

ENVIRONMENTAL CERTIFICATE AND INDEMNITY AGREEMENT

THIS ENVIRONMENTAL CERTIFICATE AND INDEMNITY AGREEMENT (this "Agreement") is dated this ____ day of _____, 20__ (the "Effective Date"), by and between _____ ("Borrower"), and _____, a New York banking corporation having its principal place of business at _____, New York ("Lender").

RECITALS:

A. Borrower has borrowed or will borrow the sum of \$_____ (the "Loan") from Lender to be secured by a first mortgage of \$_____, of even date herewith from Borrower to Lender (the "Mortgage"), on property described in Schedule "A" annexed hereto known as _____, New York (the "Premises").

B. The Loan is to be evidenced by, among other things a note in the amount of \$_____ of even date herewith from Borrower in favor of Lender (the "Note").

C. The Note, the Mortgage and all other documents (except this Agreement) that have been or may hereafter be executed by Borrower in connection with the Loan are collectively referred to hereafter as the "Loan Documents."

D. Lender has required, as a condition precedent of funding the Loan, that the Borrower indemnifies and holds Lender harmless against and from certain obligations for which Lender may incur liability, whether as mortgagee, mortgagee in possession, or successor-in-interest to Borrower by foreclosure or deed in lieu of foreclosure, by reason of the threat or presence of any Hazardous Substance at or near the Premises.

THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, Lender and Borrower hereby agree as follows:

AGREEMENT:

1. **Incorporation of Recitals.** The foregoing Recitals are incorporated herein by reference as agreements of the parties and Lender and Borrower agree they are true and accurate statements of fact.

2. **Definitions.** All capitalized terms used in this Agreement and not otherwise defined herein shall have the meaning ascribed to such terms in the Mortgage.

(a) "Environmental Law" shall mean any federal, state or local environmental or health or safety law, regulation or rules including, without limitation, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601 *et seq.*; the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended by the Solid and Hazardous Waste Amendments of 1984, 42 U.S.C. §§ 6901 *et seq.*; the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, 33 U.S.C. §§ 1251 *et seq.*; the Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601 *et seq.*;

the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001 *et seq.*; the Clean Air Act of 1966, as amended, 42 U.S.C. §§ 7401 *et seq.*; the National Environmental Policy Act of 1975, 42 U.S.C. § 4321; the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 *et seq.*; the Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531 *et seq.*; the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. §§ 651 *et seq.*; the Safe Drinking Water Act of 1974, as amended, 42 U.S.C. § 300(f); the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.*; the Federal Insecticide, Fungicide & Rodenticide Act, 7 U.S.C. §§ 136 *et seq.*; the Atomic Energy Act, 42 U.S.C. § 2014, and any other rule, guidance or common law which relates to (a) the existence and/or remedy of contamination on property; (b) the protection of persons, property, animals, or the environment from any hazardous material exposure or contamination to Hazardous Substance radiation or other emanations; (c) the use generation, storage, removal, recovery, treatment, transport, disposal, and control of Hazardous Substance, including hazardous wastes and building materials; (d) the prevention of, control of, or response to the exposure of employees or other persons to any hazardous material or radiation; or (e) the prevention of, control of, or response to the emission or discharge of Hazardous Substance in the workplace or environment;

(b) “Hazardous Substance” shall include, but not be limited to: (i) asbestos in any form; (ii) urea formaldehyde foam insulation; (iii) transformers or other equipment which contain dielectric fluid containing levels of polychlorinated biphenyls (PCBs) in excess of 50 parts per million; (iv) lead paint; (v) any substance deemed hazardous or toxic, or required to be disclosed, reported, treated, removed, disposed of or cleaned up by an applicable Environmental Law; (vi) any other substance or material to which exposure is prohibited, limited or regulated by any Governmental Authority; (vii) any substance or mixture which is or shall be listed, defined, or otherwise determined by any agency or court to be hazardous, toxic, dangerous or otherwise regulated, affected, controlled or giving rise to liability under any Environmental Law; (viii) polychlorinated biphenyls (PCBs); (ix) radon gas; (x) laboratory wastes; (xi) experimental products, including genetically engineered microbes and other recombinant DNA products; and (xii) petroleum, crude oil, natural gas, natural gas liquid, liquefied natural gas, other petroleum products, or synthetic gas useable as fuel; and (xiii) “source,” “special nuclear” and “by-products” material, as defined in the Atomic Energy Act of 1954, 42 U.S.C. § 2014; and

(c) “Governmental Authority” shall mean all federal, state and local governmental agencies, bodies or boards which have jurisdiction over the implementation, interpretation or enforcement of any Environmental Law.

The foregoing definition of “Hazardous Substance” to the contrary notwithstanding, the term “Hazardous Substance” shall not include materials routinely used for household use or in the normal and customary operation and maintenance of the Premises provided such materials as used by Borrower, its tenants and its and their employees or agents, are in quantities and are stored, used and disposed of in conformity with manufacturers’ recommendations and in compliance with all Environmental Law.

3. Covenants, Representations and Warranties. Except as otherwise described on Exhibit A attached to this Agreement Borrower represents and warrants that:

(a) the operations of Borrower, its employees and agents in, on or at the Premises and the Premises are and have been in compliance in all respects, including having all necessary permits, registrations and authorizations, with all applicable Environmental Laws;

(b) Borrower has not received any oral or written notice from any Governmental Authority that any of the operations of Borrower, its agents, employees or tenants in, on or at the Premises or that the Premises are subject to any judicial or administrative proceeding of any kind by any Governmental Authority alleging the violation or potential violation of any Environmental Law;

(c) Borrower has not received any written notice from any Governmental Authority that any of the operations of Borrower, its employees, agents or tenants in, on or at the Premises, or that the Premises are the subject of any official investigations, or threatened official investigation by any Governmental Authority evaluating: (i) the nature and extent of any contamination; or (ii) whether any remedial or removal action is needed to respond to a Release (as that term is defined in 42 U.S.C. § 9601(22)) or threatened Release of any Hazardous Substance or toxic waste, substance, pollutant, or contaminant, (as those terms are defined or described under any Environmental Law) into the environment;

(d) Borrower, including its employees, agents and tenants, has not filed any oral or written notice with any Governmental Authority under any Environmental Law indicating past or present generation, transportation, use, treatment, storage, disposal or release of a Hazardous Substance in, on or at the Premises;

(e) there has been no release or threatened release of any Hazardous Substance in, on or at the Premises that has not been remedied or removed in compliance with, or otherwise has not been in violation of, any Environmental Law;

(f) the Premises do not contain any Hazardous Substances nor was any Hazardous Substances used in the construction of the improvements located on the Premises;

(g) the Premises have not in the past and will not, while the Premises are owned or controlled by Borrower or by Borrower's successors, if any, in the event the Premises are sold or otherwise transferred by Borrower in violation of the Mortgage, be used by Borrower, including its employees, agents or tenants, for any use in violation of any Environmental Laws;

(h) no underground or aboveground storage tanks were, are or will be installed by Borrower on or at the Premises;

(i) no part of the Premises contains, is located within or abuts any area designated by any Governmental Authority as having special flood hazardous risks, navigable water or other body of water, tidelands, wetlands or marshlands which is subject to and in violation of any special authority, regulation, control or protection by any Governmental Authority;

(j) water used at the Premises is supplied and, while the Premises are owned or controlled by Borrower or by Borrower's successors, if any, in the event the Premises are sold or otherwise transferred by Borrower in violation of the Mortgage, will continue to be supplied by an appropriately licensed public or private utility company, and sewage from the Premises is disposed of by an appropriately licensed public or private utility company, and while the

Premises are owned or controlled by Borrower or by Borrower's successors, if any, in the event the Premises are sold or otherwise transferred by Borrower in violation of the Mortgage, will continue to be disposed of in compliance with Environmental Laws and the connections of the Premises to such sewage disposal system have been approved by all necessary Governmental Authorities;

(k) all surface water drains, if any, servicing the Premises have been constructed in accordance with the applicable Environmental Laws and have been properly connected to public or private storm or sanitary sewer lines which carry such water off the Premises, and such connections have been approved by all necessary Governmental Authorities or to the contrary such surface water is collected, retained and recharged on site pursuant to rules and regulations of Governmental Authorities;

(l) all garbage, trash and other solid waste from or relating to the Premises are and, while the Premises are owned or controlled by Borrower or by Borrower's successors, if any, in the event the Premises are sold or otherwise transferred by Borrower in violation of the Mortgage, will be collected on a regular basis by an independent commercial waste disposal company or a public waste disposal authority; and

(m) All motor oil staining any of the paved parking areas now or hereafter existing on the Premises shall be monitored by Borrower or Borrower's property manager, and, in the event of any excessive motor oil staining and/or collection in such parking areas, Borrower shall promptly cause the same to be cleaned up in accordance with all Environmental Laws and take steps to identify the source(s) of the motor oil and prohibit any further collection thereof.

4. **Ongoing Duty to Disclose.** Borrower warrants that the representations set forth in Paragraph 3 above (the "Environmental Representations") are complete and accurate and Borrower acknowledges that the Environmental Representations shall be continuing representations from Borrower to Lender until such time as Borrower has paid in full all amounts to be paid by Borrower under the Loan Documents and has completely fulfilled all of Borrower's other obligations under the Loan Documents, except such obligations that are to survive the payment of the indebtedness and the release of the Mortgage or until Borrower's obligations under this Agreement are otherwise terminated or satisfied in accordance with Paragraph 6 below (collectively, the "Satisfaction of Borrower's Obligations"). If at any time prior to the Satisfaction of Borrower's Obligations any event occurs that causes any of the Environmental Representations to no longer be true and correct, Borrower shall (upon its receipt of knowledge of such occurrence) promptly give Lender written notice of: (a) such event; (b) the actions Borrower has taken or intends to take to comply with all applicable Environmental Laws and orders of any Governmental Authority; and (c) the date by which Borrower estimates such compliance will be completed.

5. **No Duty of Lender to Investigate, Supervise or Remedy.** Anything in this Agreement or the Loan Documents to the contrary notwithstanding and regardless of any disclosures made by Borrower to Lender in Exhibit A hereto, under Paragraph 4 above or under any of the other Loan Documents (collectively, the "Disclosures"), the Lender shall have no duty or obligation to investigate or monitor any environmental condition in, on or at the Premises or to supervise, approve or participate in the investigation or remediation of any environmental condition in, on or at the Premises. Borrower agrees that the Disclosures have been and will be made solely for

the purpose of informing Lender of the condition of the Premises and that the Disclosures do not indicate or create any ability for Lender to influence Borrower's investigation or remediation of any environmental condition in, on or at the Premises. Any provision of this Paragraph 5 to the contrary notwithstanding, if Lender shall receive written notice from any Governmental Authority of any claim by such Governmental Authority regarding an alleged violation of any Environmental Law to which the Premises are subject, Lender shall promptly give Borrower written notice of such claim.

6. **Indemnity.** Borrower shall and does hereby indemnify and hold Lender, its employees, agents, officers, directors, trustees and shareholders harmless from and against all loss, cost, expense, damage, injury, obligation, liability, penalty, fine, suit and settlement including, without limitation, reasonable attorney and consultant fees and expenses, reasonable investigation and laboratory fees and expenses, the costs of remediation as required by any Governmental Authority, court costs and other litigation expenses, of whatever kind or nature, known or unknown, contingent or otherwise, arising out of any material breach by Borrower of the Environmental Representations or the other obligations or covenants, contained herein that result in a damage to the indemnified parties including but not limited to:

- (i) any actual or suspected discharge of Hazardous Substance, the threat of a discharge of any Hazardous Substance, or the actual or suspected presence of any Hazardous Substance whether or not the same originates or emanates from the Premises or any other real estate, including any loss of value of the Premises as a result of any of the foregoing;
- (ii) any costs of removal or remedial action incurred by the United States Government or any state or local Governmental Authority, any response costs incurred to any other person or loss of natural resources, including reasonable costs of assessing such injury, destruction or loss, incurred pursuant to any Environmental Law;
- (iii) liability for personal injury or property damage arising under any statutory or common law tort theory, including, without limitation, damages assessed for the maintenance of a public or private nuisance or for the carrying on of an abnormally dangerous activity at or near the Premises; and/or
- (iv) any other environmental matters affecting the Premises within the jurisdiction of the Environmental Protection Agency, any other federal agency, the New York State Department of Environmental Conservation or any state or local environmental agency or political subdivision or any court, administrative panel or tribunal.

Borrower's breach of the Environmental Representations or any other obligations or covenants contained herein shall mean and include, without limitations, any material inaccuracy therein or any materially misleading exclusion of any fact therefrom.

Borrower's obligations under this Agreement shall arise upon the discovery of, or the threat or suspected presence of any Hazardous Substance, whether or not the Environmental Protection Agency, any other federal agency, the New York State Department of Environmental Conservation or any state or local environmental agency or political subdivision or any court,

administrative panel or tribunal has taken or threatened any action in connection with the presence of any Hazardous Substance.

All of the Environmental Representations, Borrower's other obligations or covenants contained herein and this indemnity shall survive: (a) the release of the Mortgage and the other Loan Documents; (b) the discharge of all of the Borrower's obligations thereunder; and (c) any transfer of title to the Premises (whether by sale, foreclosure, deed in lieu of foreclosure or otherwise).

Lender's election to make the Loan or to foreclose upon or otherwise accept or acquire title to all or any of Borrower's interest in the Premises shall in no way be deemed a waiver or other diminution of any of Lender's rights under this Agreement nor relieve Borrower from any liability hereunder regardless of whether Lender has conducted an environmental assessment or has obtained independent knowledge from any source whatsoever regarding any environmental condition in, on or at the Premises.

This is an absolute, unconditional and continuing indemnity that shall be in addition to all other obligations or liabilities Borrower may have to Lender pursuant to this Agreement, the Loan Documents, statute or otherwise.

The Lender, for itself, its employees, agents, officers, trustees and shareholders by its execution of this Agreement, hereby expressly agrees and acknowledges that the indemnification, defend, protect and hold harmless provisions contained in this Agreement are limited to those conditions existing on or prior to the earlier of (i) acquisition of title to the Premises by Lender, its successors or assigns (ii) Lender, its successors or assigns becoming a mortgagee in possession or (iii) the appointment of a receiver, and in no event shall any indemnification, defend, protect or hold harmless provision extend to or include the willful misconduct or negligence of Lender, its successors, assigns, employees, officers, trustees and shareholder's. Anything in this Agreement or the Loan Documents to the contrary notwithstanding, Borrower, except for the obligation to defend itself in the event Borrower is named in any action, shall have no liability to indemnify Lender for any environmental conditions or events on the Premises occurring: (i) after Borrower's payment of the Loan in full and the discharge of record of the Loan Documents; or, (ii) after the date on which Borrower, with the consent of or as a result of the actions of Lender, no longer has fee title to the Premises; or, (iii) during any period in which Borrower, with the consent of or as a result of the actions of Lender, does not have possession and control of the Premises.

7. Entry on Premises. Lender, its agents, employees and contractors shall be entitled to enter onto the Premises at all reasonable times upon reasonable notice to Borrower and to conduct such inspections and testing as Lender shall deem reasonably necessary to evaluate any environmental condition in, on or at the Premises. Borrower shall pay all reasonable costs of such inspections and testing promptly on receipt of Lender's demand for such payment. If Lender conducts any inspections or testing as provided in this paragraph and if the Premises are disturbed or damaged as a result thereof, Lender, as soon as reasonably possible, shall restore the Premises to its condition immediately preceding such inspection or testing.

8. Borrower's Obligations and Warranties Secured by the Mortgage. The parties intend and agree that Environmental Representations as well as all of the Borrower's other

obligations and covenants under this Agreement shall be secured by the Loan Documents that now or hereafter secure the Note.

9. **Notices.** All notices, demands and requests to be made or given under this Agreement shall be given in the manner prescribed for notices under the Mortgage.

10. **Assignment.** Except as may otherwise be provided in the Mortgage regarding Borrower's right, if any, to sell, assign and transfer Borrower's right, title and interest in the Premises, Borrower may not assign Borrower's obligations under this Agreement without the prior written consent of Lender, which may be withheld in Lender's sole discretion. Lender may freely assign this Agreement in connection with (but only in connection with) Lender's sale, transfer or other assignment of Lender's rights in the Loan and Loan Documents without the consent of Borrower being sought or obtained.

11. **Successors.** Subject to the limitations set forth in Paragraph 6 and 10, this Agreement shall be binding on and inure to the benefit of Lender and Borrower and each of their respective successors and assigns.

12. **Headings.** The headings in this Agreement are for reference only and shall not limit or define the meaning of any provision of this Agreement.

13. **Waiver.** The waiver by Lender or Borrower of any right granted under this Agreement shall not be deemed a waiver of any other right granted hereunder, nor shall the same be deemed to be a waiver of a subsequent right obtained by reason of the continuation of any matter previously waived.

14. **Entire Agreement.** This Agreement contains the entire understanding of the parties with respect to the subject matter hereof.

15. **Amendment.** This Agreement cannot be altered or amended except pursuant to an instrument, in writing, signed by Lender and Borrower.

16. **Construction.** This Agreement is the result of negotiations between the parties, neither of whom has acted under any duress or compulsion, whether legal, economic or otherwise. Accordingly, the terms and provisions of this Agreement shall be construed in accordance with their usual and customary meanings. Lender and Borrower hereby waive the application of any rule of law that otherwise would be applicable in connection with the construction of this Agreement that ambiguous or conflicting terms or provisions should be construed against the party who (or whose attorney) prepared the executed Agreement or any earlier draft of the same. Unless the context of this Agreement otherwise clearly requires, references to the plural include the singular and the singular the plural. The words "hereof," "herein," "hereunder" and similar terms in this Agreement refer to this Agreement as a whole and not to any particular provision of this Agreement. All references to "Paragraphs" herein shall refer to the sections and paragraphs of this Agreement unless specifically stated otherwise.

17. **No Third Party Beneficiary.** No term or provision of this Agreement is intended to be, nor shall any such term or provision be construed to be, for the benefit of any person, firm, corporation or other entity not a party hereto. No such other person, firm, corporation or entity shall have any right or cause of action hereunder.

18. **Severability.** If any provision of this Agreement or any portion of any provision of this Agreement shall be deemed to be invalid, illegal or unenforceable, such invalidity, illegality or unenforceability shall not alter the remaining portion of such provision, or any other provisions hereof, as each provision of this Agreement shall be deemed severable from all other provisions hereof.

19. **Attorney's Fees.** If there is any litigation between Lender and Borrower to enforce or interpret any provisions hereof or rights arising hereunder, Lender may recover all costs and expenses, including, without limitation, reasonable attorneys' fees incurred by Lender, such fees to be determined by the court sitting without a jury.

20. **Governing Law.** This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York.

21. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. The partially executed signature page of any counterpart of this Agreement may be attached to any other partially executed counterpart of this Agreement without impairing the legal effect of the signature(s) on such signature page.

22. **Interest.** In the event that Lender incurs any obligations, costs or expenses under this Agreement, Borrower shall pay Lender immediately on demand, and if such payment is not received within ten (10) days, interest on such amount shall, after the expiration of the ten-day period, accrue at the default rate of interest under the Note until such amount, plus interest, is paid in full.

23. **Joint and Several Liability.** In the event that this Agreement is executed by more than one party as Borrower or as a co-indemnitor with Borrower, the liability of such parties is joint and several. If any party is a general partner of a general or limited partnership, such party shall be jointly and severally liable with all other general partners of such partnership. In addition, Borrower's and any co-indemnitor with Borrower's obligations hereunder are joint and several with any other person now or hereafter obligated under the Loan Documents and are independent of the obligations of Borrower and any such co-indemnitor. A separate action or actions may be brought and prosecuted against any party hereunder, whether or not action is brought against any other person or whether or not any other person is joined in such action or actions.

24. **Cumulative Remedies.** All rights and remedies of Lender hereunder or under any of the Loan Documents shall be cumulative and may be exercised singularly or concurrently. It is the purpose and intent hereof to provide safeguards, protections and rights to Lender in addition to those provided in the Loan Documents and to better secure Lender for and on account of Loan.

25. **Right to Modify Conditions.** Borrower hereby agrees that the terms, covenants and provisions contained in this Agreement and any other Loan Documents may be altered, extended, modified, waived, released or canceled by Lender, all without any further consent of Borrower, and Borrower agrees that this Agreement and Borrower's liability hereunder shall in no way be affected, diminished or released by any such alteration, extension, modification, release, waiver or cancellation. The failure of Lender to insist upon strict compliance with any of the terms of this Agreement shall not be considered to be a waiver of any such terms, nor shall it

prevent Lender from insisting upon strict compliance with this Agreement or any other Loan Document at any time thereafter.

26. **Inconsistencies Among the Loan Documents.** Nothing contained herein is intended to limit in any way the obligations of the Borrower under the Note or any other Loan Document. Any inconsistencies among the Loan Documents shall be construed, interpreted and resolved so as to benefit Lender, and Lender's election of which interpretation or construction is for Lender's benefit shall govern.

IN WITNESS WHEREOF, the parties have caused this Environmental Compliance and Indemnification Agreement to be duly executed as of the day and year first above written.

By: _____

_____ - _____

By: _____

Sample

Sample

STATE OF NEW YORK)

: ss:

COUNTY OF _____)

On the ____ day of _____ in the year 20__ before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/ her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

STATE OF NEW YORK)

: ss.:

COUNTY OF _____)

On the ____ day of _____ in the year 20__ before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

SCHEDULE A

EXHIBIT A

Sample

Sample