender the payment of all liabilities or obligations that the Debtor may now and/or in the future owe and/or incur in favor of the Lender of whatever nature, whether now existing or hereafter incurred, whether created directly or acquired by the Lender by assignment or otherwise, whether determined or undetermined, liquidated or unliquidated, matured or unmatured, and whether absolute or contingent (all in the broadest sense) collectively referred to herein as the "Liabilities"); and

WHEREAS, the Guarantor will desire
of this extension of credit to