

ENERGY REVOLVING LOAN FUND
LOAN AGREEMENT

LOAN NO.: _____

INDEX CODE: _____ AGENCY OBJECT CODES: _____

THIS LOAN AGREEMENT (this "Agreement") dated the ____ day of _____, 2012 (the "Agreement Date"), is by and between the Michigan Strategic Fund, a public body corporate and politic of the State of Michigan (the "MSF"), whose address is _____ and _____, a **[limited liability company] [corporation]** (the "Borrower"), whose address and principal office is _____, Michigan 4_____. As used in this Agreement, the MSF, and the Borrower are, individually, a "Party" and, collectively, the "Parties."

RECITALS

WHEREAS, Michigan Public Act 242 of 2009 (the "Act") created the Energy Efficiency and Renewable Energy Revolving Loan Fund (the "Fund") within the Michigan Department of Treasury, to provide a source of funds to operate programs to provide loans, grants and other forms of assistance to public or private entities for energy efficiency and renewable energy projects.

WHEREAS, the State Legislature has appropriated monies to and for the purposes of the fund from monies received by the State from the federal government pursuant to the American Recovery and Reinvestment Act of 2009, Public Law – 111-5 ("ARRA").

WHEREAS, consistent with the Act the Michigan Strategic Fund shall administer the Fund and operate the programs to provide loans, grants and other forms of assistance for energy efficiency and renewable energy projects.

WHEREAS, the Borrower has submitted a project application for a loan in the amount of \$_____ from the MSF.

WHEREAS, the MSF has reviewed the application and determined to make the loan to Borrower upon compliance of the Borrower with the terms and conditions of the Agreement.

NOW, THEREFORE, in consideration of the recitals and mutual agreements in this Agreement, the Parties agree as follows:

ARTICLE I
DEFINITIONS

Section 1.1 Defined Terms. As used in this Agreement, the following terms whenever capitalized, shall have the following respective meanings unless the context or use clearly indicates another or different meaning or intent:

- (a) **"Act"** means 2009 PA 242, including, in particular, MCL 460.912 that created the Energy Efficiency and Renewable Energy Revolving Loan Fund.

- (b) **"Affiliate"** means any person or entity that directly or indirectly owns, is owned by or is under common ownership with another person or entity to the extent of at least fifty percent (50%) of the equity (or such lesser percentage which is the maximum allowed to be owned by a foreign corporation in a particular jurisdiction or such lesser percentage provided the operational control is held by such other

person or entity) having the power to vote on or direct the affairs of such person and any person, firm, partnership, corporation or other entity actually controlled by, controlling or under common control with such other person or entity.

- (c) **"Agreement"** means this Loan Agreement as amended or supplemented in accordance with its terms, the Loan Documents and the Exhibits to this Agreement.
- (d) **"Agreement Date"** means the date set forth on the signature page of this Agreement.
- (e) **"Application"** means the Project Application for funding submitted by the Borrower, and attached as Exhibit A.
- (f) **"Board"** means the Board of Directors of the Borrower.
- (g) [RESERVED]
- (h) **"MSF"** means the Michigan Strategic Fund.
- (i) **"Bylaws"** means the bylaws for the Borrower.
- (j) **"Closing Date"** means the date on which the first disbursement is made under this Agreement.
- (k) **"Collateral"** means the named tangible personal property set forth on Exhibits A and B, purchased with Proceeds from the Loan and owned by the Borrower, exclusive of any inventory (as such term is defined in the Michigan Uniform Commercial Code).
- (l) [RESERVED]
- (m) [RESERVED]
- (n) **"Deliverables"** means the Performance Report, 1512 Report and the Financial Report (Exhibits J, K and L).
- (o) **"Events of Default"** means those events described in Sec.7.1 of this Agreement, and **"Event of Default"** shall mean any one of such events.
- (p) **"Exhibit"** means each of the documents or instruments attached to this Agreement identified as an Exhibit.
- (q) **"Fund"** means Energy Efficiency and Renewable Energy Revolving Loan Fund created by the Act.
- (r) **"Guaranty"** means the Guaranty contained in Exhibit "N" along with all the rights, representations, warranties, and obligations contained therein.
- (s) **"Indebtedness"** means the outstanding principal of, and accrued but unpaid interest on, the Note.
- (t) **"Intellectual Property"** means all patents, patent applications, trademarks, trademark applications, service marks, service mark applications, trade names,

copyrights, manufacturing processes, formulae, trade secrets, customer lists and know how.

- (u) **"Loan"** means the loan made by the MSF to the Borrower under this Agreement.
- (v) **"Loan Budget"** means a summary of approved items for expenditure of Proceeds (Exhibit "B").
- (w) **"Loan Disbursement"** means a disbursement of Proceeds under this Agreement.
- (x) **"Loan Disbursement Request"** means a written request from the Borrower for a Loan Disbursement in the form of Exhibit "D".
- (y) **"Loan Documents"** means this Agreement, the Note, and the Security Agreement.
- (z) **"Maximum Loan"** has the meaning set forth in Section 2.1.
- (aa) **"Note"** means the promissory note of the Borrower evidencing the Loan in the form attached as Exhibit "E".
- (bb) **"Operating Agreement"** means the operating agreement for the Borrower.
- (cc) **"Proceeds"** means funds disbursed by the MSF to the Borrower pursuant to this Agreement.
- (dd) **"Performance Report"** means the monthly report submitted on the 15th of each month describing the current status of the Project in the form of Exhibit "K".
- (ee) **"Project"** means the scope of work as set forth in Exhibits "A" & "B".
- (ff) [RESERVED]
- (gg) **"Revolving Loan Manager"** means the individual designated by the MSF as the contact person for the Loan.
- (hh) **"Security Agreement"** means a Security Agreement in the form attached as Exhibit "G" wherein the Borrower grants the MSF a security interest in Collateral.
- (ii) **"State"** means the State of Michigan.

Section 1.2 Construction of Certain Terms. Unless the context of this Agreement otherwise requires, (i) words of any gender include each other gender; and (ii) words using the singular or plural number also include the plural or singular number.

ARTICLE II **LOAN**

Section 2.1 Loan Commitment. Pursuant to this Agreement, the MSF agrees to make a Loan to the Borrower in the amount of up to _____ Dollars (\$_____) (the "Maximum Loan") in installments and at times the Borrower specifies in accordance with Section 2.2. The MSF's obligation to disburse any portion of the Maximum Loan shall automatically be suspended upon the occurrence, and during the continuance, of an Event of Default.

Section 2.2 Loan Disbursement Procedure. The Borrower, at its discretion, may request a disbursement (a "Loan Disbursement") of a portion of the Maximum Loan no more frequently than once a month by delivering to the Revolving Loan Manager a completed Loan Disbursement Request, substantially in the form attached as Exhibit "D" (the "Loan Disbursement Request"). Loan Disbursements shall be made (either by check or wire transfer as selected by the Revolving Loan Manager) directly to the company, upon satisfaction of the following conditions:

- (a) Loan Disbursements will be made on a reimbursement or advance basis and in conformance with the Borrowers Application and Loan Budget submitted to and approved by the MSF. Each Loan Disbursement Request shall be accompanied by the Deliverables, invoices, and proof of payment if applicable;
- (b) In addition to the items set forth in Section 2.2 immediately above, the initial Loan Disbursement Request must be accompanied by:
 - (i) an executed original of the Note; and
 - (ii) an executed Security Agreement, substantially in the form attached as Exhibit "G"; and
- (c) Provided the Borrower has submitted its final report, the final Loan Disbursement, together with all other Loan Disbursements to the Borrower, cannot exceed the Maximum Loan;
- (d) The MSF will make the final Loan Disbursement upon receipt and approval of the Borrower's final reports demonstrating completion of the project in compliance with Exhibits A (Budget), and B (Loan Budget), including amendments;
- (e) The MSF reserves the right to request additional information necessary to substantiate a Loan Disbursement Request, before approving the Loan Disbursement;
- (f) All Loan Disbursement Requests must be submitted on or before [INSERT DATE].

Section 2.3 Loan Terms. The Borrower understands and agrees to the following terms:

- (a) Loan repayments shall be made in equal semi-annual installments of principal and interest beginning not later than six (6) months after the Agreement Date and concluding not later than six (6) years after the Agreement Date. Only interest payments will be collected on disbursed Loan Proceeds for the first twelve (12) months starting from the Agreement Date. Exhibit "C" contains the Amortization Schedule for this Loan. Upon disbursement of Loan Proceeds, an updated Amortization schedule will be provided. There is no penalty for early prepayment of the Loan.
- (b) The interest rate established, when the Loan is executed, will remain in effect throughout the term of the Loan.
- (c) Interest on the Loan is fixed at 6% and is calculated under simple interest terms, based on a 360-day year. See the attached Amortization Schedule in Exhibit "C" of this Agreement.

- (d) No prepayment shall relieve the Borrower's obligation to make subsequent scheduled semi-annual payments when due.
- (e) The Borrower shall remit semi-annual payments by check made payable to: "Michigan Strategic Fund." Checks shall be mailed to: Michigan Strategic Fund, 300 North Washington Square, Lansing, Michigan 48913. Checks shall be identified by loan number and index code.
- (f) Semi-annual payments unpaid after the semi-annual due date shall be considered delinquent. Delinquent payments will be charged a late penalty equal to four percent (4.0%) of the amount of the payment then due. In the event of delinquency, the MSF shall increase the interest rate up to ten (10%) on remaining semi-annual payments.
- (g) An Event of Default shall have occurred when the semi-annual payment remains unpaid sixty (60) calendar days after the semi-annual due date.
- (h) Upon an Event of Default, the MSF may turn the Loan over to a collection agency or take any other action legally available to the MSF. If this Agreement is given to a collection agency or the Michigan Department of Treasury for collection, or if suit is brought for collection, or if it is collected through probate, bankruptcy, or other judicial proceeding, then Borrower shall pay to the MSF all costs of collection, including reasonable attorney's fees and court costs, in addition to other amounts due. Reasonable attorney's fees shall be ten percent (10%) of all amounts due unless either party pleads otherwise.

Section 2.4 Loan Prepayments. The Borrower shall have the right to prepay accrued interest and principal in whole or in part, at any time upon thirty (30) calendar days prior written notice to the Revolving Loan Manager setting forth the amount of the prepayment. The MSF shall apply prepayments first to accrued interest and then to principal.

Section 2.5 Acceleration. Upon the occurrence of an Event of Default that remains uncured beyond the period allowed in Section 7.1, the MSF may at its sole option and discretion declare the entire unpaid balance of principal and accrued interest immediately due and owing. The MSF shall give the Borrower written notice of this declaration of acceleration by sending a statement to the Borrower stating the declaration and setting out the amount owed as of the date of the notice. Interest shall continue to accrue at the rate set out in this Agreement until the Borrower pays the entire balance, together with all accrued interest and any applicable premium or penalties, in full.

Section 2.6 Right of Offset. Notwithstanding anything to the contrary, to the extent any funds under any grant agreement, **[including _____,]** or any other agreement, between the Borrower on the one hand, and the MSF or the Michigan Economic Development Corporation on the other, are due the Borrower ("Other Agreements") and any semi-annual payments on the Loan are delinquent, or an Event of Default has occurred and is continuing, the MSF in its sole discretion, may offset against and deduct from the amounts payable to the Borrower under the Other Agreements and apply these funds to the amounts outstanding under the Note and this Agreement.

ARTICLE III **REPRESENTATIONS AND COVENANTS OF THE COMPANY**

Section 3.1 Organization. The Borrower is duly incorporated and is validly existing in good standing under the laws of the State of _____ and has the power and authority to enter into and perform its obligations under this Agreement. Exhibit "I" includes a certificate of

good standing from the State of Michigan dated within thirty (30) calendar days of the Closing Date, together with copies of the Borrower's certificate/articles of incorporation/organization (including all amendments, restatements and supplements). On the Agreement Date, the Borrower has its principal office and **[all][_____ %]** all of its business operations and employees located within the State of Michigan.

Section 3.2 Corporate Authority. The execution, delivery and performance by the Borrower of this Agreement has been duly authorized and approved by all necessary and proper corporate action on the part of the Borrower and will not (i) violate any provision of law or of the Borrower's certificate/articles of incorporation or bylaws, or (ii) result in the breach of or constitute a default or require any consent under, or result in the creation of any lien, charge, restriction, claim or encumbrance upon any property or assets of the Borrower pursuant to any indenture or other agreement or instrument to which the Borrower is a party or by which the Borrower or its property may be bound or affected, and this Agreement is valid, binding, and enforceable in accordance with its terms, except as limited by applicable bankruptcy, insolvency, moratorium, reorganization or other laws or principles of equity affecting the enforcement of creditors' rights generally or by general principles of equity. The consent resolutions of the board of directors/members of the Borrower reflecting all necessary company action authorizing the Borrower to enter into this Agreement are attached as Exhibit "H".

Section 3.3 Consent. Except as has been disclosed in writing to the MSF, or the Revolving Loan Manager, no consent or approval is necessary from any governmental or other authority, except the MSF as a condition to the execution and delivery of this Agreement by the Borrower or the performance of any of its obligations under this Agreement.

Section 3.4 Full Disclosure. Neither this Agreement, the Application, nor any written statements or certificates furnished by the Borrower to the MSF in connection with the making of the Loan and Agreement contain any untrue statement of material fact, or omit a fact necessary to make the statements true. There are no undisclosed facts, which materially adversely affects or, to the best of the Borrower's knowledge, is likely to materially adversely affect the properties, business, or condition (financial or otherwise) of the Borrower or the ability of the Borrower to perform its obligations under this Agreement.

Section 3.5 Litigation. Except as has been disclosed in writing to the MSF or the Revolving Loan Manager, to the knowledge of the Borrower or its officers, there are no suits or proceedings, pending or, to the knowledge of the Borrower, threatened, before any court, governmental commission, board, MSF, or other administrative agency or tribunal, which, if resolved against the Borrower, would have a material adverse effect on the financial condition or business of the Borrower.

Section 3.6 Compliance with Laws. To its knowledge, the Borrower is not and will not during the term of this Agreement be in violation of any laws, ordinances, regulations, rules, orders, judgments, decrees or other requirements imposed by any governmental authority to which it is subject, including those related to research misconduct and research integrity, and will not fail to obtain any licenses, permits or other governmental authorizations necessary to the ownership of its properties or to the conduct of its business, which violation or failure to obtain might materially and adversely affect its business, profits, properties or condition (financial or otherwise).

Section 3.7 Suits or Other Proceedings. Upon the Borrower obtaining knowledge of any material litigation, dispute or proceeding being instituted or threatened against the Borrower or any attachment, levy, execution or other process being instituted against any property or assets of the Borrower, the Borrower will promptly notify the MSF and the Revolving Loan Manager in writing of such litigation, dispute, levy, execution or other process.

Section 3.8 No Brokers or Finders. No individual person, firm or entity has a right, interest or claim against the Borrower for any commission or other compensation as a finder or broker in connection with the transactions contemplated by this Agreement.

Section 3.9 Use of Proceeds. The Borrower shall use the Proceeds as described in the Application and Loan Budget. The Borrower agrees that all Proceeds shown in the Budget to be spent as specified. Any changes to the Application and Loan Budget must be pre-approved in writing by the Revolving Loan Manager and the MSF. The Borrower shall maintain an overall financial management system that must ensure effective control over and accountability for all funds received under this Agreement, as well as records that allow for the comparison of actual expenditures outlays with budgeted amounts, supported in each case by source documentation (including without limitation time sheets and third party invoices) for all expenditures of Proceeds that is sufficiently detailed so as to allow for the verification of such expenditure and comparison with Application and Loan Budget line items.

Section 3.10 Property. The Borrower will maintain its property and assets in customary repair, order and condition.

Section 3.11 Proprietary Information of Third Parties. No third party has claimed or, to the Borrower's knowledge, has reason to claim that any individual person, firm or entity employed by or affiliated with the Borrower has: (a) violated an employment, non-competition or non-disclosure agreement; (b) disclosed or utilized any trade secret or proprietary information or documentation of the third party; or (c) interfered in the employment relationship between the third party and any of its present or future employees. The Borrower has not received a request for information from a third party that suggests this type of claim may be contemplated. To the Borrower's knowledge, after reasonable inquiry, no individual person, firm or entity employed by or affiliated with the Borrower has or intends to: (i) employ any trade secret, information or documentation proprietary to any former employer; or (ii) violate any confidential relationship with a third party in connection with the development, manufacture or sale of any of the Borrower's products, proposed products, services or proposed services. The Borrower is not aware of any aspect in the conduct of its business or the performance of this Agreement that will constitute a breach or default under any agreement entered into by any individual person, firm or entity employed by or affiliated with the Borrower.

Section 3.12 Trade Secret Protection. To the Borrower's knowledge, all technical information developed by and belonging to the Borrower that has not been patented has been kept confidential. All employees and consultants of the Borrower having access to the confidential or proprietary information of the Borrower have signed a non-disclosure agreement for the benefit of the Borrower. The Borrower has taken all reasonable security measures to protect the secrecy, confidentiality, and value of the Borrower's trade secrets. To the Borrower's knowledge, the trade secrets have not been disclosed by the Borrower or by any shareholder, officer, or employee in any forum, such as a conference or seminar, or in any professional journal, trade publication or any other publication or non-confidential writing. The trade secrets have not been disclosed in a presentation to a prospective joint venture or manufacturing partner or investor without an appropriate confidentiality agreement. Any of the employees of the Borrower and any other individual person, firm or entity who, either alone or in concert with others, developed, invented, discovered, derived, programmed, or designed these secrets or who have knowledge of or access to information relating to them, have been put on notice thereof and have entered into appropriate nondisclosure agreements. To the knowledge of the Borrower, no individual person, firm or entity other than the Borrower's officers, employees, or consultants under obligations of confidentiality has possession or knowledge of the Borrower's trade secrets.

Section 3.13 Intellectual Property Rights. The Borrower owns or possesses adequate licenses or other rights to use all Intellectual Property necessary or desirable to the conduct of its

business as currently conducted and as proposed to be conducted. No claim is pending or, to the Borrower's knowledge is threatened, in connection with the Borrower's use of the Intellectual Property. To the Borrower's knowledge, there is no basis for a claim against the Borrower's use of the Intellectual Property. The Borrower has not taken any action or failed to take any action that might cause the Borrower to be declared in default of any license agreement to which the Borrower is a party.

ARTICLE IV **INSURANCE AND INDEMNIFICATION**

Section 4.1 Maintenance of Insurance. Borrower shall procure and maintain all risks insurance, including without limitation fire, theft, workers' compensation, and liability coverage, together with such other insurance as the MSF or State may require with respect to the Collateral in form, amounts, coverage and basis reasonably acceptable to the MSF or State, will deliver to the Revolving Loan Manager from time to time the policies or certificates of insurance in form satisfactory to the MSF or State, including stipulations that coverage will not be cancelled or diminished without fifteen (15) calendar days prior written notice to the MSF and not including any disclaimer of the insurer's liability for failure to give such notice. Each insurance policy also shall include an endorsement providing that coverage in favor of the MSF will not be impaired in any way by any act, omission or default of Borrower or any other person. In connection with all policies covering assets in which the MSF holds or is offered a security interest, Borrower will provide the MSF with such Loss Payable clause or other endorsement as the MSF may require. If Borrower at any time fails to obtain or maintain any insurance as required under this Agreement, the MSF may (but shall not be obligated) obtain such insurance as the MSF deems appropriate, including if the MSF so chooses "single interest insurance", which will cover only the MSF's interest in the collateral. Borrower will be responsible for reimbursing the MSF for any premiums the MSF must pay to maintain said insurance within thirty (30) calendar day notice by the MSF.

Section 4.2 Indemnification and Hold Harmless.

- (a) Except for disbursement of the Proceeds as required in this Agreement, the MSF, the State, and their respective participants, officers, agents and employees (collectively, the "Indemnified Persons") shall not be liable to the Borrower for any reason.
- (b) The Borrower shall indemnify and hold the State, the MSF, other Indemnified Persons harmless against any and all claims asserted by or on behalf of any individual person, firm or entity (other than an Indemnified Person), arising or resulting from, or in any way connected with this Agreement and any and all related documents executed and delivered in connection therewith or any act or failure to act by the Borrower under the Agreement, including all liabilities, costs and expenses, including reasonable counsel fees, incurred in any action or proceeding brought by reason of any such claim. In the event that any action or proceeding is brought against the MSF, the State, or other Indemnified Persons by reason of any such claim, such action or proceeding shall be defended by MSF, or State counsel or by counsel chosen by the Borrower, as the MSF, or State shall determine and indicate by notice to the Borrower within fifteen (15) calendar days of the MSF's, or State's receipt of notice of the filing of any such claim. In the event such defense is by the MSF, or State's counsel, the Borrower shall indemnify the MSF, or State for reasonable costs of its counsel allocated to such defense and charged to the MSF, or State. The Borrower shall also indemnify the State, the MSF, or other Indemnified Persons from and against all costs and expenses, including reasonable counsel fees, lawfully incurred in enforcing any obligation of the Borrower under this Agreement.

- (c) The Borrower shall have no obligation to indemnify an Indemnified Person under this Section 4.2 if a court with competent jurisdiction finds that the liability in question was caused by the willful misconduct or gross negligence of the MSF, or State or other Indemnified Person, unless the court finds that despite the adjudication or liability, the MSF, or State, or other Indemnified Person is fairly and reasonably entitled to indemnity for the expenses the court considers proper. The MSF, or State, and the Borrower agree to act cooperatively in the defense of any action brought against the MSF, or State, or another Indemnified Person to the greatest extent possible.
- (d) Any Indemnified Person making a claim under this Section 4.2 shall give the Borrower notice within fifteen (15) calendar days following the Indemnified Person's receipt of the complaint or other pleading giving rise to this claim, which notice shall specify the nature, scope and amount of any claim and be accompanied by a complaint or other pleading giving rise to this claim. The failure of the Indemnified Person to deliver this notice within such fifteen (15) day period shall, if materially prejudicial to the Borrower's ability to defend the action, relieve the Borrower of its indemnity obligation for this claim. In the event that the MSF, or the State shall use its own counsel to defend against any claim giving rise to the Borrower's obligation of indemnity under this Section 4.2, the Borrower shall nonetheless, at its sole cost and expense, have the right to participate in the defense to the extent practical. The Borrower shall not have the right or authority to settle any claim against or affecting the rights of the MSF, or the State or other Indemnified Person without the prior written consent of the MSF, the State or other Indemnified Person. The MSF, the State or other Indemnified Person shall not be liable for the settlement of any proceeding made without its prior written consent.
- (e) Performance of the activities contemplated under this Agreement is within the sole control of the Borrower and its employees, agents and contractors, and an Indemnified Person shall have no liability in tort or otherwise for any loss or damage caused by or related to the actions or failures to act, products and processes of the Borrower, its employees, agents or contractors. The Borrower shall also indemnify the MSF, the State or other Indemnified Person from and against all costs and expenses, including reasonable counsel fees, lawfully incurred in enforcing any obligation of the Borrower under this Agreement. This Section 4.2 shall survive the termination of this Agreement.

ARTICLE V
CONDITIONS TO THE OBLIGATIONS OF THE MSF

Section 5.1 General. The MSF's obligations under this Agreement are contingent upon the Borrower satisfying the Revolving Loan Manager that the conditions in Section 5.2 through Section 5.4 have been met, on or before the Closing Date.

Section 5.2 [RESERVED]

Section 5.3 Satisfactory Due Diligence. The MSF and the Revolving Loan Manager shall have completed their due diligence of the Borrower and be satisfied with the outcome.

Section 5.4 Guaranty. An individual who is a primary or beneficial owner of the Borrower or other individual shall guarantee repayment of the loan as evidenced by such person executing and delivering to the MSF the Guaranty in substantially the form found in Exhibit "N".

ARTICLE VI

GENERAL TERMS AND CONDITIONS

Section 6.1 **Borrower Deliverables And Reporting Requirements.** The Borrower shall submit Deliverables and follow all reporting and other requirements specified in Exhibit "M" of this Agreement.

- (a) The Borrower must complete and submit the Deliverables according to a form and format prescribed by the MSF and must include supporting documentation of eligible project expenses. These reports shall be due according to a schedule to be prescribed by the MSF.
- (b) The forms provided by the MSF shall be submitted to the Revolving Loan Manager. All required supporting documentation (invoices, proof of payment, etc.) for expenses must be included with the report.
- (c) The Borrower shall provide the final Deliverables and final Loan Disbursement Request in a format prescribed by the MSF. The Borrower shall submit the final Deliverables, including all supporting documentation for expenses, the final Loan Disbursement Request and any other information or reports requested by the MSF or required by Exhibit "M" within sixty (60) calendar days from the completion of the Project.

Section 6.2 **Borrower Responsibilities**

- (a) The Borrower agrees to abide by all local, state, and federal laws, rules, ordinances, and regulations in the performance of this Loan.
- (b) All local, state, and federal permits, if required, are the responsibility of the Borrower. Award of this Loan is not a guarantee of permit approval by the State.
- (c) The Borrower shall be solely responsible to pay all taxes, if any, that arise from the Borrower's receipt of this Loan.
- (d) The Borrower shall annually budget an amount sufficient to make all payments due and payable under this Loan.
- (e) The Borrower shall comply with all requirements pursuant to the American Recovery and Reinvestment Act (ARRA). See Exhibit "M".
- (f) The Borrower acknowledges that it is a crime to knowingly and willingly file false information with the State for the purpose of obtaining this Agreement or any disbursement of Proceeds under the Agreement, and that any such filing may subject the Borrower, its agents, and/or employees to criminal and civil prosecution and/or termination of the loan.

Section 6.3 **Use Of Material.**

- (a) Unless otherwise required by law, all intellectual property developed using funds from this Agreement, including copyright, patent, trademark and trade secret, shall belong to the Borrower.
- (b) Notwithstanding Section 6.3(a) if the MSF in its sole discretion determines that the Borrower uses any Proceeds in contravention of Section 3.9 that results in the development of any intellectual property, such intellectual property shall become the property of and belong to the MSF.

Section 6.4 Assignability. The Borrower shall not assign this Agreement or assign or delegate any of its duties or obligations under this Agreement to any other party without the prior written consent of the MSF. The MSF does not assume responsibility regarding the project relationships between the Borrower and any subcontractor.

Section 6.5 Subcontracts. The MSF reserves the right to deny the use of any consultant, contractor, associate, or other personnel to perform any portion of the Project. The Borrower is solely responsible for all Project activities. Further, the MSF will consider the Borrower to be the sole point of contact with regard to all matters relating to the Loan. All subcontractors used by the Borrower in performing the Project shall be subject to the provisions of this Agreement and shall be qualified to perform the duties required.

Section 6.6 Non-Discrimination. The Borrower shall comply with the Elliott Larsen Civil Rights Act, 1976 PA 453, as amended, MCL 37.2101 et seq, the Persons with Disabilities Civil Rights Act, 1976 PA 220, as amended, MCL 37.1101 et seq, and all other federal, state, and local fair employment practices and equal opportunity laws and covenants that it shall not discriminate against any employee or applicant for employment, to be employed in the performance of this Agreement, with respect to his or her hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment, because of his or her race, religion, color, national origin, age, sex, height, weight, marital status, or physical or mental disability that is unrelated to the individual's ability to perform the duties of a particular job or position. The Borrower agrees to include in every subcontract entered into for the performance of this Agreement this covenant not to discriminate in employment. A breach of this covenant is a material breach of this Agreement and an Event of Default under Section 7.1.

Section 6.7 Unfair Labor Practices. The Borrower shall comply with the Employers Engaging in Unfair Labor Practices Act, 1980 PA 278, as amended, MCL 423.321 et seq.

Section 6.8 Liability

- (a) The Borrower, not the State or MSF, is responsible for all liabilities as a result of claims, judgments, or costs arising out of activities to be carried out by the Borrower under this Agreement, if the liability is caused by the Borrower, any subcontractor, or anyone employed by the Borrower.
- (b) All liability as a result of claims, demands, costs, or judgments arising out of activities to be carried out by the State or MSF in the performance of this Agreement is the responsibility of the State or MSF and not the responsibility of the Borrower if the liability is caused by any State or MSF employee or agent.
- (c) In the event that liability arises as a result of activities conducted jointly by the Borrower and the State or MSF, in fulfillment of their responsibilities under this Agreement, such liability is held by the Borrower and the State or MSF in relation to each party's responsibilities under these joint activities.
- (d) Nothing in this Agreement should be construed as a waiver of any governmental immunity by the Borrower, the MSF, the State, its agencies, or their employees, respectively as provided by statute or court decisions.

Section 6.9 Conflict Of Interest. No government employee, or member of the legislative, judicial, or executive branches of state or local government, or member of the Borrower's Board of Directors, its employees, partner agencies, or their families shall personally benefit financially from any part of this Agreement.

Section 6.10 Anti-Lobbying. If all or a portion of this Loan is funded with state funds, then the Borrower shall not use any of the loan funds awarded in this agreement for the purpose of lobbying as defined in the State of Michigan's lobbying statute, MCL 4.415(2). "Lobbying" means communicating directly with an official of the executive branch of state government or an official in the legislative branch of state government for the purpose of influencing legislative or administrative action." The Borrower shall not use any of the loan funds awarded in this Agreement for the purpose of litigation against the State. Further, the Borrower shall require that language of this assurance be included in the award documents of all sub-awards at all tiers.

Section 6.11 Debarment and Suspension. By signing this Agreement, the Borrower certifies to the best of its knowledge and belief that it, its agents, and its subcontractors:

- (a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal department or the State.
- (b) Have not within a three-year period preceding this Agreement been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) transaction or contract under a public transaction, as defined in 45 CFR 1185; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.
- (c) Are not presently indicted or otherwise criminally or civilly charged by a government entity (federal, state, or local) with commission of any of the offenses enumerated in (a) immediately above.
- (d) Have not, within a three-year period preceding this Agreement, had one or more public transactions (federal, state, or local) terminated for cause or default.
- (e) Will comply with all applicable requirements of all other state or federal laws, executive orders, regulations, and policies governing this program.

Section 6.12 Audit And Access To Records. The MSF reserves the right to conduct a programmatic and financial audit of the Project. The Borrower will be required to maintain its books and records in accordance with GAAP, applied on a consistent basis, and permit the MSF or State or any of its duly authorized representatives to examine and audit Borrower's books and records at all reasonable times.

Section 6.13 Financial Statements. The Borrower shall furnish the Revolving Loan Manager with the following:

- (a) Its annual tax returns as filed with the Internal Revenue Service as soon as available, but in no event later than ninety (90) calendar days after the applicable filing date for the tax reporting period ended, Federal and other Government tax returns, prepared by a certified public accountant satisfactory to MSF.
- (b) Its annual statements soon as available, but in no event later than ninety (90) after the end of each fiscal year, Borrower's balance sheet, income statement, and statement of cash flows for the year ended, compiled and audited by an independent certified public accountant.

- (c) All financial reports required to be provided under this Agreement shall be prepared in accordance with GAAP, applied on a consistent basis, and certified by Borrower as being true and correct.
- (d) Any such additional Information and statements, as the MSF or State or any of its duly authorized representatives may request in its sole discretion from time to time.

Section 6.14 [RESERVED]

Section 6.15 Other Sources Of Funding. The Borrower guarantees that any claims for reimbursement made to the MSF under this Agreement must not be financed by any source other than the MSF under the terms of this Agreement. If funding is received through any other source, the Borrower agrees to delete from Borrower's Loan Disbursement Request, or to immediately refund to the MSF, the total amount representing such duplication of funding.

Section 6.16 [RESERVED]

Section 6.17 Closeout

- (a) A determination of Project completion, which may include a site inspection and an audit, shall be made by the MSF after the Borrower has completed the Project activities and provided all deliverables described in this Agreement including Exhibits "A" and "M".
- (b) Upon issuance of final disbursement from the MSF, the Borrower releases the State and the MSF of all claims against the State and the MSF arising under this Agreement. Unless otherwise provided in this Agreement, or by State law, final disbursement under this Agreement shall not constitute a waiver of the State's or MSF's claims against the Borrower.
- (c) The Borrower shall immediately refund to the MSF any disbursements in excess of the costs allowed by this Agreement including funds disbursed for activities deemed to be ineligible upon invoice review.

Section 6.18 Cancellation. This Agreement may be canceled by the MSF, upon (30) calendar days written notice, due to, Executive Order, budgetary reduction, or other lack of funding, upon request by the Borrower, or upon mutual agreement by the MSF and Borrower.

Section 6.19 Termination. This Agreement may be terminated by the MSF as follows.

- (a) Upon thirty (30) calendar days written notice to the Borrower:
 - (i) If the Borrower fails to comply with the terms and conditions of the Agreement, or with the requirements of the Act, ARRA or the rules promulgated thereunder, or other applicable state or federal law or rules.
 - (ii) If the Borrower knowingly and willingly presents false information to the MSF for the purpose of obtaining this Agreement or any disbursement under this Agreement.
 - (iii) If the MSF finds that the Borrower, or any of the Borrower's agents or representatives, offered or gave gratuities, favors, or gifts of monetary value to any official, employee or agent of the State in an attempt to secure this Agreement or favorable treatment in awarding, amending, or making any determinations related to the performance of this Agreement.

- (iv) If the Borrower or any subcontractor, manufacturer, or supplier of the Borrower appears in the register of persons engaging in unfair labor practices that is compiled by the Michigan Strategic Fund, or its successor.
 - (v) During the thirty (30) calendar day written notice period, the MSF shall also withhold disbursement for any findings pursuant to (a) through (ii), above.
- (b) Immediately and without further liability to the MSF or State if the Borrower, or any agent of the Borrower, or any agent of any subcontract is:
- (i) Convicted of a criminal offense incident to the application for or performance of a State, public, or private contract or subcontract;
 - (ii) Convicted of a criminal offense, including but not limited to any of the following: embezzlement, theft, forgery, bribery, falsification, or destruction of records, receiving stolen property, or attempting to influence a public employee to breach the ethical conduct standards for State of Michigan employees;
 - (iii) Convicted under State or federal antitrust statutes; or
 - (iv) Convicted of any other criminal offense that, in the sole discretion of the MSF or State, reflects on the Borrower's business integrity.
 - (v) Added to the federal or state Suspension and Debarment list.
 - (vi) In the event that the State Legislature or the State government fails to provide or terminates the funding necessary for the MSF to fund the Proceeds, the MSF may terminate this Agreement by providing notice to the Borrower not less than thirty (30) calendar days prior to the date of cancellation provided, however, that in the event the action of the State Legislature or State government results in an immediate absence or termination of funding, this Agreement may be terminated effective immediately upon delivery of written notice to the Borrower. In the event of termination of funding, the MSF has no further obligation to make loan disbursements beyond the date of termination of this Agreement.
- (c) Other than as set forth in this Section 6.19, this Agreement shall terminate upon payment in full of the Note, whether by payment at maturity, prepayment or acceleration.

Section 6.20 Access Agreement. A voluntary access agreement or court-ordered access must be secured by the Borrower prior to performance of the scope of work described in Exhibit "A" for any portion of the project area or property where loan activities will be undertaken and that is not owned by the Borrower. Evidence of access must be provided to the MSF at its request.

Section 6.21 [RESERVED]

Section 6.22 Project Implementation. The Borrower shall implement the Project in Exhibit A. Changes or additions to the Project may be submitted in writing and are subject to approval by the MSF. Changes to the Project without prior approval from the MSF, or performance of activities that are not part of the Project or an amendment to a Project, are considered

ineligible expenses and may result in the Borrower being responsible for payment of unapproved activities.

Section 6.23 Ineligible Expenses. Although the following costs may be related to the scope of work described in Exhibit A, the following are ineligible expenses under the loan:

- (a) Costs incurred prior to execution of the Agreement, including applicant's cost for preparing the Application.
- (b) Sick pay, vacation pay, holiday pay, payroll taxes, vehicles, computers, travel costs, personnel costs, real property (e.g. land and buildings) parking, tuition reimbursement/remission, vehicle allowance, car rental, seminars, conferences, meetings, subscriptions, dues, and memberships.
- (c) Construction or repair of buildings or structures.
- (d) Costs incurred after the Agreement has expired.

Section 6.24 Other Terms And Conditions

- (a) The MSF may withhold Loan disbursements until the MSF determines that the Borrower is able to proceed with the Project described in Exhibit "A", pursuant to the American Recovery and Reinvestment Act (ARRA).
- (b) Following completion of the Project, the MSF may conduct annual compliance inspections for two (2) years to determine whether the Project is being maintained for the use specified in this Agreement.
- (c) The Borrower acknowledges, by signature of this Agreement, that the MSF is not obligated to provide additional funding for this project. The Borrower shall assume responsibility for any additional costs necessary to complete the project and in excess of the approved Loan.
- (d) The Borrower acknowledges by its signature of this Agreement that there have been no material changes in the project proposal since the date the loan funds were approved. If the proposed project changes, the Borrower shall immediately notify the MSF in writing.
- (e) A beneficial owner or owners of the Borrower shall agree to the terms of and execute the Guaranty contained in Exhibit "N"

Section 6.25 Successor Parties. At any time, the Borrower may substitute any Affiliate or successor in interest after a merger or consolidation or other legal act that transfers fiduciary responsibility of the Borrower through receivership, etc. for this Agreement and all other documents related to the Loan. Similarly, any statutory successor or successor agency named in an Executive Order of the Governor may be substituted for the Michigan Strategic Fund in this Agreement and all other documents related to the Loan. Each party shall notify the other in writing of a substitution under this section.

Section 6.26 [RESERVED].

Section 6.27 Publicity. The Borrower will not use the name of the MSF, the State, nor any officer, agent or employee of the State or MSF, in any publicity, advertising or news release concerning this Agreement without the prior written approval of the Revolving Loan Manager or an authorized representative of the MSF.

Section 6.28 Compliance with Governing Documents. The Borrower shall comply with all obligations under its certificate/articles of incorporation/organization, bylaws/operating agreement and this Agreement.

Section 6.29 Discharge of Obligations. Unless contested in good faith by appropriate proceedings without risk of encumbrance of any Borrower asset, the Borrower shall promptly pay and discharge all taxes, assessments, and governmental charges lawfully levied or imposed upon it (in each case before they become delinquent and before penalties accrue), pay when due all lawful claims for labor, materials, supplies, and rents, and pay all other debts and liabilities that if unpaid would by law result in a writ of attachment, garnishment, execution, tax lien, or similar writ upon any of the property of the Borrower.

ARTICLE VII **DEFAULT**

Section 7.1 Events of Default. The occurrence of any one or more of the following events or conditions shall constitute an "Event of Default" under this Agreement, unless a written waiver of the Event of Default is signed by the MSF:

- (a) any representation made by the Borrower shall prove incorrect at the time that such representation was made in any material respect, including, but not limited to, any information provided under Section 6.1 and the Application;
- (b) any material breach by the Borrower of an obligation of, the Borrower under this Agreement, which breach is not cured to the reasonable satisfaction of the MSF within thirty (30) calendar days after receipt of notice; if such breach cannot be cured within such thirty (30) calendar day period, it shall not constitute an Event of Default under this Agreement so long as the MSF reasonably determines that the Borrower is diligently pursuing a cure;
- (c) any failure by the Borrower to pay any installment of principal or interest when due under this Agreement and such failure shall continue and shall not be cured for a period of sixty (60) calendar days after the due date of such payment;
- (d) the Borrower's failure generally to pay debts as they mature, including any loan with any other entity or agency of the State, or the appointment of a receiver or custodian over a material portion of the Borrower's assets, which receiver or custodian is not discharged within sixty (60) calendar days of such appointment;
- (e) any voluntary bankruptcy or insolvency proceedings are commenced by the Borrower;
- (f) any involuntary bankruptcy or insolvency proceedings are commenced against the Borrower, which proceedings are not set aside within sixty (60) calendar days from the date of institution thereof;
- (g) any writ of attachment, garnishment, execution, tax lien, or similar writ is issued against the property of the Borrower which is not either (i) removed within sixty (60) calendar days, or (ii) bonded over by the Borrower while being contested in good faith by appropriate proceedings;
- (h) the Collateral is sold, conveyed, leased, hypothecated, assigned, transferred, pledged, granted as security, or disposed of without the prior written approval of the MSF, except in the Borrower's ordinary course of business;

- (i) the Borrower moves its business, operations or employees out of State;
- (j) the Borrower ceases substantially all of its operations.

Section 7.2 Available Remedies. Upon the occurrence of any one or more of the Events of Default, in addition to the remedy of Acceleration provided in Section 2.4, the MSF may terminate this Agreement and retains the right to demand return of any Proceeds paid as a result of the violation of this Agreement giving rise to such Event of Default. The termination of this Agreement is not intended to be the sole and exclusive remedy in case any Event of Default shall occur and each remedy shall be cumulative and in addition to every other provision or remedy given herein or now or hereafter existing at law, in equity, by statute or otherwise. The Borrower will pay all costs and expenses, including, without limitation, reasonable attorneys fees and expenses incurred by the MSF in collecting any sums due the MSF under this Agreement, in enforcing any of its rights under this Agreement due to failure of the Borrower to comply with its obligations under this Agreement, or in exercising any remedies available to the MSF as result of the occurrence of one or more Events of Default. The rights and remedies of the MSF shall survive termination of this Agreement.

Section 7.3 Reimbursement. If this Agreement is terminated as described in Section 6.19 or Section 7.2, the MSF shall have no further obligation to make any further disbursement of any kind to the Borrower. The Borrower shall reimburse the MSF for disbursements of the Proceeds determined to have been expended for purposes other than as set forth in Section 3.9 and for the Proceeds which were previously disbursed but not yet expended by the Borrower and which are not subject to an irrevocable or non-cancelable legal commitment of the Borrower for expenditure of funds contemplated by the Application or otherwise approved by the MSF.

ARTICLE VIII **MISCELLANEOUS**

Section 8.1 Notices. Solely for the purpose of determining when a Party is deemed to have received any notice or other form of communication required under this Agreement, any notice, approval, request, authorization, direction or other communication under this Agreement shall be given in writing and shall be deemed to have been delivered and given for all purposes (i) on the delivery date if delivered by confirmed facsimile; (ii) on the delivery date if delivered personally to the Party to whom it is directed; (iii) one (1) business day after deposit with a commercial overnight carrier, with written verification of receipt; or (iv) three (3) business days after the mailing date, whether or not actually received, if sent by United States mail, return receipt requested, postage and charges prepaid, or any other means of rapid mail delivery for which a receipt is available. The notice address for the Parties shall be the address as set forth in the introductory paragraph of this Agreement, with the other relevant notice information, including the recipient for notice and, as applicable, such recipient's fax number or e-mail address, to be as reasonably identified by the notifying Party. The MSF, the Revolving Loan Manager and Borrower may by notice given to other Parties designate any further or different addresses to which subsequent notices shall be sent.

Section 8.2 Entire Agreement. This Agreement, together with the Exhibits, sets forth the entire agreement of the Parties with respect to the subject matter, and supersedes all prior agreements, understandings and communications, whether written or oral, with respect to the subject matter of this Agreement.

Section 8.3 Counterparts and Copies. This Agreement may be executed in any number of counterparts, each of which, when executed shall be deemed an original, and all of which together, shall constitute one and the same agreement. Copies (whether photostatic, facsimile or otherwise) of this Agreement may be made and relied upon to the same extent as though such copy was an original.

Section 8.4 Severability. If any clause, provision or section of this Agreement shall be held illegal or invalid by any court, to the extent permitted by the court order, decree or judgment the invalidity of such clause, provision or section shall not affect any of the remaining clauses, provisions or sections of this Agreement and this Agreement shall be construed and enforced as if the illegal or invalid clause, provision or section had not been contained in this Agreement.

Section 8.5 Captions. The captions or headings in this Agreement are for convenience only and in no way define, limit or describe the scope or intent of any provisions or sections of this Agreement.

Section 8.6 Governing Law. This Agreement and the Loan Documents shall be deemed to be a contract made under the laws of the State, and for all purposes shall be governed by, and construed in accordance with, the laws of the State.

Section 8.7 Relationship between Parties. The relationship between the parties is only as described in this Agreement. The Borrower and its officers, agents and employees shall not describe or represent themselves as agents of the State or the MSF to any individual person, firm or entity for any purpose.

Section 8.8 Successors and Assigns. The MSF may at any time assign its rights in this Agreement and the Loan Documents, and transfer its rights in any or all of the Collateral. The Borrower may not assign its rights or obligations under this Agreement without the prior written consent of the MSF. The terms and conditions of this Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns.

Section 8.9 Waiver. A failure or delay in exercising any right in respect of this Agreement will not be presumed to operate as a waiver unless otherwise stated in this Agreement, and a single or partial exercise of any right will not be presumed to preclude any subsequent or further exercise of that right or the exercise of any other right.

Section 8.10 Amendment. This Agreement may not be modified or amended except pursuant to a written instrument signed by the Parties.

[REMAINDER OF PLEDGE LEFT BLANK, SIGNATURES FOLLOW]

The Parties have executed this Agreement as of _____, 20__.

MICHIGAN STRATEGIC FUND

Mark Morante
Fund Manager
Michigan Strategic Fund
State of Michigan

BORROWER: _____

By: _____

Its: _____