



Director Indemnity Agreement

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DIRECTOR INDEMNIFICATION AGREEMENT

This DIRECTOR INDEMNIFICATION AGREEMENT is made and entered into this ____ day of [MONTH], 20__ (the "**Agreement**") by and between [COMPANY NAME], a _____ corporation (the "**Company**") with principal offices at [PRINCIPAL ADDRESS] and [DIRECTOR NAME] ("**Director**"), whose address is [ADDRESS].

RECITALS:

WHEREAS, Director, a member of the Board of Directors of Company (the "**Board**"), performs a valuable service in such capacity for Company; and

WHEREAS, the stockholders of Company have adopted Bylaws (the "**Bylaws**") providing for the indemnification of the officers, directors, agents and employees of Company to the maximum extent authorized by [CITE] (the "**Statute**"); and

WHEREAS, the Bylaws and the Statute, as amended and in effect from time to time or any successor or other statutes of [STATE] having similar import and effect, currently purport to be the controlling law governing Company with respect to certain aspects of corporate law, including indemnification of directors and officers; and

WHEREAS, in accordance with the authorization provided by the Statute, Company may from time to time purchase and maintain a policy or policies of Directors and Officers Liability Insurance ("**D&O Insurance**"), covering certain liabilities which may be incurred by its directors and officers in the performance of services as directors and officers of Company; and

WHEREAS, as a result of developments affecting the terms, scope and availability of D&O Insurance there exists general uncertainty as to the extent and overall desirability of protection afforded members of the Board by such D&O Insurance, if any, and by statutory and bylaw indemnification provisions; and

WHEREAS, in order to induce Director to continue to serve as a member of the Board, Company has determined and agreed to enter into this Agreement with Director.

NOW, THEREFORE, in consideration of Director's continued service as a director after the date hereof, the parties hereto agree as follows:

1. Certain Definitions. The following terms used in this Agreement shall have the meanings set forth below. Other terms are defined where appropriate in this Agreement.

1.1 "**Disinterested Director**" shall mean a director of Company who is not or was not a party to the Proceeding in respect of which indemnification is being sought by Director.

1.2 "**Expenses**" shall include all direct and indirect costs (including, without limitation, attorneys' fees, retainers, court costs, transcripts, fees of experts, witness fees, travel expenses, duplicating costs, printing and binding costs, telephone charges, postage, delivery service fees, all other disbursements or out-of-pocket expenses and reasonable compensation for time spent by Director for which he or she is otherwise not compensated by Company) actually

and reasonably incurred in connection with a Proceeding or establishing or enforcing a right to indemnification under this Agreement, applicable law or otherwise; provided, however, that "Expenses" shall not include any Liabilities.

1.3 **"Final Adverse Determination"** shall mean that a determination that Director is not entitled to indemnification shall have been made pursuant to Section 5 (Procedure for Determination of Entitlement to Indemnification) and either (i) a final adjudication in a [STATE] court or decision of an arbitrator pursuant to Section 12 (Remedies of Director) shall have denied Director's right to indemnification hereunder, or (ii) Director shall have failed to file a complaint in a [STATE] court or seek an arbitrator's award pursuant to Section 12 (Remedies of Director) for a period of one hundred twenty (120) days after the determination made pursuant to Section 5 (Procedure for Determination of Entitlement to Indemnification).

1.4 **"Independent Legal Counsel"** shall mean a law firm or member of a law firm selected by Company and approved by Director (which approval shall not be unreasonably withheld) and that neither is presently nor in the past five (5) years has been retained to represent: (i) Company, in any material matter, or (ii) any other party to the Proceeding giving rise to a claim for indemnification hereunder. Notwithstanding the foregoing, the term "Independent Legal Counsel" shall not include any person who, under the applicable standards of professional conduct then prevailing, would have a conflict of interest in representing either Company or Director in a Proceeding to determine Director's right to indemnification under this Agreement.

1.5 **"Liabilities"** shall mean liabilities of any type whatsoever including, but not limited to, any judgments, fines, ERISA excise taxes and penalties, and penalties and amounts paid in settlement (including all interest assessments and other charges paid or payable in connection with or in respect of such judgments, fines, penalties or amounts paid in settlement) of any proceeding.

1.6 **"Proceeding"** shall mean any threatened, pending or completed action, claim, suit, arbitration, alternative dispute resolution mechanism, investigation, administrative hearing or any other proceeding whether civil, criminal, administrative or investigative, including any appeal therefrom.

1.7 **"Change of Control"** shall mean the occurrence of any of the following events after the date of this Agreement: (a) a change in the composition of the Board, as a result of which fewer than two-thirds (2/3) of the incumbent directors are directors who either (i) had been directors of Company _____ (__) months prior to such change or (ii) were elected, or nominated for election, to the Board with the affirmative votes of at least a majority of the directors who had been directors of Company _____ (__) months prior to such change and who were still in office at the time of the election or nomination; or (b) any "person" (as such term is used in section 13(d) and 14(d) of the Securities Exchange Act of 1934, as amended) through the acquisition or aggregation of securities is or becomes the beneficial owner, directly or indirectly, of securities of Company representing twenty percent (20%) or more of the combined voting power of Company's then outstanding securities ordinarily (and apart from rights accruing under special circumstances) having the right to vote at elections of directors (the **"Capital Stock"**), except that any change in ownership of Company's securities by any person

resulting solely from a reduction in the aggregate number of outstanding shares of Capital Stock, and any decrease thereafter in such person's ownership of securities, shall be disregarded until such person increases in any manner, directly or indirectly, such person's beneficial ownership of any securities of Company.

2. Services to the Company. Director will serve, at the will of the Company or under separate contract, if any such contract exists, as Director of the Company or as a director, officer or other fiduciary of an affiliate of the Company (including any employee benefit plan of the Company) faithfully and to the best of [his/her] ability so long as he or she is duly elected and qualified in accordance with the provisions of the Bylaws or other applicable charter documents of the Company or such affiliate; provided, however, that Director may at anytime and for any reason resign from such position (subject to any contractual obligation that Director may have assumed apart from this Agreement) and that the Company or any affiliate shall have no obligation under this Agreement to continue Director in any such position.

3. Indemnity of Director. The Company hereby agrees to hold harmless and indemnify Director to the fullest extent authorized or permitted by the provisions of the Bylaws and the Statute, as the same may be amended from time to time (but, only to the extent that such amendment permits the Company to provide broader indemnification rights than the Bylaws or the Statute permitted prior to adoption of such amendment.

4. Additional Indemnity. Subject only to the exclusions set forth in Section 5 (Limitations on Additional Indemnity), Company hereby further agrees to hold harmless and indemnify Director:

(a) against any and all Expenses in connection with any Proceeding (including an action by or in the right of Company) to which Director is, was or at any time becomes a party, or is threatened to be made a party, by reason of the fact that Director is, was or at any time becomes a director, officer, employee or agent of Company, or is or was serving or at any time serves at the request of Company as a director, officer, employee or agent of another Company, partnership, joint venture, trust, employee benefit plan or other enterprise; and

(b) otherwise to the fullest extent as may be provided to Director by Company under the non-exclusivity provisions of the Bylaws of Company and the Statute.

5. Limitations on Additional Indemnity. No indemnity pursuant to Section 5 (Additional Indemnity) shall be paid by Company:

(a) except to the extent the aggregate of losses to be indemnified thereunder exceeds the sum of such losses for which the Director is indemnified pursuant to Section 3 (Indemnity of Director) or reimbursed pursuant to any D&O Insurance purchased and maintained by Company;

(b) in respect of remuneration paid to Director if it shall be determined by a final judgment or other final adjudication that such remuneration was in violation of law;

(c) on account of any Proceeding in which judgment is rendered against Director for an accounting of profits made from the purchase or sale by Director of securities of Company

pursuant to the provisions of Section 16(b) of the Securities Exchange Act of 1934 and amendments thereto or similar provisions of any federal, state or local statutory law;

(d) on account of a Final Adverse Determination that Director's conduct was knowingly fraudulent or deliberately dishonest or constituted willful misconduct;

(e) provided there has been no Change of Control, on account of or arising in response to any Proceeding (other than a Proceeding referred to in Section 11(b) (Notification and Defense of Claim) initiated by Director or any of Director's affiliates against Company or any officer, director or stockholder of Company unless such Proceeding was authorized in the specific case by action of the Board of Company;

(f) if a final decision by a Court having jurisdiction in the matter shall determine that such indemnification is not lawful; or

(g) on account of any Proceeding to the extent that Director is a plaintiff, a counter-complainant or a cross-complainant therein (other than a Proceeding permitted by Section 5(e) hereof).

6. Procedure for Determination of Entitlement to Indemnification.

6.1 Request for Indemnification. Whenever Director believes that he or she is entitled to indemnification pursuant to this Agreement, Director shall submit a written request for indemnification to Company. Any request for indemnification shall include sufficient documentation or information reasonably available to Director to support his or her claim for indemnification. Director shall submit his or her claim for indemnification within a reasonable time not to exceed five (5) years after any judgment, order, settlement, dismissal, arbitration award, conviction, acceptance of a plea of nolo contendere or its equivalent, final termination or other disposition or partial disposition of any Proceeding, whichever is the later date for which Director requests indemnification. The President, Secretary or other appropriate officer shall, promptly upon receipt of Director's request for indemnification, advise the Board in writing that Director has made such a request. Determination of Director's entitlement to indemnification shall be made not later than ninety (90) days after Company's receipt of his or her written request for such indemnification.

6.2 Forum. The Director shall be entitled to select the forum in which Director's request for indemnification will be heard, which selection shall be included in the written request for indemnification required in Section 6.1 (Request for Indemnification). This forum shall be any one of the following: (a) the stockholders of Company; (b) a quorum of the Board consisting of Disinterested Directors; (c) Independent Legal Counsel, who shall make the determination in a written opinion; or (d) a panel of three arbitrators, one selected by Company, another by Director and the third by the first two arbitrators selected. If for any reason three arbitrators are not selected within thirty (30) days after the appointment of the first arbitrator, then selection of additional arbitrators shall be made by the [American Arbitration Association]. If any arbitrator resigns or is unable to serve in such capacity for any reason, the [American Arbitration Association] shall select his or her replacement. The arbitration shall be conducted pursuant to the commercial arbitration rules of the [American Arbitration Association] now in effect. If

Director fails to make such designation, his or her claim shall be determined by the forum selected by Company.

7. Presumption and Effect of Certain Proceedings. Upon making a request for indemnification, Director shall be presumed to be entitled to indemnification under this Agreement and Company shall have the burden of proof to overcome that presumption in reaching any contrary determination. The termination of any Proceeding by judgment, order, settlement, arbitration award or conviction, or upon a plea of nolo contendere or its equivalent shall not affect this presumption or, except as may be provided in Section 5 (Limitations on Additional Indemnity), establish a presumption with regard to any factual matter relevant to determining Director's rights to indemnification hereunder. If the person or persons so empowered to make a determination pursuant to Section 6.2 (Forum) shall have failed to make the requested determination within thirty (30) days after any judgment, order, settlement, dismissal, arbitration award, conviction, acceptance of a plea of nolo contendere or its equivalent, or other disposition or partial disposition of any Proceeding or any other event which could enable Company to determine Director's entitlement to indemnification, the requisite determination that Director is entitled to indemnification shall be deemed to have been made.

8. Contribution. If the indemnification provided in Sections 3 (Indemnity of Director) and 4 (Additional Indemnity) is unavailable and may not be paid to Director for any reason other than those set forth in Section 5 (Limitations on Additional Indemnity), then in respect of any Proceeding in which Company is or is alleged to be jointly liable with Director (or would be if joined in such Proceeding), Company shall contribute to the amount of Expenses and Liabilities paid or payable by Director in such proportion as is appropriate to reflect (i) the relative benefits received by Company on the one hand and Director on the other hand from the transaction from which such Proceeding arose, and (ii) the relative fault of Company on the one hand and of Director on the other hand in connection with the events which resulted in such Expenses and Liabilities, as well as any other relevant equitable considerations. The relative fault of Company on the one hand and of Director on the other shall be determined by reference to, among other things, the parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such Expenses and Liabilities. Company agrees that it would not be just and equitable if contribution pursuant to this Section 8 (Contribution) were determined by pro rata allocation or any other method of allocation which does not take account of the foregoing equitable considerations.

9. Insurance and Funding. Company hereby represents and warrants that it shall purchase and maintain insurance to protect itself and/or Director against any Expenses and Liabilities in connection with any Proceeding to the fullest extent permitted by the Statute.

10. Continuation of Obligations. All agreements and obligations of Company contained herein shall continue during the period Director is a director, officer, employee or agent of Company (or is or was serving at the request of Company as a director, officer, employee or agent of another Company, partnership, joint venture, trust, employee benefit plan or other enterprise) and shall continue thereafter so long as Director shall be subject to any possible Proceeding, by reason of the fact that Director was serving Company or such other entity in any capacity referred to herein.

11. Notification and Defense of Claim. Promptly after receipt by Director of notice of the commencement of any Proceeding, Director will, if a claim in respect thereof is to be made against Company under this Agreement, notify Company of the commencement thereof; but the omission so to notify Company will not relieve it from any liability which it may have to Director otherwise than under this Agreement. With respect to any Proceeding as to which Director notifies Company of the commencement thereof:

(a) Company will be entitled to participate therein at its own expense;

(b) Except as otherwise provided below, to the extent that it may wish, Company jointly with any other indemnifying party similarly notified will be entitled to assume the defense thereof, with counsel reasonably satisfactory to Director. After notice from Company to Director of its election to assume the defense thereof, Company will not be liable to Director under this Agreement for any Expenses subsequently incurred by Director in connection with the defense thereof other than reasonable costs of investigation or as otherwise provided below. Director shall have the right to employ his or her own counsel in such Proceeding but the Expenses associated with the employment of such counsel incurred after notice from Company of its assumption of the defense thereof shall be at the expense of Director unless (i) the employment of counsel by Director has been authorized by Company, (ii) Director shall have reasonably concluded that there may be a conflict of interest between Company and Director in the conduct of the defense of such Proceeding or (iii) Company shall not in fact have employed counsel to assume the defense of such Proceeding, in each of which cases the Expenses of Director's separate counsel shall be at the expense of Company. Company shall not be entitled to assume the defense of any Proceeding brought by or on behalf of Company or as to which Director shall have made the conclusion provided for in (ii) above; and

Provided there has been no Change of Control, Company shall not be liable to indemnify Director under this Agreement for any amounts paid in settlement of any Proceeding effected without its written consent, which consent shall not be unreasonably withheld. Company shall be permitted to settle any Proceeding except that it shall not settle any Proceeding in any manner which would impose any penalty, out-of-pocket liability, or limitation on Director without Director's written consent.

12. Advancement and Repayment of Expenses. In the event that Director employs his or her own counsel pursuant to Section 11(b)(i) through (iii) (Notification and Defense of Claim), Company shall advance to Director, prior to any final disposition of any Proceeding any and all Expenses incurred in investigating or defending any such Proceeding within ten (10) days after receiving copies of invoices presented to Director for such Expenses.

Director agrees that Director will reimburse Company for all Expenses paid by Company in defending any Proceeding against Director in the event and only to the extent that there has been a Final Adverse Determination that Director is not entitled, under the provisions of the Statute, the Bylaws, this Agreement or otherwise, to be indemnified by Company for such Expenses.

13. Remedies of Director.

13.1 Adjudication. In the event that (i) a determination pursuant to Section 6 (Procedure for Determination of Entitlement to Indemnification) is made that Director is not entitled to indemnification, (ii) advances of Expenses are not made pursuant to this Agreement, (iii) payment has not been timely made following a determination of entitlement to indemnification pursuant to this Agreement, or (iv) Director otherwise seeks enforcement of this Agreement, Director shall be entitled to a final adjudication in an appropriate court of his or her rights. Alternatively, Director at his or her option may seek an award in arbitration to be conducted by a single arbitrator pursuant to the commercial arbitration rules of the American Arbitration Association now in effect, whose decision is to be made within ninety (90) days following the filing of the demand for arbitration. The Company shall not oppose Director's right to seek any such adjudication or arbitration award.

13.2 No Prejudice. In the event that a determination that Director is not entitled to indemnification, in whole or in part, has been made pursuant to Section 6 (Procedure for Determination of Entitlement to Indemnification), the decision in the judicial proceeding or arbitration provided in paragraph (a) of this Section 13 (Remedies of Director) shall be made de novo and Director shall not be prejudiced by reason of a determination that he or she is not entitled to indemnification.

13.3 Determination Binding. If a determination that Director is entitled to indemnification has been made pursuant to Section 6 (Procedure for Determination of Entitlement to Indemnification) or otherwise pursuant to the terms of this Agreement, Company shall be bound by such determination in the absence of (i) a misrepresentation of a material fact by Director or (ii) a specific finding (which has become final) by an appropriate court that all or any part of such indemnification is expressly prohibited by law.

13.4 Company Stipulation. In any court proceeding pursuant to this Section 13 (Remedies of Director), Company shall be precluded from asserting that the procedures and presumptions of this Agreement are not valid, binding and enforceable. The Company shall stipulate in any such court or before any such arbitrator that Company is bound by all the provisions of this Agreement and is precluded from making any assertion to the contrary.

13.5 Expenses. Expenses reasonably incurred by Director in connection with his or her request for indemnification under this Agreement, meeting enforcement of this Agreement or to recover damages for breach of this Agreement shall be borne by Company.

13.6 Injunctive Relief. Company and Director agree herein that a monetary remedy for breach of this Agreement, at some later date, will be inadequate, impracticable and difficult to prove, and further agree that such breach would cause Director irreparable harm. Accordingly, Company and Director agree that Director shall be entitled to temporary and permanent injunctive relief to enforce this Agreement without the necessity of proving actual damages or irreparable harm. The Company and Director further agree that Director shall be entitled to such injunctive relief, including temporary restraining orders, preliminary injunctions and permanent injunctions, without the necessity of posting bond or other undertaking in connection therewith. Any such requirement of bond or undertaking is hereby waived by Company, and Company

acknowledges that in the absence of such a waiver, a bond or undertaking may be required by the court.

14. Miscellaneous Provisions.

14.1 No Assignment. Neither this Agreement nor any rights or obligations hereunder may be transferred or assigned without the other party's prior written consent and any attempt to the contrary shall be void.

14.2 Governing Statute. This Agreement will be construed in accordance with and governed by the laws of the [STATE], without giving effect to the conflict of law principles of the [STATE].

14.3 Consent to Jurisdiction. The Company and Director each irrevocably consent to jurisdiction of the courts of the [STATE] for all purposes in connection with any Proceeding which arises out of or relates to this Agreement and agree that any Proceeding instituted under this Agreement shall be brought only in the state courts of the [STATE].

14.4 Successors and Assigns. Except as otherwise expressly provided in this Agreement, this Agreement will be binding on, and will inure to the benefit of, the successors and permitted assigns of the parties to this Agreement. Nothing in this Agreement is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights or obligations under or by reason of this Agreement, except as expressly provided in this Agreement.

14.5 Notices. All notices and other communications required or permitted hereunder will be in writing and will be delivered by hand or sent by overnight courier, fax or e-mail to:

if to Company:

fax: _____

e-mail: _____

Attention: _____

if to Director:

fax: _____

e-mail: _____

Attention: _____

Each party may furnish an address substituting for the address given above by giving notice to the other parties in the manner prescribed by this Section 14.5 (Notices). All notices and other communications will be deemed to have been given upon actual receipt by (or tender

to and rejection by) the intended recipient or any other person at the specified address of the intended recipient.

14.6 Separability. Each of the provisions of this Agreement is a separate and distinct agreement and independent of the others, so that if any or all of the provisions hereof shall be held to be invalid or unenforceable to any extent for any reason, such invalidity or unenforceability shall not affect the validity or enforceability of the other provisions hereof, or the obligation of the Company to indemnify the Officer to the full extent provided by the Bylaws or the Statute, and the affected provision shall be construed and enforced so as to effectuate the parties' intent to the maximum extent possible.

14.7 Subrogation. In the event of payment under this agreement, Company shall be subrogated to the extent of such payment to all of the rights of recovery of Director, who shall execute all documents required and shall do all acts that may be necessary to secure such rights and to enable Company effectively to bring suit to enforce such rights.

14.8 Non-Exclusivity of Rights. The rights conferred on Director by this Agreement shall not be exclusive of any other right which Director may have or hereafter acquire under any statute, provision of Company's [Certificate of Incorporation; Articles of Incorporation] or Bylaws, agreement, vote of stockholders or directors, or otherwise, both as to action in his official capacity and as to action in another capacity while holding office.

14.9 Survival of Rights. The rights conferred on Director by this Agreement shall continue after Director has ceased to be a director, officer, employee or other agent of Company or such other entity.

14.10 Construction. The titles of the sections of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement. Unless the context of this Agreement clearly requires otherwise: (a) references to the plural include the singular, the singular the plural, and the part the whole, (b) references to one gender include all genders, (c) "or" has the inclusive meaning frequently identified with the phrase "and/or," (d) "including" has the inclusive meaning frequently identified with the phrase "including but not limited to" or "including without limitation," and (e) references to "hereunder," "herein" or "hereof" relate to this Agreement as a whole. Any reference in this Agreement to any statute, rule, regulation or agreement, including this Agreement, shall be deemed to include such statute, rule, regulation or agreement as it may be modified, varied, amended or supplemented from time to time.

14.11 Entire Agreement. This Agreement embodies the entire agreement and understanding between the parties hereto with respect to the subject matter of this Agreement and supersedes all prior or contemporaneous agreements and understandings other than this Agreement relating to the subject matter hereof.

14.12 Amendment and Waiver. This Agreement may be amended only by a written agreement executed by the parties hereto. No provision of this Agreement may be waived except by a written document executed by the party entitled to the benefits of the provision. No waiver of a provision will be deemed to be or will constitute a waiver of any other provision of this

Agreement. A waiver will be effective only in the specific instance and for the purpose for which it was given, and will not constitute a continuing waiver.

14.13 Counterparts. This Agreement may be in any number of counterparts, each of which will be deemed an original, but all of which together will constitute one instrument.

[The remainder of this page has been intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto have executed this Director's Indemnification Agreement on and as of the day and year first above written.

[COMPANY NAME]

By: _____

Its:

[Director Name], Director