

STATE SMALL BUSINESS CREDIT INITIATIVE  
HI-CAP COLLATERAL SUPPORT PROGRAM  
**CERTIFICATE AND AGREEMENT OF BORROWER**  
BETWEEN  
LENDER AND BORROWER

In consideration of the making of the Term Loan, Revolving Loan or Draw to Term Loan (the "Loan") by \_\_\_\_\_ (the "Lender") to \_\_\_\_\_, a \_\_\_\_\_ (the "Borrower") for \$ \_\_\_\_\_ under the Hawaii Small Business Capital Collateral Support Program ("HI-CAP COLLATERAL") within the State Small Business Credit Initiative Program ("SSBCI") of the U.S. Department of the Treasury ("Treasury") administered by the Hawaii Green Infrastructure Authority ("HGIA") for the State of Hawaii, the Borrower is giving this certificate and making the covenants and agreements herein ("Certificate and Agreement"). The undersigned has the requisite authority and power to sign below on behalf of the Borrower, and Borrower has reviewed, acknowledges, consents to, accepts and affirms all of the terms and conditions set forth by the Lender in its Loan documents between Borrower and Lender, and in this Certificate and Agreement.

The Borrower desires the Loan from the Lender and acknowledges that the Lender requires the pledge by HGIA of cash collateral under the HI-CAP Collateral Program to support said Loan. The initial deposit ("Initial Deposit") shall be in the amount of \$ \_\_\_\_\_ (the Initial Deposit, and reductions thereto per terms of the HI-CAP Collateral Program, collectively, the "Cash Collateral").

The Lender has disclosed to the Borrower and any co-maker, guarantor, endorser, other debtor or obligor of the Loan, of the existence of the Cash Collateral in connection with the making and servicing of the Loan and collecting payments to be made by the Borrower. The Lender shall exercise the same degree of care and discretion in servicing the Loan and collecting payments from the Borrower as it would take in servicing the Loan and collecting payments solely for its own account.

The Borrower understands that the Lender may amend the terms and conditions of the Loan Documents without the consent of HGIA, provided however, the Lender may not, without the express prior written approval of the Executive Director of HGIA, by amendment or otherwise: (i) increase the amount of the Loan (ii) amend any of the Borrower's representations in this Certificate and Agreement, or (iii) waive or release any claim against any Borrower or any co-maker, guarantor, endorser, other debtor or obligor of the Loan; or (iv) consent to any release, substitution, or exchange of collateral, except (a) sales of inventory in the ordinary course of business or (b) sales, substitution and exchange of worn or obsolete equipment in the ordinary course of business, or (c) sales of collateral in the event of liquidation of collateral; or (v) effectuate any of the circumstances in Sections(i), (ii), (iii) or (iv) above.

The Borrower certifies, attest and makes the following representations, warranties and covenants that it is and will remain in compliance with all SSBCI program requirements, including but not limited to the following:

- 1. Sex Offender Certification.** No principal of the Borrower listed above has been convicted of a sex offense against a minor (as such terms are defined in 34 U.S.C. § 20911). For the purposes of this certification, "principal" is defined as "if a sole proprietorship, the proprietor; if a partnership, each managing partner and each partner who is a natural person and holds a 20% or more ownership interest in the partnership;

and if a corporation, limited liability company, association or a development company, or other entity, each director, each of the five most highly compensated executives or officers or employees of the entity, and each direct or indirect holder of 20% or more of the ownership stock or stock equivalent of the entity.

2. **Business Purpose.** The Loan is an Eligible Loan under the HI-CAP Collateral Program and the SSBCI Capital Program Policy Guidelines, as may be amended. Further, the Loan proceeds will be used for a "business purpose." A business purpose includes, but is not limited to, start up costs, working capital, franchise fees, acquisition of equipment, inventory, or services used in the production, manufacturing or delivery of business's goods or services, or in the purchase, construction, renovation, or tenant improvements of an eligible place of business that is not for passive real estate investment purposes. SSBCI funds may be used to purchase any tangible or intangible assets except goodwill. The term "business purpose" excludes acquiring or holding passive investments in real estate, the purchase of securities, except as permitted in Section 3.f. below; and lobbying activities (as defined in Section 3(7) of the Lobbying Disclosure Act of 1995, P.L. 104-65, as amended (2 U.S.C. §1602(7))).
3. **Prohibited Use of Loan.** The loan proceeds will not be used:
  - a. for any impermissible purpose under the SSBCI Capital Program Policy Guidelines, as may be amended, including without limitation any impermissible purposes set forth in Sections VII.f & VIII.f and 12 U.S. Code § 5704;
  - b. to pay any person to influence or attempt to influence any agency, elected official, officer or employee of a State or Local Government in connection with the making, award, extension, continuation, renewal, amendment, or modification of any State or Local Government contract, grant, loan or cooperative agreement as such terms are defined in 31 U.S.C. §1352;
  - c. to repay delinquent Federal or State income taxes unless the Borrower has a payment plan in place with the relevant taxing authority;
  - d. to repay taxes held in trust or escrow (e.g. payroll or sales taxes);
  - e. to reimburse funds owed to any owner, including any equity investment or investment of capital for the business' continuance; or
  - f. to purchase any portion of the ownership interest of any owner of the business, except for the purchase of an interest in an employee stock ownership plan qualifying under section 401 of Internal Revenue Code, worker cooperative, or related vehicle, provided that the transaction results in the employee stock ownership plan or other employee-owned entity holding a majority interest (on a fully diluted basis) in the business.
4. **Borrower Affiliations.** The Borrower is not:
  - a. an executive officer, director, or principal shareholder of the Lender;
  - b. a member of the immediate family of an executive officer, director, or principal shareholder of the Lender; or
  - c. a related interest or immediate family member of such an executive officer, director, or principal shareholder of the Lender.

For the purposes of the above three borrower affiliation restrictions, the terms "executive officer", "director", "principal shareholder", "immediate family", and "related interest" refer to the same relationship to the Lender as the relationships described in part 215 of title 12 of the Code of Federal Regulations, or any successor to such part.

5. **Borrower Business.** The Borrower is not:
  - a. a business engaged in speculative activities that profit from fluctuations in price, such as wildcatting for oil and dealing in commodities futures, unless those activities are incidental to the regular activities of the business and part of a legitimate risk management strategy to guard against price fluctuations related to the regular activities of the business or

- through the normal course of trade<sup>1</sup>;
- b. a business that earns more than half of its annual net revenue from lending activities, unless the business is (1) a CDFI that is not a depository institution or a bank holding company, or (2) a Tribal enterprise lender that is not a depository institution or a bank holding company;
  - c. a business engaged in pyramid sales, where a participant's primary incentive is based on the sales made by an ever-increasing number of participants;
  - d. a business engaged in activities that are prohibited by federal law or, if permitted by federal law, applicable law in the jurisdiction where the business is located or conducted (this includes businesses that make, sell, service, or distribute products or services used in connection with illegal activity, unless such use can be shown to be completely outside of the business's intended market); this category of businesses includes direct and indirect marijuana businesses, as defined in Small Business Administration (SBA) Standard Operating Procedure (SOP) 50 10 6<sup>2</sup>; or
  - e. a business deriving more than one-third of gross annual revenue from legal gambling activities, unless the business is a Tribal SSBCI participant, in which case the Tribal SSBCI participant is prohibited from using SSBCI funds for gaming activities but is not restricted from using SSBCI funds for non-gaming activities merely due to an organizational tie to a gaming business.
6. **Hawaii Operations.** As applicable, the Borrower is duly organized, validly existing and in good standing under the laws of the state under which the Borrower is organized and if the Borrower is not organized under the laws of the State of Hawaii, the Borrower is qualified to do business in the State of Hawaii. So long as any portion of the Loan is outstanding, the Borrower shall maintain substantially all of its employees for the project being financed (exclusive of sales staff) or operations for the project within the State of Hawaii. Also, the Borrower is an Eligible Borrower as defined under the SSBCI Capital Program Policy Guidelines, as may be amended.
7. **Criminal and Civil Matters.** Neither the Borrower nor any of its affiliates, subsidiaries, officers, directors and any person who, directly or indirectly, holds a pecuniary interest in the Borrower of 20% or more: (i) have any criminal convictions incident to the application for or performance of a state contract or subcontract, and (ii) have any criminal convictions of have been held liable in any civil proceeding that negatively reflects on the person's business integrity, including without limitation, based on a finding of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or violation of state or federal antitrust statutes. Also, the Borrower is not in material violation of any federal or state law, judgment, decree, order, or governmental rule or regulation.
8. **Borrower Size.** Borrower does not have more than 750 employees.
9. **SSBCI Reporting.** The Borrower shall cooperate with the Lender, HGIA, HTDC, The U.S. Treasury, and any of their representatives, and provide the following information no less than annually or when requested by aforementioned agencies:
- a. the total principal amount of each Loan or authorized as a line of credit, and of that amount, the portion that is from non-private sources;

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<sup>1</sup> A construction loan permitted under the guidance on passive real estate investment in the SSBCI Capital Program Policy Guidelines will not be considered a speculative business for purposes of SSBCI.

<sup>2</sup> See chapter 3.A.8.b of SBA SOP 50 10 6 (effective October 1, 2020), which specifies the following with respect to marijuana-related businesses: "Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, businesses that derive revenue from marijuana-related activities or that support the end-use of marijuana may be ineligible for SBA financial assistance."

- b. the date of the initial disbursement of the Loan;
- c. the current outstanding Loan balance;
- d. the Borrower's annual gross revenues for its most recent fiscal or calendar year;
- e. the Borrower's net income for its most recent fiscal or calendar year;
- f. the Borrower's Full Time Equivalent employees;
- g. the Borrower's Part Time Equivalent employees;
- h. The average wage of all employees;
- i. the estimated number of jobs created or retained as a result of the Loan;
- j. the amount of additional private financing occurring for or on behalf of the Borrower after the closing of the Loan; and
- k. as may be requested by HGIA or Lender from time to time, any other information from required by HGIA or under the SSBCI Program, including any rules, guidelines and regulations, which may be promulgated, or amended thereunder.

The aforementioned information shall be provided by the Borrower to HGIA, the Lender and the State of Hawaii as requested, to provide reports and any other information required from time to time under the HI-CAP Collateral Program and the SSBCI Capital Program Policy Guidelines, including any rules, guidelines and regulations which may be promulgated, or amended from time to time.

**10. Minority or Women or Veteran-Owned or Controlled<sup>3</sup> Business Enterprises.**

The Borrower  is  is not a Minority-Owned or Women-Owned or Veteran-Owned Business Enterprise.

**11. No Interest in Cash Collateral Funds.** The Borrower understands and has not been promised or told by the Lender, its employees or agents that it has any legal, beneficial or equitable interest in any Cash Collateral funds.

**12. Fees to HGIA.** The Lender shall pay HGIA a Closing Fee and an Annual Fee as set forth below. The Borrower understands that said fees may be charged by the Lender to the Borrower and agrees to promptly remit payment to the Lender upon invoicing:

- a. a closing fee equal to the greater of 50 basis points (0.5%) of the value of the Initial Deposit or \$50.00 ("Closing Fee"). This Closing Fee shall be paid by the Lender to HGIA at the time of the closing of the Loan Documents; and
- b. an annual fee (the "Annual Fee") shall be paid by the Lender to HGIA. The Lender shall remit payment of the Annual Fee to HGIA based on the actual Term Loan Collateral Requirement, Revolving Loan Collateral Requirement or Draw to Term Loan Collateral Requirement, as applicable under Section 3 of the Cash Collateral Deposit Agreement multiplied by the Collateral Support Percentage still required by the Lender to support the loan, multiplied by 50 basis points. (Example: Actual Annual Fee = Actual Term Loan Principal Balance x Collateral Support % x .005). The minimum Annual Fee due will be \$50.00.

**13. Disclaimer.** The Borrower is aware that it has been offered a loan by the Lender which will have a HI-CAP Collateral Program cash collateral deposit. HGIA is not a party to the loan and plays no role in the Lender's decision regarding whether or not to make the loan, or in the setting of the interest rate, fees, duration or any other terms or conditions of the loan. The Lender's rights and remedies are delineated in the loan agreement between itself and the Borrower and in laws applicable to any financing. HGIA is not involved in any decision by the Lender with respect to

<sup>3</sup> The term "owned and controlled" means, if privately owned, 51 percent is owned by such individuals; if publicly owned, 51 percent of the stock is owned by such individuals; and in the case of a mutual institution, a majority of the board of directors, account holders, and the community of which the institution services is predominantly comprised of such individuals.

enforcing the Lender's rights under the loan agreement. However, HGIA has rights of subrogation. In the event a claim is made by the Lender on the HI-CAP Collateral Program Loan, HGIA may exercise its right to continue collection efforts.

**Passive Real Estate Investment Exception.** To the extent Borrower is a real estate holding company using the proceeds of the Loan to acquire and hold real or personal property and subsequently leasing the real or personal property to a related operating company, the Borrower represents and warrants the following:

- a. \_\_\_\_\_ is a co-borrower or a guarantor of the Loan, as applicable;
- b. Both the Borrower and \_\_\_\_\_ have executed all required certifications, as applicable;
- c. Each natural person holding an ownership interest constituting at least twenty percent (20%) of the Borrower and the \_\_\_\_\_ has provided a personal guaranty in favor of the Lender for the Loan; and
- d. Borrower and \_\_\_\_\_ have a written lease with a term at least equal to the term of the Loan, including options to renew exercisable solely by \_\_\_\_\_
- e. The percentage of space occupied by \_\_\_\_\_ meets SSBCI requirements.

Borrower shall take all action necessary to cause the terms and conditions in the Lender's Loan Documents, HGIA's HI-CAP Collateral Program Documents and this Certificate and Agreement to be satisfied in all respects.

Borrower further agrees that Lender may provide any information or knowledge the Lender may have about the Borrower or about any matter relating to the Loan or the Loan Documents as referenced in the Certificate and Agreement to HGIA or its successors.

**NAME OF BORROWER**

\_\_\_\_\_ ,

a \_\_\_\_\_

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

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

Its: \_\_\_\_\_

Date: \_\_\_\_\_

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

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

Its: \_\_\_\_\_