**PARTICIPATING LOAN AGREEMENT**

Entered into by:

Loan Number:

Dated:

# SECURED PROMISSORY NOTE

**$ .**

Dated:

State:

THIS PROMISSORY NOTE EVIDENCES A PARTIPATING LOAN AND IS SECURED BY A DEED OF TRUST.

For value received, the undersigned, , LLC (“Maker”), promises to pay to (together with any successor holder of this Note, "Payee") at Payee’s office at or at such other location as Payee may from Same to Same designate, the principal sum of [amount of money in words] ($ **.** ) together with higher of (a) the interest thereon from the date of disbursement of principal at the rate of [number in words] percent ( %) per annum; or (b) Contingent Interest as defined in the Contingent Interest Agreement ("Contingent Interest Agreement") dated concurrently herewith and executed by Maker and Payee which is incorporated herein by reference. Payments of principal and interest shall be made as provided below.

Principal and interest shall be due and payable as follows:

1. All Capital contributions by Payee shall be paid first;
2. Upon the repayment of Principal as set forth in (a), interest as set forth herein or Contingent Interest shall be payable for the remaining term of this agreement;
3. The full outstanding principal balance of this Note, plus accrued interest and all other sums shall also be due and payable upon any "Sale” as such term is defined in the Contingent Interest Agreement, or upon an “Event of Default” as set forth hereunder.

This Note shall be governed by the following provisions:

1. All payments shall be applied first to the outstanding principal balance and then to interest. The payment of interest, other than Contingent Interest, to be made under this Note shall be calculated on the basis of a year of 365 days.
2. No privilege is reserved to prepay all or any portion of this Note.
3. This Note is secured by the Deed of Trust to

, executed on even date herewith, encumbering certain property described therein ("Property").

1. The occurrence of any of the following shall constitute an "Event of Default" hereunder:
   1. Default in the payment of any installment of principal or interest on this Note when due or in the payment or performance of any other obligation of Maker hereunder pursuant to the terms hereof.
   2. The failure to use the funds for their agreed upon purpose; namely, to buy rehab and resell the property located at .
2. Upon the occurrence of any such Event of Default, then at the option of Payee, the entire unpaid balance of principal of this Note, together with all accrued interest thereon, all Contingent Interest payable on account thereof as provided in the Contingent Interest Agreement, and all other payments required under this Note, shall at such Same or at any Same thereafter as Payee may elect, regardless of the Maturity Date of this Note, become immediately due and payable.

Without limiting the scope of the foregoing provisions, the provisions of this paragraph shall constitute both a waiver of any right Maker may have to prepay this Note, in whole or in part.

1. In the event that any amount payable hereunder is not paid when due, then in addition to all other rights set forth herein, Payee shall have the right to collect a late charge equal to percent ( %) of the delinquent payment, which late charge shall be payable upon demand. Maker and Payee agree that such late charge represents a good faith and fair and reasonable estimate of the probable extraordinary cost to Payee of such delinquency. The right to collect such late charge shall be in addition to all other rights granted to Payee hereunder.
2. If this Note is not paid when due or if an Event of Default occurs, Maker promises to pay all costs of collection and other costs incurred by Payee as a result thereof, including, but not limited to, reasonable attorneys' fees incurred by Payee, whether or not suit is filed hereon, for advice and for any and all other services Payee determines to be necessary or advisable by virtue of the delinquency in payment or other Event of Default.
3. Same is of the essence of each obligation hereunder.
4. No delay or omission on the part of Payee in exercising any rights hereunder shall operate as a waiver of such right or of any other right hereunder or under said instruments.
5. Any notices to Payee or Maker given under or pursuant to this Note shall be in writing and shall be addressed and delivered to the respective party or parties.
6. The Term of this Agreement is TWELVE (12) months or upon full pay off of this Note.
7. Miscellaneous.
8. **Entire Agreement**. This Agreement constitutes the entire Agreement between the Maker and Payee (“Parties”) and may be changed only by written instrument, dated and signed by both Parties.
9. **Choice of Law**. This Agreement shall be interpreted, performed, and enforced in accordance with the laws of the State of .
10. **Courts***.* Any action to enforce, arising out of, or relating in any way to, any of the provisions of this Agreement, shall be brought and

prosecuted in the courts of [County],

[State] .

1. **Attorney Fees and Costs**. The prevailing party in any dispute, suit or arbitration shall be entitled to an award of all costs, including all reasonable attorneys’ fees arising out of said dispute, suit, or arbitration.
2. **Heirs, Successors, and Assigns**. This Agreement and shall be binding on the heirs, successors and assigns of the Parties.
3. **Assignment**. This Agreement and the responsibilities hereunder may not be assigned to any third party by the Parties without the express written consent of both Parties except that Payee may assign the beneficial interest of this Note to an entity in which Payee remains an owner.
4. **Arbitration Clause**. The Parties agree to enter into the following steps, to be taken in the order they are listed, in the event of a dispute:

The Parties agree to act in good faith and meet to discuss their dispute should one arise.

Should the meeting not produce a resolution, the Parties agree to retain the services of a mediator to aid in a resolution. The Parties agree to participate in a 4-hour mediation prior to moving to #3. Step #2 shall be completed within two (2) weeks of the meeting referred to in #1.

Should #2 not produce a resolution, the Parties agree to resolve the remaining issues via the American Arbitration Association’s rules and procedures.

1. **Authority**. The Parties warrant that they have the authority to execute this Agreement and that the signers have the authority to bind the Parties hereto.
2. **Force Majeure**. Except as otherwise provided herein, neither party shall be liable for any failure to perform or delay in performance of its obligations hereunder caused by circumstances beyond its reasonable control, including without limitation, failure or delay caused by fire, flood, storm, earthquake, explosion, accident, war, rebellion, insurrection, sabotage, epidemic, labor dispute, labor shortages, transportation embargoes, failures or delays in transportation, inability to secure materials or finished goods from suppliers or manufacturers on a timely basis, acts of God, acts of any governmental body, agency, or entity or such other external circumstance.
3. **Severability**. Each paragraph, section and/or provision of this Agreement is severable. If any provision hereof is held to be illegal or invalid for any reason whatsoever, it shall not affect the validity of the remainder of this Agreement.
4. **Counterparts**. The Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
5. **Modification**. This Agreement may not be modified except by the written agreement of the Parties.

IN WITNESS WHEREOF, PAYEE has executed this Promissory Note as of the year and date set forth above.

, LLC (“Maker”)

,

, Manager

Acknowledgement

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| --- | --- |
| State of | ) |
| )ss. | |
| County of | ) |

On the day of , 20 , before me,

, NOTARY, personally appeared,

**,** personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity, and that by his/her/their signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Notary Public

My Commission Expires:

# CONTINGENT INTEREST AGREEMENT

*THIS CONTINGENT INTEREST AGREEMENT IS SECURED BY A DEED OF TRUST.*

THIS CONTINGENT INTEREST AGREEMENT (this "Agreement") is entered into as

the date signed below by and between Liability Company ("Borrower"), and

LLC, a [State] Limited

, a [State] resident ("Lender").

***RECITALS***

1. Lender has agreed to make a shared appreciation loan to Borrower in the original principal amount of $ (the "Loan").
2. The Loan is evidenced by a Secured Promissory Note dated as of

, in the original principal amount of $ (the "Note"). The Note and this Agreement are secured by a Deed of Trust.

1. This Agreement, the Note, and all other documents entered into by Borrower with respect to the Loan will be referred to herein as the "Loan Documents."

NOW, THEREFORE, in consideration of the foregoing recitals and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Borrower and Lender hereby agree as follows:

SECTION 1. Definitions.

# AGREEMENT

As used herein, the terms "Agreement", "Borrower", "Lender", "Loan", "Note", and "Loan Documents" shall have the meanings set forth above, and the following terms shall have the meanings set forth below:

"Additional Interest" shall have the meaning set forth in Section 3.a.

"Affiliate" shall mean any person which, directly or indirectly, controls or is controlled by or is under common control with a person and, for the purpose of this definition, "control" (including, with correlative meanings, the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of management and policies, whether through the ownership of voting securities or by contract or otherwise.

"Default Rate" shall have the meaning set forth in Section 4.

"Event of Default" shall have the meaning set forth in Section 4.

“Real Property” shall mean the real property listed in the note.

“Net Sales Price of Real Property” shall mean the dollar amount of sales of the property after all acquisition costs, legal costs, title insurance costs, insurance costs, holding costs, taxes, HOA fees, utilities, invoiced supplies from independent third parties, invoiced labor from independent third parties, rehab costs, sales costs and sales commissions.

SECTION 2. Promise to Pay Contingent Interest.

1. Promise to Pay. Borrower hereby agrees and promises to pay to Lender such amounts as are herein described as Contingent Interest and shall be in substitution of all other interest payable by Borrower under the Note.
2. Nature of Contingent Interest. Borrower acknowledges that Borrower and Lender have conferred specifically concerning the contingent and uncertain nature of the Contingent Interest. Borrower and Lender understand and agree that the Contingent Interest and each element thereof are speculative in nature, and both the payment and amount, of Contingent Interest are dependent on a number of contingencies which are not within Lender's control.
3. Term. The Term of this Agreement is for TWELVE (12) Months from the date noted, or upon payoff, or upon default.
4. Security for this Agreement. This agreement is secured by the Mortgage and/or Deed of Trust for the property named in this agreement and in the promissory note that this agreement references. Notwithstanding the payment in full of interest and principal evidenced by the Note, Lender shall have no obligation to reconvey any security instrument until all Contingent Interest and all other sums due hereunder have been paid in full.

SECTION 3. Payment of Additional Interest.

1. Nature of Additional Interest. When the Real Property is sold after the Borrower’s acquisition thereof, then [percentage number in words] percent ( %) of the Net Sales Price of Real Property profit shall be paid to LENDER.
2. Disputes Concerning Audits. Lender may notify Borrower after receipt of any statement that Lender disputes any computation or item contained in any portion of such Audit. In the event Lender so notifies Borrower, the parties shall meet in good faith within twenty (20) days after Lender's notice to Borrower to resolve such disputed items between themselves. If, despite such good faith efforts, the

parties are unable to resolve the dispute at such meeting or within ten (10) days thereafter, the items shall be submitted to arbitration, which, if the item relates to a matter of accounting, shall be performed by an independent certified public accountant or, if the item in dispute does not relate to a matter of accounting, shall be performed by an independent third party not related or affiliated in any way to Lender or Borrower (such accountant or third party herein referred to as the "Arbitrator"), which Arbitrator shall be proposed by Lender and reasonably approved by Borrower within fifteen (15) days after such ten (10) day period (but who in any case shall not be employed by Lender or Borrower). The determination of such Arbitrator shall be final and binding on the parties, and may be enforced in any court of competent jurisdiction. The Arbitrator shall endeavor to render a determination within twenty (20) days after appointment. The fees of such Arbitrator shall be paid by Borrower if the aggregate percentage discrepancy between the amounts of the items in dispute as shown in the annual audit and as finally determined by the Arbitrator exceeds three percent (3%), and otherwise shall be paid fifty percent (50%) by Lender and fifty percent (50%) by Borrower. Upon resolution of any such dispute, payment of Additional Interest shall be adjusted based upon the calculation of the actual Net Cash Flow for such period. Borrower shall pay any additional amount of Additional Interest found to be due to Lender within ten (10) days after the resolution of such dispute by the parties or the Arbitrator's determination, as applicable.

1. Borrower's Books and Records. Borrower shall keep and maintain at all times full and accurate books of account and records adequate to correctly reflect Total Revenues and Expenses. Until all sums due under the Loan Documents are paid in full, Lender shall have the right to inspect, copy and audit such books of account and records at Lender's expense, during normal business hours, and upon five business days’ notice to Borrower, whether such books and records are in the possession of Borrower or any agent of Borrower, for the purpose of verifying the accuracy of the calculation of and payments made on account of Additional Interest.

SECTION 4. Events of Default: Remedies

If one or more of the following events shall occur ("Events of Default" or an "Event of Default"):

* 1. Borrower shall default in the due and punctual payment of any amounts payable under this Agreement;
  2. Borrower shall fail to perform or observe any of the other terms, provisions, covenants, conditions, agreements or obligations contained in this Agreement;
  3. Sale of any interest in Borrower in excess of [1 % less than borrower’s percentage of interest in net profits] %;

THEN, at the option and upon the declaration of Lender, all sums and other obligations owed to Lender under this Agreement shall, without presentment, demand, protest or notice of any kind, all of which are hereby expressly waived, be forthwith due and payable, whereupon the same shall become immediately due and payable, and Lender may pursue any and all remedies set forth in the Loan Documents and enforce all obligations of Borrower to it under this Agreement and the other Loan Documents, and exercise any and all other remedies granted to it at law, in equity or otherwise, all of which rights and remedies shall be cumulative. Interest at the rate of ( %) per annum (the "Default Rate") shall accrue on all Contingent Interest payable hereunder from the date due until the date paid; provided, however, that if there is a maximum legal rate of interest applicable to such Contingent Interest, then the interest payable thereon shall not exceed simple interest at such maximum rate permitted by law.

SECTION 5. Relationship of Lender and Borrower as Creditor and Debtor Only.

1. Nature of Relationship. The relationship between Lender and Borrower in connection with the Loan shall be solely that of creditor and debtor. Nothing contained in this Agreement or in any other Loan Documents, including without limitation Lender's right to receive Contingent Interest, shall be deemed or construed to create a partnership, tenancy-in-common, joint tenancy, joint venture or co-ownership between Lender and Borrower.
2. Indemnification by Borrower. Borrower agrees to indemnify and hold Lender harmless from and against any and all third party claims and liabilities, losses, injuries, costs, damages and expenses (including, without limitation, reasonable attorneys' fees) arising therefrom, which Lender may incur in administering or enforcing the Loan as a result of any act of Lender hereunder or taken pursuant hereto and of and from any and all claims or demands whatsoever which may be instituted against Lender by reason of any alleged obligations or undertakings on its part to perform or discharge any of the terms, covenants or agreements contained in any lease or any other agreement made by Borrower (except to the extent the same results from Lender's gross negligence or intentional misconduct). As used herein, the term "gross negligence" shall mean an act or omission taken or not taken with reckless disregard of the consequences thereof. Should Lender incur any such liability or in defense of any claims or demands related thereto, the amount thereof, including, without limitation, costs, expenses and reasonable attorneys' fees, shall be payable to Lender immediately upon demand together with interest thereon at the Default Rate from the later of the date the demand therefor is received by Borrower or the date such amounts were incurred by Lender, to the date reimbursed; provided, however, that if there is a maximum legal rate of interest applicable to such interest, then

the interest rate shall not exceed simple interest at such maximum rate permitted by law. Upon the failure of Borrower to so reimburse, Lender may declare all sums due hereunder and under the Note and the other Loan Documents immediately due and payable.

1. Security. The obligations of Borrower under this Contingent Interest Agreement are secured by the Assignment and all other security held by Lender, specifically the Secured Promissory Note and Deed of Trust. Such documents are each incorporated herein by reference.

SECTION 6. Miscellaneous.

Miscellaneous.

* 1. **Entire Agreement**. This Agreement constitutes the entire Agreement between the Maker and Payee (“Parties”) and may be changed only by written instrument, dated and signed by both Parties.
  2. **Choice of Law**. This Agreement shall be interpreted, performed, and enforced in accordance with the laws of the State of .
  3. **Courts***.* Any action to enforce, arising out of, or relating in any way to, any of the provisions of this Agreement, shall be brought and prosecuted in the courts of [County] , [State] .
  4. **Attorney Fees and Costs**. The prevailing party in any dispute, suit or arbitration shall be entitled to an award of all costs, including all reasonable attorneys’ fees arising out of said dispute, suit, or arbitration.
  5. **Heirs, Successors, and Assigns**. This Agreement and shall be binding on the heirs, successors and assigns of the Parties.
  6. **Assignment**. This Agreement and the responsibilities hereunder may not be assigned to any third party by the Parties without the express written consent of both Parties except that Payee may assign the beneficial interest of this Note to an entity in which Payee remains an owner.
  7. **Authority**. The Parties warrant that they have the authority to execute this Agreement and that the signers have the authority to bind the Parties hereto.
  8. **Force Majeure**. Except as otherwise provided herein, neither party shall be liable for any failure to perform or delay in performance of its obligations hereunder caused by circumstances beyond its reasonable control, including without limitation, failure or delay caused by fire, flood, storm, earthquake, explosion, accident, war, rebellion, insurrection, sabotage, epidemic, labor dispute, labor shortages, transportation embargoes, failures or delays in transportation, inability to secure materials or finished goods from suppliers or manufacturers on a timely basis, acts of God, acts of any governmental body, agency, or entity or such other external circumstance.
  9. **Severability**. Each paragraph, section and/or provision of this Agreement is severable. If any provision hereof is held to be illegal or invalid for any reason whatsoever, it shall not affect the validity of the remainder of this Agreement.
  10. **Counterparts**. The Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
  11. **Modification**. This Agreement may not be modified except by the written agreement of the Parties.

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

# SIGNATURE PAGES TO FOLLOW

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“BORROWER”:

, LLC (“Maker”)

,

, Manager

Acknowledgement

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| --- | --- |
| State of | ) |
| )ss. | |
| County of | ) |

On the day of , 20 , before me,

, NOTARY, personally appeared,

**,** personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity, and that by his/her/their signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Notary Public

My Commission Expires:

“LENDER”:

A [Name of State] Resident

Acknowledgement

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| --- | --- |
| State of | ) |
| )ss. | |
| County of | ) |

On the day of , 20 , before me,

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Notary Public

My Commission Expires: