

## APPENDIX 6 : SBA ENVIRONMENTAL INDEMNIFICATION AGREEMENT

SBA Loan No: \_\_\_\_\_

This SBA Environmental Indemnification Agreement ("Agreement") effective \_\_\_\_\_, is executed by \_\_\_\_\_ ("Borrower"), \_\_\_\_\_ [insert name(s) of indemnitor(s) not obligated on the Loan] ("Third Party Indemnitor"), (Borrower and Third Party Indemnitor collectively referred to as "Indemnitors"), \_\_\_\_\_ [Insert name of Certified Development Company or 7(a) Lender] ("Lender") and the U.S. Small Business Administration ("SBA").

The parties to this Agreement mutually agree as follows:

### I. RECITALS

**A.** Borrower has applied for an SBA loan from Lender in the principal amount of \$ \_\_\_\_\_ [insert full loan amount] (the "Loan") to be evidenced by a promissory note (the "Note") and secured by a "Mortgage" encumbering certain real and personal property (collectively, the "Property") described in the "Loan Documents" including the land located at \_\_\_\_\_ [insert address] and described in Exhibit "A" attached hereto.

**B.** SBA and Lender are not willing to make the Loan without the execution and delivery of this Agreement.

### II. DEFINITIONS

For purposes of this Agreement: (1) whenever the singular form of a word is used it includes the plural, and whenever the plural form of a word is used it includes the singular; (2) the word "or" has the inclusive meaning represented by the phrase "and/or"; (3) terms used in this Agreement that are not defined below but are defined in either 13 CFR, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9875 ("CERCLA") or 40 CFR, shall have the meaning provided in 13 CFR, CERCLA or 40 CFR; and (4) unless the context otherwise clearly requires, the following definitions apply:

**A. "Adjoining Properties"** means any real property or properties the border of which is (are) shared in part or in whole with that of the Property, or that would be shared in part or in whole with that of the Property but for a street, road, or other public thoroughfare separating the properties.

**B. "At"**, whether capitalized or not, when used with respect to the Property or Adjoining Properties, means "at, on, in, into, under, above, from or about."

**C. "Borrower"** means the Person(s) identified as the Borrower in the Loan Documents and the first paragraph of this Agreement and includes any successor in interest by virtue of assumption, merger, acquisition, transfer, assignment or otherwise.

**D. "Contamination"** means the presence of any Hazardous Substance at or affecting the Property, including any Hazardous Substances that have migrated to or from the Property, provided such Hazardous Substances are present in such concentrations or under such conditions as to create a violation, liability or duty to conduct a response under any Environmental Law.

**E. "Engineering Control"** means a device or structure constructed at the Property to prevent people from coming into contact with Contamination or to prevent mobile Contamination such as groundwater Contamination from moving off site. Examples include asphalt or concrete caps, fences, extraction wells, trenches and subsurface barrier walls.

**F. "Environmental Activity"** means any use, storage, holding, existence, Release, emission, discharge, generation, processing, abatement, removal, disposition, handling or transportation of any Hazardous Substance.

**G. "Environmental Claim"** means any written complaint, summons, action, citation, notice of violation, directive, order, claim, litigation, investigation, judicial or administrative proceeding or action, judgment, lien, demand, letter or communication from any Person alleging non-compliance with any Environmental Law, Institutional Control or Engineering Control, relating to any actual or threatened Release, or arising from an Environmental Activity.

**H. "Environmental Investigation"** means an investigation of the Property that: (1) is conducted by an independent Environmental Professional; (2) begins with a Phase I Site Assessment in accordance with ASTM E1527-05 that includes a review of all relevant and material environmental records concerning the Property and Adjoining Properties in the actual or constructive possession, custody or control of the Borrower including, if any, those provided by the seller; and (3) includes any other investigation recommended by the Environmental Professional conducting the Phase I to determine and document the nature and extent of any Contamination and the cost to remediate it such as record reviews, soil and water testing, or underground storage tank inspections.

**I. "Environmental Investigation Report"** (or the "Report") means the written account of the Environmental Investigation of the Property attached as Exhibit "B", which: (1) is signed by the Environmental Professional who conducted the Environmental Investigation; (2) includes a reliance letter that specifically grants SBA and Lender the right to rely on the Report; and (3) includes a detailed list of all relevant and material environmental records utilized by the Environmental Professional to establish the nature and extent of Contamination including those pertaining to past or on-going Remediation at the Property or Adjoining Properties.

**J. "Environmental Laws"** means any and all applicable federal, state tribal and local statutes, laws, rules, regulations, ordinances, codes, principles of common law, judicial orders, administrative orders, consent decrees, judgments, permits, licenses or other binding determinations of any judicial or regulatory authority, now or hereafter in effect, imposing liability, establishing standards of conduct or otherwise relating to protection of the environment (including natural resources, surface water, groundwater, soils, and indoor and ambient air), health and safety, land use matters or the presence, use, generation, treatment, storage, disposal, Release or threatened Release, transport or handling of Hazardous Substances.

**K. "Environmental Professional"** means a person who meets the requirements set forth in 40 CFR Section 312.10(a).

**L. "Governmental Entity"** means any federal, state, commonwealth, tribal or local government branch, authority, district, agency, court, tribunal, department, officer, official, board, commission or other instrumentality that exercises any form of jurisdiction or authority under any Environmental Law.

**M. "Hazardous Substance"** means and includes any substance, material or waste regulated by CERCLA or any other Environmental Law, and specifically includes petroleum products, radioactive materials, asbestos, polychlorinated biphenyls, and radon gas.

**N. "Including"**, and its derivatives such as "include" and "includes", whether or not capitalized, means including without limitation.

**O. "Indemnified Parties"** means and includes SBA and Lender.

**P. "Institutional Control"** means a legal or administrative action or requirement imposed on the Property to minimize the potential for human exposure to Contamination or to protect the integrity of a Remedy. Examples include deed notices, deed restrictions, and long-term site monitoring or site security requirements.

**Q. "Lender"** means the Person identified as the Lender in the first paragraph of this Agreement and any successor in interest by virtue of merger, acquisition, transfer, assignment or otherwise including any Person acquiring the Property or the Loan from Lender or SBA.

**R. "Loan Documents"** means and includes the Note, the Mortgage and any other document regarding the Loan. This Agreement is one of the Loan Documents, but it is not secured by the Mortgage.

**S. "Mortgage"** means the Mortgage identified in the Recitals section of this Agreement and includes all liens that secure the Loan regardless of their method of creation including those created by recording a mortgage, deed of trust, assignment of rents, collateral assignment of purchaser's interest in land sale contract or a Uniform

Commercial Code financing statement. The Mortgage secures the Loan and all extensions, modifications, replacements, renewals, substitutions or consolidations thereof, including increases to the principal balance of the Note resulting from payment of expenses incurred to enforce the terms of the Note or other Loan Documents, or to preserve or dispose of the collateral securing the Loan, such as payments for property taxes, prior liens, insurance, appraisals, and attorney's fees and costs.

**T. "Mortgage Release Date"** means the earlier of the following two-dates: (1) the date on which the indebtedness and obligations secured by the Mortgage have been fully paid and performed and the Mortgage has been released of record; or (2) the date on which the Mortgage is foreclosed, or a conveyance by a deed in lieu of foreclosure is effective, and possession of the Property has been given to and accepted by a Person other than Lender or SBA free of occupancy, redemption rights or any other claim by Borrower or guarantors of the Loan.

**U. "Person"** means an individual, firm, corporation, limited liability company, limited liability partnership, association, partnership, joint venture, commercial entity, tribe, trust, or Government Entity.

**V. "Property"** means all or any portion of the real and personal property identified in the Recitals section of this Agreement, including all improvements, fixtures and equipment, soil, ground water, surface water, air, waterways, and water bodies associated with the real property.

**W. "Purchase and Sale Documents"** means and includes every document memorializing each agreement related to Borrower's acquisition of the Property including the purchase and sale agreement and amendments thereto, and all related documents such as supply agreements, deeds, environmental declarations, rights of first refusal, options, etc.

**X. "Release"**, when used with respect to the Property or Adjoining Properties, means the presence of or any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, seeping, migrating, dumping or disposing of any Hazardous Substance into the environment including the abandonment or discarding of barrels, drums, tanks, and similar receptacles and containers, containing Hazardous Substances.

**Y. "Remediation" or "Remedial Action"** and their derivatives (such as "Remediate") means and includes any investigation, clean-up, corrective action or monitoring required to comply with applicable Environmental Laws including all actions within the definition of "removal" and "remedial" actions as those terms are defined in applicable Environmental Laws.

**Z. "Third Party Indemnitor"** means, individually and collectively, the Person(s) identified as the Third Party Indemnitor in the first paragraph of this

Agreement and includes any successor in interest by virtue of merger, acquisition, transfer, assignment or otherwise.

### **III. REPRESENTATIONS AND WARRANTIES**

**A. Full Disclosure of Property Purchase and Sale Agreement.** If the Loan is to enable Borrower to acquire the Property, Borrower represents and warrants that all of the relevant and material terms and conditions of the purchase and sale of the Property have been disclosed to Lender and that Borrower has provided Lender with an accurate and complete copy of the Purchase and Sale Documents.

**B. Control of Property.** If the Loan is to enable Borrower to acquire the Property from Third Party Indemnitor, Third Party Indemnitor represents and warrants that the Property is free from all encumbrances that could enable Third Party Indemnitor or its affiliates to control the use or ownership of the Property e.g., rights of first refusal; options to purchase or repurchase the Property; deed restrictions; or restrictive covenants such as those that limit the brand of fuel that can be sold on the Property.

**C. Condition of Equipment.** If the loan is to enable the Borrower to acquire the Property associated with the operation of a gas station, Indemnitors warrant that all fuel dispensing equipment located on the Property has been tested by an independent contractor within the preceding six months and that all leaking or otherwise defective equipment, systems, containment devices, etc., have been or will be replaced or repaired prior to closing.

**D. Disclosure of Environmental Information.**

1. Full Disclosure by Third Party Indemnitor. Third Party Indemnitor represents and warrants that Third Party Indemnitor has provided Borrower with an accurate and complete copy of each record pertaining to the Property, (regardless of origin or method by which it was produced, recorded or preserved), in Third Party Indemnitor's actual or constructive possession, custody or control that pertain to the Property including those that materially relates to: (1) Contamination; (2) Hazardous Substances at the Adjoining Properties; or (3) compliance with any Environmental Law, Institutional Control or Engineering Control concerning the Property.

2. Full Disclosure by Borrower. Borrower represents and warrants that Borrower provided the Environmental Professional who signed the Report with an accurate and complete copy of each record, (regardless of origin or method by which it was produced, recorded or preserved and including all records provided to Borrower by Third Party Indemnitor), in Borrower's actual or constructive possession, custody or control that materially relates to: (1) Contamination; (2) Hazardous Substances at the Adjoining Properties; (3) compliance with any Environmental Law, Institutional Control or Engineering Control concerning the Property; or (4) any other matter addressed by this Agreement.

**E. Environmental Investigation of Property.**

1. Conducted by Independent Environmental Professional. Lender and Borrower represent and warrant to SBA that an independent Environmental Professional has conducted an Environmental Investigation of the Property and that a complete and accurate copy of the Environmental Investigation Report is attached hereto as Exhibit "B".

a. Lender's Warranty. Lender represents and warrants to SBA that: (1) the Environmental Professional who prepared the Report is not a representative, employee, associate or affiliate of, Lender or any Person in which Lender has an ownership interest; and (2) no influence has been exerted over the Environmental Professional with regard to the preparation of the Report or the contents thereof by Lender or by any of Lender's attorneys, agents, employees, associates or affiliates.

b. Indemnitors' Warranty. Each Indemnitor independently represents and warrants to SBA that to the best of Indemnitor's knowledge: (1) the Environmental Professional who prepared the Report is not a representative, employee, associate or affiliate of, Indemnitor or any Person in which Indemnitor has an ownership interest; and (2) no influence has been exerted over the Environmental Professional with regard to the preparation of the Report or the contents thereof by Indemnitor or by any of Indemnitor's attorneys, agents, employees, associates or affiliates.

2. Report Establishes Environmental Baseline of Property. Lender and each Indemnitor independently represent and warrant to SBA that they have no knowledge of any facts or circumstances that could result in the Report containing incomplete or inaccurate information.

**F. Execution and Performance of Agreement.** Each Indemnitor independently represents and warrants to SBA and Lender that:

1. Authority and Financial Capability. Indemnitor is either an individual or a duly organized, validly existing business entity in good standing and duly qualified to do business in each jurisdiction where the conduct of its business requires such qualification; and Indemnitor has and will maintain full power, financial capability and authority to enter into this Agreement, and to perform Indemnitor's obligations hereunder.

2. Validity of Agreement. This Agreement is a legal, valid, and binding obligation of Indemnitor enforceable according to its terms.

3. Authority to Sign. Indemnitor has proper authority to execute this Agreement as evidenced by, and has, if required, provided Lender with a

complete and accurate copy of a valid, certified resolution or other evidence confirming such authority.

## IV. COVENANTS

In addition to their obligations and liabilities under applicable law, Indemnitors covenant and agree as follows:

### A. Borrower Covenants

**1. Notice to Lender.** Borrower shall immediately notify Lender upon becoming aware of any of the following: (1) Any Release on the Property that must be reported to any Governmental Entity under applicable Environmental Laws; (2) Any Contamination, or imminent threat of Contamination, or any violation of Environmental Laws in connection with the Property or operations conducted thereon; (3) Any order, notice of violation, fine or penalty or similar action by any Governmental Entity relating to Hazardous Substances or Environmental Laws and the Property or the operations conducted thereon; (4) Any expiration or revocation of any required environmental permit, registration or authorization with regard to the Property or the operations conducted thereon; (5) Any Environmental Claim relating to the Property or the operations conducted thereon; or (6) Any matters relating to Hazardous Substances or Environmental Laws that would give a reasonably prudent lender cause to be concerned that the value of their security interest in the Property may be reduced or threatened or that may impair or threaten to impair Borrower's ability to perform any of Borrower's obligations under this Agreement when such performance is due.

**2. Use of Property.** Borrower shall not allow Hazardous Substances or the occurrence of any Environmental Activity at the Property except as necessary to operate the type of business specified in the Loan Documents.

**3. Compliance with Environmental Laws.** Borrower shall not cause, commit, permit or allow non-compliance with any Environmental Law, Institutional Control or Engineering Control with respect to the Property and shall obtain, keep in effect and comply with all permits, registrations and authorizations required by Environmental Laws with respect to the Property and operations conducted thereon.

**4. Environmental Insurance.** Borrower shall include Lender as a loss payee on all environmental insurance policies held by Borrower relating to the Property.

**5. UST Reimbursement Funds.** If the Property securing the Loan is associated with the operation of a gas station, Borrower shall register for all participate in any available federal, state or local petroleum storage tank fund programs that Borrower is eligible to participate in, which permitting full or

partial reimbursement of costs incurred for the assessment or Remediation of Contamination, even if such program is voluntary.

**B. Borrower and Third Party Indemnitor Covenants**

**1. Record Retention.** Until the Mortgage Release Date, Indemnitors shall retain and make available to SBA and Lender upon request an accurate and complete copy of each record, (regardless of origin or method by which it was produced, recorded or preserved), in Indemnitor's actual or constructive possession, custody or control that materially relates to: (1) Contamination; (2) Hazardous Substances at the Adjoining Properties; (3) compliance with any Environmental Law, Institutional Control or Engineering Control concerning the Property; or (4) any other matter addressed by this Agreement.

**2. Control of Property.** Prior to the Mortgage Release Date, Indemnitors shall not record or cause to be recorded any document containing a provision that could enable any Person to control the use or ownership of the Property, such as a purchase option; repurchase option; or restrictive covenant such as one that limits the brand of fuel that can be sold on the Property.

**V. REMEDIATION**

**A. Corrective, Preventive and Remedial Action.** Indemnitors shall, at their own cost and expense, in a manner that is in compliance with all applicable laws, and at times that will not unreasonably interfere with Borrower's use of the Property, promptly undertake, continuously and diligently pursue and complete any and all Remedial Action that is necessary to: (1) Remediate any Contamination; (2) correct non-compliance with any Environmental Law, Institutional Control or Engineering Control concerning the Property; or (3) respond to any threatened or pending Environmental Claim regarding the Property.

**B. Limitation on Third Party Indemnitor's Duty to Remediate.** If Third Party Indemnitor is the seller or prior owner of the Property, Third Party Indemnitor's duty under this section of the Agreement shall be limited to Remedial Action: (1) necessitated by acts, omissions, events or conditions existing or occurring in connection with the condition, use or occupancy of the Property on or before the date title to the Property is transferred to Borrower under the Purchase and Sale Documents as disclosed in the Environmental Investigation Report; or (2) created or caused by Third Party Indemnitor, (including Third Party Indemnitor's employees, representatives, agents, contractors, or consultants), at any time after the date title to the Property is transferred to Borrower. As set forth in Paragraph VII herein, provided that neither SBA nor Lender has acquired title to the Property, Third Party Indemnitor may also limit its duty to Remediate under this Agreement by paying the entire balance due under the Loan Documents including any applicable pre-payment penalty.

**C. Remediation Standards.** Remediation required under this Agreement shall, at a minimum, meet the applicable, relevant and appropriate requirements and



standards in the Environmental Laws ("ARARs") that must be met before the responsible Government Entity will issue a No Further Action letter or the written equivalent thereof.

**D. Duration of Responsibility to Remediate.** Indemnitors' responsibility for Remediation under this Agreement shall continue until the earlier of: (1) the Mortgage Release Date; or (2) the responsible Governmental Entity issues a No Further Action Letter or equivalent written assurance that the applicable, relevant and appropriate requirements and standards in the Environmental Laws ARARs have been met. Provided, however, that Indemnitors' responsibility for Remediation shall resume if the responsible Governmental Entity thereafter determines that additional Remedial Action is necessary with respect to any Contamination covered by this Agreement.

## VI. INDEMNIFICATION

**A. SBA and Lender's Right to Indemnification.** Except as provided below, upon demand by an Indemnified Party, Indemnitors agree to indemnify and defend (by counsel selected by Indemnitors and reasonably acceptable to SBA and Lender) Indemnified Parties from and against any and all "Environmental Risks." For purposes of this Agreement, "Environmental Risks" means and includes any and all actual or threatened losses, (including loss of use and diminution in value of the Loan or the Property), all direct and indirect costs associated with Remedial Action (including the repair, replacement or restoration of improvements and equipment; and monitoring and other closure requirements imposed by any Governmental Entity), liabilities, demands, claims and causes of action (including those asserted by third parties for personal injury, illness, death, and damage to real and personal property), damages (including natural resource damages, consequential damages and punitive damages), expenses (including experts' and consultants' fees and disbursements), reasonable attorneys' fees and disbursements for in-house and outside counsel (including those incurred at trial, on appeal, or in enforcing this Agreement, and regardless of the outcome), fines, assessments, penalties, forfeitures, judgments, settlements, orders, equitable relief of any kind, suffered, paid, incurred by, or sought from an Indemnified Party by any Person in connection with, in whole or in part, or arising or allegedly arising, directly or indirectly out of: (1) the inaccuracy or breach of any representation, warranty or covenant contained in this Agreement; (2) the presence, suspected presence, or threat of Contamination; (3) non-compliance with any Environmental Law, Institutional Control or Engineering Control; (4) any Environmental Claim; or (5) the filing or imposition of any environmental lien against the Property.

1. Limitation on Third Party Indemnitor's Duty to Indemnify. If Third Party Indemnitor is the seller or a prior owner of the Property, Third Party Indemnitor's duty to indemnify and defend Indemnified Parties shall be limited to Environmental Risks arising from acts, omissions, events or conditions existing or occurring in connection with the condition, use or occupancy of the Property: (1) on or before the date title to the Property is transferred to Borrower; or (2) created or caused by Third Party Indemnitor, (including Third Party Indemnitor's employees, representatives, agents, contractors, or consultants), at any time after

the date title to the Property is transferred to Borrower. As set forth in Paragraph VII herein, provided that neither SBA nor Lender has acquired title to the Property, Third Party Indemnitor may also limit its duty to indemnify under this Agreement by paying the entire balance due under the Loan Documents including any applicable pre-payment penalty.

2. Duration of Indemnitors' Duty to Indemnify. Indemnitors' duty to indemnify and defend Indemnified Parties shall continue until the earlier of the following dates: (1) the Mortgage Release Date or (2) the date after which all pending and potential causes of action that could be asserted against any or all of the Indemnified Parties arising from Contamination or other matters addressed by this Agreement are finally resolved and satisfied in full, dismissed with prejudice and all appeal rights exhausted, or otherwise barred by the applicable statute of limitation.

**B. Demand for Indemnification or Tender of Defense.**

1. Procedure. In connection with any demand for indemnification or defense made pursuant to this Agreement, the Indemnified Party servicing the Loan shall notify the responsible Indemnitor(s) in writing as soon as reasonably practical and shall specify, to the best of Indemnified Parties' knowledge, the facts giving rise to the demand for indemnification or the need for legal defense.

2. Amounts Payable. Any amount to be paid to Indemnified Parties by Indemnitors under this Agreement shall be a demand obligation, immediately due and payable, which Indemnitors hereby promise to pay, and shall bear interest at the monetary default interest rate provided for in the Note. Payments under this Agreement shall not reduce Borrower's obligations and liabilities under the Note or other Loan Documents.

3. Subrogation. In the event Indemnitors pay Indemnified Parties any amount under this Agreement, Indemnitors shall be subrogated to any rights of Indemnified Parties relating thereto, provided, however, that such subrogation shall not be in derogation of any rights of Indemnified Parties under this Agreement, and shall not be construed to limit the obligations of Indemnitors hereunder.

**VII. THIRD PARTY INDEMNITOR'S ELECTION TO PAY LOAN BALANCE.**

In the event that either SBA or Lender makes a written demand on Third Party Indemnitor pursuant to this Agreement, and provided that neither SBA nor Lender has acquired title to the Property, Third Party Indemnitor may elect to pay the entire balance due under the Loan Documents, including any applicable pre-payment penalty, in exchange for (1) a release from all liability under this Agreement; and (2) an assignment of SBA and Lender's interest in the Loan Documents to Third Party Indemnitor.

## VIII. RELEASE AND WAIVER

**A. Liability Related to Contamination.** Each Indemnitor waives all known and unknown rights and releases all claims and causes of action whether now or hereafter in existence that Indemnitor may have against SBA and Lender related to Contamination at the Property including the right, if any, to indemnification in the event SBA or Lender acquires title to the Property.

**B. Alteration of SBA or Lender's Legal Rights.** If any document has been recorded that could alter SBA or Lender's legal rights, remedies or responsibilities such as provisions requiring lien subordination, special notice of default, or forbearance from initiating liquidation activities; or provisions requiring subsequent Property owners to waive legal rights and remedies, release claims or indemnify another Person, Indemnitors waive the right to enforce such provisions against SBA and Lender.

**C. Buyout of Duty to Remediate.** If any document gives Third Party Indemnitor the option to pay a lump sum or provide other consideration to Borrower, whether directly or indirectly, in lieu of Remediating the Property, Third Party Indemnitor waives the right to enforce such provision without the prior written consent of SBA and Lender, and Borrower waives the right to receive such consideration without the prior written consent of SBA and Lender.

## IX. SUBORDINATION

**A. Priority of Mortgage.** As set forth in greater detail in Exhibit "C", any lien to secure the performance of any of Borrower's monetary or non-monetary obligations to Third Party Indemnitor shall be unconditionally subordinate to the Mortgage.

**B. Indemnitor's Consent to Subordination.** Each Indemnitor independently represents and warrants that: (1) Lender has provided Indemnitor with the opportunity to examine the terms of the Mortgage and Loan Documents; and (2) Indemnitor understands that Lender has no obligation to Third Party Indemnitor to advance any funds under its Mortgage or see to the application of the Mortgage funds, and that any application or use of such funds for purposes other than those provided for in the Loan Documents shall not defeat, in whole or in part, the subordination of Third Party Indemnitor's rights and interests in the Property.

## X. LOAN DEFAULT

In the event of default on the Loan, SBA and Lender's obligation to Third Party Indemnitor shall not extend beyond complying with applicable law regardless of conflicting provisions, if any, in the Purchase and Sale Documents such as those requiring notice of Loan default, notice of Mortgage foreclosure, or forbearance prior to initiating liquidation activities on the Loan.

## **XI. GENERAL PROVISIONS**

**A. Consideration.** Indemnitors acknowledge that: (1) they will receive direct and indirect benefits from the Loan; (2) that SBA and Lender have relied and will rely on the representations, warranties, covenants and agreements herein in closing and funding the Loan; and (3) that the execution and delivery of this Agreement is an essential condition but for which SBA and Lender would not make the Loan.

**B. Primary and Unconditional Nature of Obligations.** Indemnitors' liability under this Agreement is direct and primary and not that of a guarantor or surety. Unless otherwise specified, the representations, warranties, covenants, agreements and other obligations set forth in this Agreement: (1) are not conditioned on fault or on any other event, occurrence, matter or circumstance; (2) are in addition to, and not in substitution for, any provisions regarding related matters in the Loan Documents; (3) shall not terminate on the Mortgage Release Date or be discharged or satisfied by payment or satisfaction of the Loan or foreclosure of the Mortgage; (4) shall continue in effect after any sale or transfer of the Loan or Property, including transfers pursuant to foreclosure proceedings or in lieu thereof; (5) shall apply regardless of whether or not a Governmental Entity issues an order requiring Remediation, indemnification or any other obligation of Indemnitors under this Agreement; and (6) shall not be affected or impaired by: (a) the voluntary or involuntary liquidation of all or substantially all of any Indemnitor's assets, including liquidation through a receivership, bankruptcy, reorganization or other similar proceedings; (b) SBA or Lender's failure to give any Indemnitor notice of any event or matter under this Agreement, the Loan Documents, or otherwise; (c) any finding or allegation that Lender or SBA is or was an "owner" or "operator" of the Property; (d) any extension of time for performance under any Loan Document; (e) any exculpatory provision in the Note, Mortgage or other Loan Documents limiting SBA or Lender's recourse to the Property or other security, or limiting SBA or Lender's right to a deficiency judgment; (f) the release of Borrower or any other Person from performance or observance of any agreement, covenant, term or condition in the Note, Mortgage, other Loan Documents or this Agreement; (g) the release or substitution in whole or in part of any collateral for the Loan; (h) the determination by a Governmental Entity that a third party is responsible for the Contamination or its Remediation; or (i) any other act or omission of SBA or Lender other than those specially found by a court of law to have arisen out of gross negligence or willful misconduct.

**C. Exhibits Incorporated by Reference.** All Exhibits hereto are deemed a part of this Agreement, incorporated and made a part of this Agreement, including: (1) Exhibit "A" – Legal Description of Real Property Securing Loan; (2) Exhibit "B" – Environmental Investigation Report; and (3) Exhibit "C" – Memorandum of SBA Environmental Indemnification Agreement.

**D. Disclaimer.** This Agreement constitutes neither a finding by SBA or Lender, nor knowledge on their part, as to the risks to human health or the environment

posed by any Contamination; nor does it constitute a representation by SBA or Lender that the Property is fit for any particular purpose.

**E. Headings and Font Style.** The headings and font style (including bold lettering) used in this Agreement are for convenience of reference only and shall not be used to define the meaning of any provision.

**F. Rights Not Exclusive.** SBA and Lender's rights and remedies under this Agreement are in addition to any explicit or implied rights and remedies SBA and Lender may have against Indemnitors or any other Person under the Loan Documents, at law, or in equity.

**G. No Waiver; Rights Cumulative.** The rights and remedies available to SBA and Lender may be exercised separately or together, and as many times, and in any order that SBA or Lender choose. SBA and Lender may delay or forgo enforcing any of their rights without giving any up. Any waiver, consent or approval under this Agreement must be in writing and signed by all of the parties to be effective.

**H. Assignment.** Indemnitors shall not assign, transfer or delegate this Agreement or any obligation of Indemnitors hereunder without the prior written consent of SBA and Lender which shall not be unreasonably withheld. Any attempted assignment, transfer or delegation without SBA and Lender's prior written consent shall be null and void. SBA and Lender may assign or transfer, in whole or in part, conditionally or otherwise, any interest in this Agreement without impairing the indemnification granted to SBA and Lender, which shall continue to exist for the benefit of SBA and Lender notwithstanding any such assignment or transfer.

**I. Notice.** All notices, demands, consents and other communications required or that any party desires to give under this Agreement shall be in writing and delivered by fax, hand, courier, or by registered or certified United States mail, postage pre-paid, return receipt requested, to the appropriate address or, if applicable, facsimile number, specified at the end of this Agreement or to such other address or facsimile number as Indemnitors, SBA or Lender may designate in a written notice given to all parties to this Agreement. Notices that are delivered by facsimile, hand or courier shall be deemed received upon delivery or transmission. Notices that are deposited in the United States mail shall be deemed received three days after the date mailed. Notwithstanding the foregoing, a copy of any notice sent by facsimile shall also be delivered to the addressee by hand, overnight courier or United States mail, and any notice of change of address shall not be effective until actual receipt.

**J. Consent to Jurisdiction.** Indemnitors consent to the jurisdiction of the United States District Court for the Federal District in which the Property is located for all purposes in connection with any action or proceeding that arises out of or relates to this Agreement.

**K. Construction.** This Agreement shall be governed by and its provisions construed in accordance with federal law, and to the extent not inconsistent therewith, the

laws of the state where the Property is located without regard to its choice of law principles. In the event a court of law or equity finds any provision of this Agreement, or the application thereof to any party or circumstance, to be invalid or unenforceable, the remainder of this Agreement, or the application of such provision to parties or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each provision shall be valid and enforced to the fullest extent permitted by law or equity.

**L. Modification or Termination.** No amendment, modification, termination or cancellation of this Agreement shall be effective unless it is in writing signed by an authorized representative of each party.

**M. Integration and Entire Agreement.** This Agreement sets forth the entire understanding of the parties and supersedes and merges all other written and oral negotiations, commitments, understandings and agreements relating to the subject matter hereof among the parties including contradictory provisions that would otherwise apply to Indemnified Parties, if any, contained in the Purchase and Sale Documents.

**N. Counterparts.** The parties may sign this Agreement in identical counterparts. The signature pages from the separately signed counterparts may be attached to one copy of this Agreement to form a single document.

**O. Memorandum of Agreement.** Concurrently with the execution of this Agreement, the parties shall execute a Memorandum of SBA Environmental Indemnification Agreement (the "Memorandum"), in the form attached hereto as Exhibit "C." The executed Memorandum shall be immediately recorded in the official records of the appropriate county or other government office in the state where the Property is located. In the event of a conflict between the terms of the Memorandum and this Agreement, the terms of this Agreement shall control.

**P. Intentional Omission or False Statement.** Each party signing this Agreement acknowledges that intentionally falsifying or concealing any material fact with regard to the subject matter of this Agreement may result in prosecution under applicable laws including 18 U.S.C. 1344, which provides for fines up to \$1,000,000 and imprisonment for up to 30 years.

[Add additional signature blocks as necessary including a signature block for the Operating Company, if any, identified in the Loan Documents.]

Borrower:

\_\_\_\_\_ [Insert name of Borrower]

By: \_\_\_\_\_

Name and Title: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone Number: \_\_\_\_\_  
Facsimile Number: \_\_\_\_\_

[Add notary acknowledgement]

Third Party Indemnitor:

\_\_\_\_\_ [Insert name of Third Party Indemnitor]

By: \_\_\_\_\_  
Name and title: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone Number: \_\_\_\_\_  
Facsimile Number: \_\_\_\_\_

[Add notary acknowledgement]

Lender:

\_\_\_\_\_ [Insert name of CDC or lending institution]

By: \_\_\_\_\_  
Name and Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone Number: \_\_\_\_\_  
Facsimile Number: \_\_\_\_\_

[Add notary acknowledgement]

U. S. Small Business Administration

By: \_\_\_\_\_  
Name and Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
Phone Number: \_\_\_\_\_  
Fax Number: \_\_\_\_\_

[Add notary acknowledgement]

A copy of each notice, demand and other correspondence with regard to this Agreement must include the SBA loan number and be sent to:

Associate General Counsel for Litigation  
Office of General Counsel  
U.S. Small Business Administration  
409 3<sup>rd</sup> Street S.W.  
Washington, DC 20416

And to:

Legal Counsel for \_\_\_\_\_ [Insert name of SBA District  
Office]

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone Number: \_\_\_\_\_

Fax Number: \_\_\_\_\_

Exhibit "A"  
Legal Description of Real Property Securing Loan  
[To be inserted]

Exhibit "B"  
Environmental Investigation Report  
[To be inserted]

Exhibit "C"  
Memorandum of SBA Environmental Indemnification Agreement



## Sample Recording Information

Return Address:

Please print or type information

Document title(s) (or transactions contained therein): Memorandum of SBA  
Environmental Indemnification Agreement

Grantor(s):

[Insert names of Borrower(s) and Third Party Indemnitor(s). For individuals, type last name first, then first name and middle initial. Add additional lines as necessary.]

- 1.
- 2.
- 3.

Grantee(s):

1. [Insert name of Lender.]
2. U.S. Small Business Administration, an Agency of the United States Government

Legal Description:

[Insert legal description or abbreviated legal description of Property: i.e., lot, block, plat or section, township, range.]

Assessor's Property Tax Parcel or Account Number at the time of recording:

[Insert Property tax ID number.]

Reference Number(s) of subordinated document(s):

[Insert recording number(s) of Third Party Indemnitor's document(s) to be subordinated to Mortgage securing SBA Loan and other lien instruments.]

Reference Number(s) of Document subordinated to:

[Insert recording number(s) of Mortgage securing SBA Loan and other lien instruments]

**EXHIBIT "C"**

**MEMORANDUM OF SBA ENVIRONMENTAL INDEMNIFICATION AGREEMENT**

SBA Loan No. \_\_\_\_\_

This Memorandum of SBA Environmental Indemnification Agreement ("Memorandum") dated \_\_\_\_\_ [insert date of SBA Environmental Indemnification Agreement] is executed by \_\_\_\_\_ (whether one or more, "Borrower"), \_\_\_\_\_ [insert name of indemnitor(s) not obligated on the SBA Loan] (whether one or more, "Third Party Indemnitor"), \_\_\_\_\_ [Insert name of Certified Development Company or Lending Institution] ("Lender"), and the U.S. Small Business Administration ("SBA").

**I. PURPOSE OF MEMORANDUM**

The purpose of this Memorandum is to provide constructive notice of the unrecorded SBA Environmental Indemnification Agreement of even date with this Memorandum entered into by Borrower, Third Party Indemnitor, SBA and Lender (the "Agreement") pertaining to the real and personal property described therein including the land located at \_\_\_\_\_ [Insert address] and legally described in Exhibit "A" attached hereto (collectively, the "Property"). The Agreement contains, but is not limited to, the following provisions, which are addressed in greater detail therein:

A. Indemnification and Remediation. Borrower and Third Party Indemnitor agree to indemnify SBA and Lender against certain losses, liabilities, damages, etc., including attorney fees and costs, related to environmental contamination associated with the Property and other matters addressed and more fully set forth in the Agreement.

B. Indemnitor's Election to Pay Loan Balance. Third Party Indemnitor may, under certain conditions, limit its duty to remediate and indemnify under the Agreement by paying the entire balance due under the Loan Documents including any applicable pre-payment penalty.

C. Release and Waiver. Borrower and Third Party Indemnitor release and waive all rights, claims and causes of action against SBA and Lender with regard to environmental contamination at the Property and other matters addressed in the Agreement including the right to enforce any provision recorded in the chain of title to the Property that alters SBA or Lender's legal rights, remedies or responsibilities.

D. Warranties and Covenants. Indemnitors warrant, among other things, that there are no documents recorded against the Property that would enable Third Party Indemnitor or its affiliates to control the use or ownership of the Property, such as a right

of first refusal, purchase option, repurchase option, restrictive covenant, deed restriction, etc.; and covenant, among other things, not to record or cause to be recorded any such document before Borrower's SBA Loan has been paid in full.

E. Subordination. Third Party Indemnitor unconditionally subordinates to SBA and Lender's Mortgage recorded in volume \_\_\_\_\_ of \_\_\_\_\_, page \_\_\_\_\_, under auditor's file number \_\_\_\_\_, records of \_\_\_\_\_ County, State of \_\_\_\_\_ any right, title or interest Third Party Indemnitor has with respect to the Property, whether of record or not, including the following:

Third Party Indemnitor's \_\_\_\_\_ [Insert description of lien, e.g., deed of trust, mortgage, UCC Financing Statement, etc.] dated \_\_\_\_\_, recorded in volume \_\_\_\_\_ of \_\_\_\_\_, page \_\_\_\_\_ under auditor's file number \_\_\_\_\_, records of \_\_\_\_\_ County, State of \_\_\_\_\_.

[Add additional blocks as necessary.]

**II. CONFLICTING TERMS OR PROVISIONS**

Terms used in this Memorandum that are not defined herein, but are defined in the Agreement, shall have the meaning provided in the Agreement. To the extent any term or provision of this Memorandum conflicts with any term or provision of the Agreement, the terms and provisions of the Agreement shall control.

**III. COUNTERPARTS**

The parties may sign this Memorandum in identical counterparts. The signature pages from the separately signed counterparts may be attached to one copy of this Memorandum to form a single document.

[Add additional signature blocks as necessary including a signature block for the Operating Company, if any, identified in the Loan Documents.]

Borrower:

\_\_\_\_\_ [Insert name of Borrower]

By: \_\_\_\_\_

Name and Title: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Facsimile Number: \_\_\_\_\_

[Add notary acknowledgement]

Third Party Indemnitor:

\_\_\_\_\_ [Insert name of Third Party Indemnitor]

By: \_\_\_\_\_

Name and title: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Facsimile Number: \_\_\_\_\_

[Add notary acknowledgement]

Lender:

\_\_\_\_\_ [Insert name of CDC or lending institution]

By: \_\_\_\_\_

Name and Title: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Facsimile Number: \_\_\_\_\_

[Add notary acknowledgement]

U. S. Small Business Administration

By:

\_\_\_\_\_

Name and Title: \_\_\_\_\_

Address: \_\_\_\_\_

Phone Number: \_\_\_\_\_

Fax Number: \_\_\_\_\_

[Add notary acknowledgement]

A copy of each notice, demand and other correspondence with regard to this Agreement must include the SBA loan number and be sent to:

Associate General Counsel for Litigation  
Office of General Counsel  
U.S. Small Business Administration  
409 3<sup>rd</sup> Street S.W.  
Washington, DC 20416

And to:

Legal Counsel for \_\_\_\_\_ [Insert name of SBA District  
Office]

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone Number: \_\_\_\_\_

Fax Number: \_\_\_\_\_

**ATTACHMENTS:**

Exhibit "A" - Legal Description of Real Property Securing Loan