

**Ken Birrell**

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**From:** Ken Birrell  
**Sent:** Friday, November 09, 2012 9:18 AM  
**To:** 'Jason@orangeinsure.com'  
**Subject:** Revised Documents  
**Attachments:** Solar Lenses Purchase Agreement-4819-4563-0737 ver. 1.docx; Operation and Maintenance Agreement-4848-3530-9585 ver. 1.docx; Promissory Note-4814-2619-2401 ver. 1.doc; Solar Lenses Tax Treatment Memo.pdf

Jason,

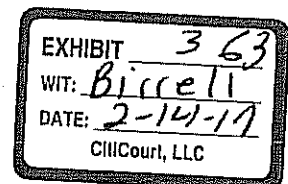
Attached is a new set of documents – the only changes are to the Memo and Purchase Agreement, but I included copies of all the documents so that you will have them in one email.

Thanks,  
Ken

**Kenneth W. Birrell**  
KIRTON | McCONKIE  
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## SOLAR LENSES PURCHASE AGREEMENT

This Solar Lenses Purchase Agreement (the "Agreement") is entered into this \_\_\_ day of \_\_\_\_\_, 20\_\_ (the "Effective Date"), by and between SOLCO I, LLC, a Utah limited liability company with offices at 4035 South 4000 West, Suite 150, Deseret, Utah 84624 ("Seller"), and \_\_\_\_\_, a \_\_\_\_\_ whose address is \_\_\_\_\_ ("Buyer"). Seller and Buyer are referred to individually herein as a "Party" and collectively as the "Parties".

### BACKGROUND

WHEREAS, Seller owns solar lenses used for solar energy collection (each, a "Solar Lens"); and

WHEREAS, Seller desires to sell a certain number of such Solar Lenses to Buyer and Buyer desires to purchase such Solar Lenses from Seller as specifically described below.

### AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants, representations, and warranties contained herein, for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the parties hereto agree as follows:

1. Solar Lenses Purchased. Seller hereby agrees to sell to Buyer and Buyer hereby agrees to purchase \_\_\_\_\_ (\_\_\_\_\_) solar lenses (the "Solar Lenses").

2. Purchase Price. The purchase price for each Solar Lens shall be Three Thousand Five Hundred Dollars (\$3,500) (the "Purchase Price"), for a total payment due from Buyer to Seller of \_\_\_\_\_ Dollars (\$\_\_\_\_\_). The Purchase Price for each of the Solar Lenses shall be paid as follows:

a. Down Payment. Buyer shall pay Seller an amount equal to One Thousand Fifty Dollars (\$1,050) for each Solar Lens (the "Down Payment"), for a total payment due from Buyer to Seller of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), upon execution of this Agreement.

b. Promissory Note. Buyer shall execute and deliver to Seller a promissory note in form substantially similar to Exhibit A hereto (the "Promissory Note") in an amount equal to the balance of the Purchase Price due after payment of the Down Payment. The Promissory Note shall provide for payments in thirty (30) substantially equal annual installments (each an "Installment Payment"). The thirty (30) year period during which payments shall be made under the Promissory Note shall be referred to herein as the "Financing Period." The Installment Payments shall bear interest at a rate equal to the long-term applicable federal rate as in effect as of the Effective Date. The first Installment Payment shall be due on the one (1) year anniversary of the Effective

Date and each subsequent Installment Payment shall be due on each subsequent anniversary of the Effective Date.

3. Failure to Pay. In the event that Buyer fails to pay any of the annual Installment Payments or any portion thereof when due, interest shall accrue on the overdue amount at the Default Rate set forth in the Promissory Note, until such amount and any interest accrued thereon have been paid in full. If Buyer fails to pay any annual Installment Payment or any portion thereof within thirty (30) days of receiving written notice from Seller of such overdue amount, Seller may immediately, upon prior written notice to Buyer, enter the Installation Site and repossess the Solar Lenses. In such event, Seller shall be entitled to recover its attorney fees, court costs, collection costs, repossession fees and other expenses incurred in repossessing the Solar Lenses. In the event Buyer voluntarily relinquishes the Solar Lenses to Seller, and thereby minimizes the expense to Seller in repossessing the Solar Lenses, Seller agrees not to report Buyer's failure to pay to any credit reporting agencies. Buyer shall receive a credit against the balance owed under the Installment Payments in an amount equal to the value of the Solar Lenses as established by an independent, qualified appraiser in writing approved by Seller and Buyer. The credit for the value of the Solar Lenses shall be given whether the Solar Lenses are re-sold by Seller or not.

4. Installation. Seller shall deliver the Solar Lens to one or more installation sites selected by Seller and communicated to Buyer (the "Installation Site"). Seller or its agent shall then install and startup the Solar Lenses at such Installation Site as soon as is commercially reasonable (the date on which each Solar Lens is installed shall be its "Installation Date").

5. Operating Site and Guidelines. Buyer shall enter into an Operation and Maintenance Agreement in the form attached hereto as Exhibit B (the "Operation and Maintenance Agreement") with an independent party (the "Operator") to oversee the operation and management of the Solar Lenses. The Parties agree that the Solar Lenses shall be used and operated only in accordance with the "Safety and Operating Guidelines" which shall be written and set forth by Seller and attached hereto as Exhibit C and incorporated herein by this reference (the "Safety and Operating Guidelines"), which shall also be attached to and incorporated into the Operation and Maintenance Agreement. Buyer hereby agrees to cause any successor to the Operator to likewise use and operate the Solar Lenses only in accordance with the Safety and Operating Guidelines.

6. Documentation for Potential Tax Benefits. Buyer and Seller acknowledge that they each understand that the Solar Lenses may qualify for certain tax incentives and benefits under the Internal Revenue Code of 1986 and other federal and state statutes, including but not limited to energy tax credits. Seller shall provide to Buyer all required documentation relating to the Solar Lenses and the larger alternative energy systems into which they will be installed as requested by Buyer for federal, state and local review of the Solar Lenses for potential tax benefits. However, Buyer hereby expressly acknowledges that neither Seller nor any person or entity affiliated with Seller has made representations to Buyer regarding potential tax benefits of this Agreement and Buyer has relied entirely on its own analysis of potential tax benefits. Buyer agrees to obtain the evaluation and opinion of its own tax attorney or accountant as to any tax matters relating to this Agreement and to the Solar Lenses. Seller does not guarantee any tax

incentive or benefit to Buyer. Seller has not and shall not claim any energy tax credit with respect to the Solar Lenses. Buyer hereby waives any and all claims against Seller and its employees, agents, officers, affiliates and representatives relating to Buyer's failure to receive any anticipated tax benefit.

7. Representations and Warranties of Seller. To induce Buyer to enter into this Agreement, Seller, makes the following representations and warranties to Buyer, each of which is true and correct as of the date hereof and which survive the execution and delivery hereof:

a. Organization and Authority. Seller is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Utah, and has all requisite authority and power to enter into this Agreement. This Agreement is the legal, valid and binding obligation of Seller enforceable in accordance with its terms. The execution, delivery and performance of this Agreement by Seller has been duly authorized by all necessary limited liability company action.

b. No Conflicts. The execution, delivery and performance by Seller of this Agreement does not and will not (i) violate any provision of the organizational documents of Seller, in each case as amended to date, (ii) constitute a violation of, or conflict with or result in any breach of, acceleration of any obligation under, right of termination under, or default under, any agreement or instrument to which Seller is a party or by which Seller or the Solar Lenses is/are bound, (iii) violate any judgment, decree, order, statute, rule or regulation applicable to Seller or the Solar Lenses, (iv) require Seller to obtain any approval, consent or waiver of, or to make any filing with, any person or entity (governmental or otherwise) that has not been obtained or made, or (v) result in the creation or imposition of any mortgage, pledge, security interest, charge, lien, restriction and encumbrance of any kind (collectively, "Liens") on the Solar Lenses.

c. Title to and Condition of Solar Lenses. Seller is the lawful owner of, has marketable title to, and has the full right to sell, transfer and assign all of the Solar Lenses. The Solar Lenses are free and clear of all Liens, debts, leases (or subleases), conditional sales agreements, title retention agreements, claims, or restrictions against transfer or assignment, and there are no filings in any registry of deeds in any jurisdiction or under the Uniform Commercial Code or similar statute in any jurisdiction showing Seller as debtor which create or perfect a Lien on the Solar Lenses.

8. Representations and Warranties of Buyer. To induce Seller to enter into this Agreement, Buyer makes the following representations and warranties to Seller, each of which is true and correct as of the date hereof and which survive the execution and delivery hereof:

a. Organization and Authority. Buyer is a \_\_\_\_\_ duly organized, validly existing and in good standing under the laws of the State of \_\_\_\_\_, and has all requisite authority and power to enter into this Agreement. This Agreement is the legal, valid and binding obligation of Buyer, enforceable in accordance with its terms. The execution, delivery and performance of this Agreement by Buyer has been duly authorized by all necessary \_\_\_\_\_ action.

b. No Conflicts. The execution, delivery and performance by Buyer of this Agreement does not and will not (i) violate any provision of the organizational documents of Buyer, as amended to date, (ii) constitute a violation of, or conflict with or result in any breach of, acceleration of any obligation under, right of termination under, or default under, any agreement or instrument to which Buyer is a party or by which it is bound, (iii) violate any judgment, decree, order, statute, rule or regulation applicable to Buyer, or (iv) require Buyer to obtain any approval, consent or waiver of, or to make any filing with, any person or entity (governmental or otherwise) that has not been obtained or made.

9. Warranty. Seller hereby warrants, for the period from the date of the installation to the end of the Financing Period (the "Warranty Period"), that the Solar Lenses shall remain in good operating condition. Seller shall initiate, within five (5) business days following the receipt of written notice that a Solar Lens is not operating properly or is not in good operating condition, either directly or through the use of one or more independent maintenance or repair entities, maintenance or repair of the malfunctioning or non-operating components of the Solar Lens. Seller shall complete such maintenance or repair work within a reasonable time thereafter. Seller shall be responsible for all material, equipment and labor costs incurred to complete such maintenance and repair work. Seller shall not be responsible for or liable for loss of revenue or other consequential damages sustained by Buyer due to the failure of the Solar Lenses to remain in good operating condition. Seller's obligations shall be limited to the maintenance and repair obligations stated herein.

10. Seller's Warranty Obligations. Seller hereby warrants, for the Warranty Period, that each Solar Lens and each of the components thereof, will be free from defects in materials and workmanship. Within five (5) business days following the receipt of written notice from Buyer, Seller shall initiate reasonable efforts to ascertain repair or replacement requirements, to order replacement parts and equipment needed for repair, and to deploy qualified maintenance personnel to repair the Solar Lenses. The cost of warranty parts, replacement equipment and labor shall be borne by Seller. Seller shall not be responsible for or liable for loss of revenue or other consequential damages sustained by Buyer due to defects in materials or workmanship. Seller's obligations with respect to this warranty shall be limited to the parts, equipment replacement, and repair obligations stated herein.

11. No Additional Warranties. Seller makes no representations or warranties, expressed or implied, including the implied warranty of merchantability and fitness, except as expressly stated in this Agreement.

12. Warranty Limitations. In the event a Solar Lens becomes inoperable for any reason, except as otherwise provided under the warranty during the Warranty Period, Seller shall not be obligated to furnish a substitute Solar Lens or any component thereof. In any event, Seller shall not be liable for any special or consequential damages of any nature resulting from such inoperability.

13. Waiver for Delays. Buyer hereby waives any and all claims against Seller for delays, including but not limited to claims for damages due to delays in preparing plans; delays in applying for or obtaining approvals or permits; delays in the delivery, installation, or start-up

of the Solar Lenses; or delays in performing warranty work. This waiver includes any and all direct, indirect or consequential damages.

14. LIMITATION OF LIABILITY. NEITHER OF THE PARTIES SHALL HAVE LIABILITY FOR INCIDENTAL, CONSEQUENTIAL, SPECIAL, INDIRECT OR EXEMPLARY DAMAGES TO THE OTHER ARISING OUT OF THIS AGREEMENT OR THE TRANSACTIONS, EVENTS OR OCCURRENCES RELATED THERETO AND EACH HEREBY WAIVES ANY AND ALL SUCH CLAIMS FOR INCIDENTAL, CONSEQUENTIAL, SPECIAL, INDIRECT OR EXAMPLARY DAMAGES AGAINST THE OTHER.

15. Dispute Resolution. If any claim, dispute or controversy arises between the Parties with respect to the Agreement (a "Dispute") that cannot be resolved by the Parties, then such Dispute shall be resolved by binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be the sole and exclusive forum for resolution of such Dispute, and the award rendered shall be final and binding. Judgment on the award rendered may be entered in any court having jurisdiction thereof. The arbitration shall be conducted in English and shall be held in Salt Lake City, Utah. Any award of the arbitrator(s) (i) shall be in writing, (ii) shall state the reasons upon which such award is based and (iii) may include an award of costs, including reasonable attorneys' fees and disbursements. The arbitrators shall have no authority to award consequential damages or punitive damages or any other damages not measured by the prevailing Party's actual direct damages, and the arbitrators may not, in any event, make any ruling, finding or award that does not conform to the term and conditions of this Agreement. Any Party may make an application to the arbitrators seeking injunctive relief to maintain the status quo until such time as the arbitration award is rendered or the dispute, controversy or claim is otherwise resolved. Any Party may also apply to any court having jurisdiction and seek injunctive relief in order to maintain the status quo until such time as the arbitration award is rendered or the dispute, controversy or claim is otherwise resolved. In the course of resolving Disputes, to the extent practicable, the Parties shall continue to perform the terms and conditions of this Agreement that are not in dispute.

16. Governing Law. This Agreement shall be construed in accordance with the laws of the State of Utah, without regard to its conflicts of law principles.

17. Notices. All notices, requests, demands, and other communications required under this Agreement shall be in writing, in English, and shall be deemed to have been duly given if delivered (i) personally, (ii) by facsimile transmission with written confirmation of receipt, (iii) by overnight delivery with a reputable national overnight delivery service, or (iv) by mail or by certified mail, return receipt requested, and postage prepaid. If any notice is mailed, it shall be deemed given five business days after the date such notice is deposited in the United States mail. Any notice given shall be deemed given upon the actual date of such delivery. If notice is given to a party, it shall be given at the address for such party set forth below. It shall be the responsibility of the Parties to notify the other Party in writing of any name or address changes.

If to Seller:

SOLCO I, LLC  
4035 South 4000 West, Suite 150  
Deseret, UT 84624  
Attn: Neldon Johnson

If to Buyer:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

18. Entire Agreement. This Agreement sets forth the entire agreement and understanding of the Parties related to the subject matter hereof.

19. Severability. The invalidity of any provision hereof shall not affect the validity, force or effect of the remaining provisions hereof.

20. Amendment. This Agreement may be amended, modified, superseded, rescinded, or canceled only by a written instrument executed by the Parties.

21. Waivers. The failure of any Party to this Agreement at any time or times to require performance of any provision under this Agreement shall in no manner affect the right at a later time to enforce the same performance. A waiver by any Party to this Agreement of any such condition or breach of any term, covenant, representation, or warranty contained in this Agreement, in any one or more instances, shall neither be construed as a further or continuing waiver of any such condition or breach nor a waiver of any other condition or breach of any other term, covenant, representation, or warranty contained in this Agreement.

22. Assignment. Neither Party may assign this Agreement without the prior written consent of the other Party and the assignee to whom an approved assignment has been made.

23. Headings. Section headings of this Agreement have been inserted for convenience of reference only and shall in no way restrict or otherwise modify any of the terms or provisions of this Agreement.

24. Counterparts. This Agreement may be executed in one or more counterparts, each of which when executed shall be deemed to be an original, and such counterparts shall together constitute one and the same instrument. Each counterpart may be delivered by facsimile transmission or e-mail (as a .pdf, .tif or similar un-editable attachment), which transmission shall be deemed delivery of an originally executed counterpart hereof.

25. Binding Agreement. This Agreement shall be binding upon the successors and assigns of each of the parties.

26. Breach of Agreement. In the event of the breach of this Agreement by either Party, the injured Party shall be entitled to recover its costs, attorney fees, arbitration costs and arbitration fees incurred in enforcing the agreement and in pursuing appropriate remedies.

27. Potential Tax Benefits Responsibility of Buyer. Seller and Buyer acknowledge that they each understand that the Solar Lenses may qualify for certain tax incentives and benefits under the Internal Revenue Code of 1986 and other federal or state statutes. Buyer agrees to obtain the evaluation and opinion of its own tax attorney or accountant as to any tax matters relating to this Agreement and to the Solar Lenses. Seller does not guarantee any tax incentive or benefit to Buyer. Seller hereby transfers to Buyer any and all energy tax credits, if any, related to the Solar Lenses. Seller shall not claim any such energy tax credits. Seller and Buyer agree to the respective initial values of the components of the Solar Lenses.

28. Tax Reporting. The Parties hereby agree that for tax purposes they and each of their affiliates shall report the transactions contemplated by this Agreement and the Operation and Maintenance Agreement as a sale of the Solar Lenses to Buyer and a thirty (30) year operating lease of the Solar Lenses to the Operator.

IN WITNESS WHEREOF, the Parties hereto have caused this Solar Lenses Purchase Agreement to be duly executed on the day and year first above written.

**BUYER**

\_\_\_\_\_ a \_\_\_\_\_

(Signature)

Title: \_\_\_\_\_

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

**SOLCO**

SOLCO I, LLC

a Utah limited liability company

\_\_\_\_\_ (Signature)

Title: MANAGER

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

For Internal Use Only:





**Exhibit A**

**Promissory Note**

[See Attached]

KM00173

KM00173

**Exhibit B**

**Operation and Maintenance Agreement**

[See Attached]

KM00174

KM00174

**Exhibit C**

**Safety and Operating Guidelines**

[See Attached]

KM00175

KM00175

## OPERATION AND MAINTENANCE AGREEMENT

This Operation and Maintenance Agreement (the "Agreement") is entered into this \_\_\_ day of \_\_\_\_\_, 20\_\_ (the "Effective Date") by and between LTB, LLC (the "Operator"), a Nevada limited liability company with principal offices at 3838 Rayment Drive, Suite #10, Las Vegas, Nevada 89121, and \_\_\_\_\_, a \_\_\_\_\_ whose address is \_\_\_\_\_ (the "Owner"). Operator and Owner are referred to individually herein as a "Party" and collectively as the "Parties."

WHEREAS, pursuant to that certain Solar Lenses Purchase Agreement dated as of the date hereof (the "Purchase Agreement") between Owner and SOLCO I, LLC ("Solco"), a copy of which is attached hereto as Exhibit A and incorporated herein by this reference, Owner purchased from Solco certain solar lenses (the "Solar Lenses") which are more particularly described in the Purchase Agreement and which will be installed at a power plant and/or other facilities hereafter associated therewith (collectively, the "Project") at the location(s) designated in the Purchase Agreement (the "Installation Site");

WHEREAS, the Owner desires to contract with the Operator for Operator to provide operation and maintenance services in respect of the Solar Lenses;

WHEREAS, the Operator, at the Operator's sole discretion, may also be operating and maintaining solar thermal energy equipment other than the Solar Lenses at the Installation Site; and

WHEREAS, the Operator is willing to provide such services on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants, representations, and warranties contained herein, for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the parties hereto agree as follows:

### ARTICLE 1 DEFINITIONS

1.1 Definitions. Various terms are defined within the text of this Agreement. When such definition is intended, the term shall be capitalized.

### ARTICLE 2 OPERATOR SCOPE OF WORK

2.1 Appointment. The Owner appoints the Operator and the Operator accepts the appointment to perform Routine O&M Services, Additional Services and Transition Services (as such terms are defined in the Operating and Safety Guidelines (the "Guidelines") provided by Solco to Operator, a copy of which is attached hereto as Exhibit B and incorporated herein by

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this reference) subject to and in accordance with the provisions of this Agreement (collectively, the "Work").

2.2 Effective Date. With respect to each of the Solar Lenses, the Operator shall begin performing the Work on the date such Solar Lens is installed at the Installation Site (the "Effective Date") and shall continue to perform the Work with respect to such Solar Lens throughout the term of this Agreement.

2.3 Operation and Maintenance Services. The Operator will perform the Work in accordance with the standard of a reasonable and prudent operator in the state wherein the Installation Site is located and in compliance with the Guidelines, except to the extent that a reasonable and prudent operator would be unable, or would be hindered in its ability, to perform such obligations. Operator and Owner agree that Solco may modify or amend the Guidelines from time to time in the sole discretion of Solco. In the event Solco provides Operator and/or Owner with modified or amended Guidelines, such amended or modified Guidelines shall be automatically attached hereto as a new Exhibit B. Operator and Owner hereby agree to be bound by the terms of such modified or amended Guidelines without the need of otherwise amending this Agreement.

2.4 Operation and Maintenance Costs. Except as set forth in Section 2.5 below with respect to Solco's warranty obligations, Operator shall be solely responsible for the ongoing operation and maintenance of the Solar Lenses and for all costs incurred in operating and maintaining the Solar Lenses, including, but not limited to, all fuel expenses.

2.5 Damage and Repairs. Operator shall be responsible for the repair of any damage to the Solar Lenses during the term of this Agreement so as to keep the Solar Lenses in good operating condition, ordinary wear and tear excepted. Operator shall repair or cause the Solar Lenses to be repaired promptly after the damage occurs, or, alternatively, shall be responsible for the actual cost of repair or replacement of the damaged Solar Lenses incurred by Owner. In the event that a Solar Lens is not operating properly and that such failure is covered by a warranty under the Purchase Agreement, Operator shall be responsible for ensuring that Solco fulfills its warranty obligations. Operator agrees to allow Solco or Solco's agents access to the Installation Site to take any actions necessary for Solco to fulfill its warranty obligations. Operators may from time to time add parts or accessories to any Solar Lens provided that such addition does not violate the Guidelines or otherwise impair the value or utility of the Solar Lens. Any parts or accessories will become part of the Solar Lens and will be the property of Owner. Any parts or accessories removed by Operator from a Solar Lens shall be replaced with compatible parts or accessories in better condition than the part or accessory so removed.

2.6 Destroyed or Stolen Solar Lenses. In the event any Solar Lens is destroyed, stolen or damaged to such extent that Operator finds it undesirable or impossible to continue its use, Operator shall promptly replace such Solar Lens at its own cost.

2.7 Appointment of Operator Liaison. The Operator may appoint a representative who will represent the Operator under this Agreement and be responsible for receiving approvals

or instructions from the Owner that may be required from time to time. The Owner shall be entitled to rely on the actions of such representative for the purposes of this Agreement.

2.8 Governmental Approvals. The Operator shall apply for and use reasonable efforts to obtain and maintain all governmental approvals that are required to be in the Operator's name and that are necessary for the Operator to perform its obligations under this Agreement. The Operator shall assist the Owner, to the extent reasonably necessary, in obtaining governmental approvals that the Owner is required to obtain pursuant to Article 3.

2.9 Work Force. The Operator is responsible for hiring, employing, training and managing, and additionally, in respect of employees employed by affiliates of the Operator, overseeing the work force necessary to operate, maintain and repair the Project, including but not limited to the Solar Lenses, in accordance with this Agreement.

2.10 Access. The Operator shall at all times provide access to the areas of the Project where the Solar Lenses are located to Owner and its designated representatives, provided that such access does not unreasonably interrupt or interfere with the performance of the Work or the safe operation of the Project and is at the sole risk and expense of the Owner.

2.11 Legal Requirements. The Operator shall comply in all material respects with all applicable laws and regulations in the performance of the Work, including but not limited to the standards published by the Occupational Safety and Health Administration (the "OSHA Standards"). Operator shall not be obligated to perform the Work in a manner that does not meet the OSHA Standards or that would violate any applicable law, including but not limited to the OSHA Standards.

2.12 Taxes, etc. The Operator shall comply with and pay all property taxes, sales taxes, use taxes, excise taxes, personal property taxes, assessments, ad valorem taxes, stamp and documentary taxes, and all other governmental charges, fees, fines or penalties whatsoever, whether payable by Operator or Owner or others, on or relating to the purchase and/or use of the Solar Lenses, other than federal or state income and franchise taxes of the Owner or its members. Owner will cooperate with Operator and furnish Operator with any information available to Owner in connection with Operator's obligations under this Section 2.12.

2.13 No Encumbrances. Operator shall not directly or indirectly create, incur, assume, or suffer to exist any mortgage, security interest, pledge, lien, charge, encumbrance, or claim on or with respect to the Solar Lenses, title thereto, or any interest therein (each, a "Lien") (and Operator will promptly, at its own expense, take such action as may be necessary to duly discharge any such Lien) except (a) the respective rights of Operator and Owner as herein provided, (b) Liens which result from claims against Owner (other than Liens which result from failure of Operator to perform any of Operator's obligations hereunder), (c) Liens for taxes either not yet due or being contested in good faith by appropriate proceedings and (d) inchoate materialmen's, mechanic's, workmen's, repairmen's, employee's, or other like liens arising in the ordinary course of business and not delinquent.

2.14 No Sublease. The Operator may not enter into a sublease or subcontract of its rights and obligations hereunder without the prior written consent of the Owner.

### ARTICLE 3 OWNER SCOPE OF RESPONSIBILITIES

3.1 Delivery of the Solar Lenses. Once this Agreement becomes effective, the Owner shall direct Solco to deliver the Solar Lenses to the Installation Site as directed by Operator and grant Operator and its designated and identified affiliates, employees, agents and representatives, access to the Installation Site and the Solar Lenses, as are necessary or desirable for the Operator to carry out the Work and to comply with the Operator's obligations hereunder.

3.2 Appointment of Owner Liaison. The Owner shall appoint a liaison to represent the Owner under this Agreement and be responsible for giving any approvals or instructions to the Operator that may be required from time to time. The Operator shall be entitled to rely on the approvals or instructions of such representative.

3.3 Governmental Approvals. The Owner shall apply for and use reasonable efforts to obtain and maintain all governmental approvals that are required to be in the Owner's name and that are necessary for the Owner to perform its obligations under this Agreement. The Owner shall assist the Operator, to the extent reasonably necessary, in obtaining governmental approvals that the Operator is required to obtain pursuant to Article 2.

3.4 Compliance with Applicable Laws. The Owner shall comply in all material respects with all applicable laws and regulations in connection with the performance of this Agreement.

3.5 Performance of Operator's Obligations by Owner. In the event that Operator shall fail to perform any of its obligations under this Agreement in a timely manner, Owner may, at its option, immediately or at any time thereafter perform the same or obtain performance of the same for the account of Operator without thereby waiving such default, and any amount paid for expenses or liability incurred by Owner in such performance, together with interest thereon at a rate of one and one-half percent (1.5%) per month, or the maximum rate permitted by applicable law, whichever is less, shall be payable by Operator upon demand as additional rent for the Solar Lenses.

### ARTICLE 4 COMPENSATION AND PAYMENT

4.1 Solar Lenses Production. Operator shall be responsible for collecting all income generated from the operation of the Solar Lenses, including but not limited to any revenue generated from the use or sale of thermal energy or electric power generated using the Solar Lenses (the "Gross Revenue"). In consideration for the performance by Operator of the Work, the Operator shall be entitled to retain an amount equal to the Gross Revenue minus the Rental Payment (as such term is defined in Section 4.2 below).



4.2 Rental Payment. Once a Solar Lens has been installed (each, an "Installed Lens"), then an annual rental payment will be due and owing from Operator to Owner in the amount of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) per Installed Lens (the "Rental Payment"). The first Rental Payment shall be due on the one (1) year anniversary of the Effective Date and each subsequent Rental Payment shall be due on each subsequent one (1) year anniversary of the Effective Date. The Operator shall send Owner the Rental Payment by check or wire transfer to an account specified by Owner. All Payments shall be in dollars unless otherwise agreed.

4.3 Late Payments. In the event Operator fails to pay when due any part of the Rental Payment, Operator shall pay to Owner all expenses necessarily incurred by Owner, including reasonable attorney's fees, incurred by reason of Operator's failure. In addition, late payments under this Agreement shall bear interest at a rate calculated from day to day on the basis of a 360 day year equal to one and one-half percent (1.5%) per month, or the maximum rate permitted by applicable law, whichever is less. The payment of interest shall not excuse or cure any late payment hereunder. The Operator hereby agrees that it will not make payments of any amount to any person or entity other than Owner so long as Operator is late in making any Rental Payment due to Owner.

4.4 Lease of Structural Components. Operator will provide structures that hold the Solar Lenses and receivers to collect the energy from the Solar Lenses. The Operator has agreed to lease space on the structures to the Owner, at one dollar (\$1.00) per year per Installed Lens for ninety-nine (99) years or until the Owner chooses to move the Solar Lenses to another location, which amount the Operator shall net from each annual Rental Payment.

## ARTICLE 5 INDEMNIFICATION

### 5.1 Scope of Indemnification.

(a) Subject to the limitation of liability under Article 9, the Owner shall indemnify, defend and hold harmless the Operator, its affiliates and their respective directors, officers, employees and agents ("Operator Indemnified Persons") from and against any liability, loss, damage, claim, cost, charge or expense of any kind or nature, including reasonable attorneys' fees, expenses and other costs of litigation (collectively, "Damages") incurred by any Operator Indemnified Person in connection with (i) injury to or death of any person or damage to property (including the Solar Lens, the Project and any facilities related to the Solar Lens or the Project) and (ii) any claims by third parties, in each case, as a result of or otherwise relating to (A) the breach by the Owner of any of its obligations under this Agreement or (B) the gross negligence or willful misconduct of the Owner, its affiliates and its and their respective directors, officers, employees and agents; provided that the Owner shall not be liable to indemnify any such Operator Indemnified Person for any Damages to the extent that such Damages are to be indemnified by the Operator pursuant to Section 5.1(b), are the result of the gross negligence or willful misconduct of the Operator or, in respect of any such Operator Indemnified Person, such Operator Indemnified Person, or the breach by the Operator of any of its obligations under this Agreement.

(b) Subject to the limitation of liability under Article 9, the Operator shall indemnify, defend and hold harmless the Owner, its affiliates and its and their respective directors, officers, employees and agents ("Owner Indemnified Persons") from and against any Damages incurred by any Owner Indemnified Person in connection with (i) injury to or death of any person or damage to property (including the Solar Lens, the Project and any facilities related to the Solar Lens or the Project) and (ii) any claims by third parties, in each case, as a result of (A) the breach by the Operator of any of its obligations under this Agreement or (B) the gross negligence or willful misconduct of the Operator, its Affiliates and its and their respective directors, officers, employees and agents; provided that the Operator shall not be liable to indemnify any such Owner Indemnified Person for any Damages to the extent such Damages are to be indemnified by the Owner pursuant to Section 5.1(a), are the result of the gross negligence or willful misconduct of the Owner or, in respect of any such Owner Indemnified Person, such Owner Indemnified Person, or the breach by the Owner of any of its obligations under this Agreement.

5.2 Limitation of Liability. The limitation of liability under Article 9 shall not apply to or include the amount of insurance proceeds received by the Operator under insurance obtained in accordance with this Agreement.

5.3 No Effect on Insurers. The provisions of this Article 5 will not be construed to relieve any insurer of its obligations to pay any insurance claims in accordance with the provisions of any valid insurance policy.

5.4 Survival. The Parties' obligations under this Article 5 survive any termination of this Agreement.

## ARTICLE 6 OWNERSHIP; RISK OF LOSS AND INSURANCE

6.1 Ownership of Solar Lenses. Title to each Solar Lens shall remain in Owner during the term of this Agreement. The Solar Lenses shall at all times be and remain personal property of the Owner regardless of how the Solar Lenses may be affixed to any real property as part of a Project. Owner shall be permitted to display notice of its ownership of the Solar Lenses by affixing to each Solar Lens an identifying stencil or plate or any other indicia of ownership. Operator agrees to keep the Solar Lenses at the Installation Site. Operator shall not remove the Solar Lenses from the Installation Site without the prior written consent of Owner. In addition to any other rights Owner may have with respect to Solar Lenses (including, but not limited to rights granted elsewhere in this Agreement or by statute), in order to secure the payment of the Rental Payment and any other sums due or to become due from Operator to Owner hereunder, Operator hereby grants to Owner a security interest in all of Operator's real property, equipment and personal property that are part of or located at the Installation Site, whether now existing or hereafter arising or acquired by Operator at any time during the Term of this Agreement, and in any and all accessions or additions thereto, substitutions therefore, and replacements, proceeds and products thereof. Operator agrees to execute and deliver to Owner, upon request, financing statements, continuation statements and such other documents as Owner may require to perfect and maintain the security interest granted by Operator hereby. In the event of Operator's default

in the payment of Rental Payments or any other sums due under this Agreement, Owner shall have, in addition to all other rights and remedies provided by law or by other provisions of this Agreement, the rights and remedies of a secured party under the Uniform Commercial Code as the same now exists, plus such further rights as may hereafter be granted by amendment thereof. Operator will not, directly or indirectly, sublet, lend or otherwise relinquish possession and control of the Solar Lenses without the prior written consent of Owner. In no event shall any sublease, lending arrangement, or other relinquishment of possession of the Solar Lenses, whether or not done with the knowledge or approval of Owner, cause Operator's obligations under this Agreement to be discharged or diminished to any extent.

6.2 Risk of Loss. All risk of loss or damage to the Solar Lenses shall be borne by Operator during the term of this Agreement.

6.3 Insurance Required of the Operator.

(a) Required Coverage. The Operator shall obtain and maintain, at its sole expense, the following insurance:

1. Property Insurance. Property insurance, insuring against loss, damage or destruction by fire and other casualty, including theft, vandalism and malicious mischief, insuring the Solar Lenses for not less than One Hundred Percent (100%) of their full insurable replacement cost, with coverage to be sufficient to repair or replace the Solar Lenses.

2. Flood Insurance. Within sixty (60) days after written notice from Owner to Operator that the Installation Site is located in a special flood hazard area designated by the Federal Emergency Management Administration, flood insurance coverage sufficient to repair or replace the Solar Lenses in the event of any damage or loss due to flooding.

3. Earthquake Insurance. Within sixty (60) days after written notice from Owner to Operator that the Installation Site is located in high earthquake hazard area designated by the U.S. Geological Survey, earthquake insurance coverage sufficient to repair or replace the Solar Lenses in the event of any damage or loss due to an earthquake.

4. Liability Insurance. Commercial general liability insurance against claims for personal injury, bodily injury or death, and property damage or destruction occurring in, on or around the Installation Site and any other claims related to the design, manufacture, delivery, installation, start-up, operation or maintenance of the Solar Lenses, in amounts not less than One Million Dollars (\$1,000,000) per occurrence, with an aggregate not less than Five Million Dollars (\$5,000,000).

5. Worker's Compensation Insurance. Worker's compensation insurance, or its equivalent, in the statutorily mandated limits.

6. Other Insurance. Such other insurance and coverages as may be necessary to comply any applicable laws or as Owner or Operator may otherwise deem necessary in their reasonable discretion.

(b) Policy Requirements. All insurance policies shall: (i) provide for a waiver of subrogation by the insurer as to claims against Owner, its employees and agents and provide that such insurance cannot be unreasonably cancelled, invalidated or suspended on account of the conduct of Operator, its officers, directors, employees or agents; (ii) be written on an "occurrence" basis and provide that all insurance required to be carried by Operator is primary, that any "no other insurance" clause in any insurance policy required to be carried by Operator excludes any policies of insurance maintained by Owner, and that all such insurance policies will not be brought into contribution with insurance maintained by Owner; (iii) provide that the policy of insurance shall not be terminated, cancelled or substantially modified without at least thirty (30) days prior written notice to Owner, unless such termination or cancellation is for non-payment, in which case, the policy of insurance shall not be terminated or cancelled without at least ten (10) days prior written notice to Owner; (iv) be issued by insurance companies licensed to do business in the state in which the Installation Site is located and which are rated A- or better by Best's Key Rating Guide or otherwise approved by Owner; (v) be written for a period of at least one (1) year; and (vi) name Owner, its successors, assigns and affiliates, as an additional insured and loss payee.

(c) Evidence of Insurance. Prior to installation of the Solar Lenses, Operator shall have delivered to Owner all required policies of insurance, together with certificates of insurance, or other evidence of coverage satisfactory to Owner, evidencing that such insurance is in full force and effect (or will be in full force and effect no later than the Effective Date) and satisfies the requirements set forth in this Agreement. At least thirty (30) days prior to the expiration of each such policy, Operator shall furnish Owner written evidence that such policy has been renewed or replaced by delivering to Owner a copy of the replacement policy or an insurance company certificate reciting that there is in full force and effect insurance of the types and in the amounts required by this Agreement.

## ARTICLE 7 FORCE MAJEURE

7.1 Event of Force Majeure. Any failure by the Operator or the Owner to carry out any of their respective obligations under this Agreement will not be deemed a breach of contract or default, other than obligations to pay monies due and payable pursuant to this Agreement, if such failure arises out of causes beyond the control and without the fault or negligence of such Party (an "Event of Force Majeure"), that Party having taken all appropriate precautions, due care and reasonable alternative measures with the objective of avoiding such failure and of carrying out its obligations under this Agreement. If any activity is delayed, curtailed or prevented by an Event of Force Majeure, then, anything in this Agreement to the contrary notwithstanding, the time for carrying out the activity thereby affected and the term of this

Agreement will each be extended for a period equal to the total of the periods during which such Event of Force Majeure was operative, and for such further periods, if any, as are necessary to make good the time lost as a result of such Event of Force Majeure.

7.2 Notice; Cooperation. The Party whose ability to perform its obligations is affected by an Event of Force Majeure shall notify as soon as practicable the other Party in writing, stating the cause, and the Parties shall endeavor to do all reasonable acts and things within their power to remove such cause. No Party is obligated to resolve or terminate any disagreement with third parties, including labor disputes, except under conditions acceptable to it or pursuant to the final decision of any arbitral, judicial or statutory agent having jurisdiction to finally resolve the disagreement. As to labor disputes, any Party may request the other Party to cooperate in a joint endeavor to alleviate any conflict which may arise.

## ARTICLE 8 TERM AND TERMINATION

8.1 Term of Agreement. This Agreement becomes effective as of the Effective Date and, unless terminated by either Party pursuant to this Article 8, will terminate on the thirty (30) year anniversary of the installation of the last Solar Lens hereunder.

8.2 Events of Default. The following events shall constitute Events of Default:

(a) Operator shall fail to make any Rental Payment or other payment hereunder including payment of personal property taxes, other taxes, fees, or assessments within thirty (30) days after the same shall become due;

(b) Either Party breaches any of its material obligations under this Agreement and fails to cure such breach within ninety (90) days of the receipt of written notice from the other Party; provided, however, that the exercise of any termination right to be effective must occur within ninety (90) days after the other Party becomes aware that its termination right exists; provided, further, that the Party will have the opportunity, within ninety (90) days of receiving notice of the event or breach to cure the event or breach, or, if such event or breach is not reasonably capable of being cured within such period, to submit to the other Party a plan (a "Remedial Plan") calculated to cure such event or breach within an additional reasonable period of time but, having commenced actions to cure the event or breach in accordance with a Remedial Plan, fails to pursue such actions diligently or is unable to effect a cure within the period contemplated in the Remedial Plan; provided, further, that if the existence of such event or breach is disputed, such termination may occur only following resolution of the dispute regarding the existence or non-existence of a breach;

(c) A Party (i) does not generally pay its debts as they become due, (ii) ceases to do business as a going concern, (iii) admits in writing its inability to pay its debts, (iv) makes an assignment for benefit of creditors, (v) commences any case, proceeding, or action seeking to have an order for relief entered on its behalf against it as a debtor or to adjudicate it as bankrupt or insolvent or is subject to any involuntary proceeding

regarding the same, (vi) seeks reorganization, arrangement, adjustment, liquidation, dissolution, or composition of it or its debts under any law relating to bankruptcy, insolvency, reorganization or relief of debtors, or (vii) seeks appointment of a receiver, trustee, custodian, or other similar official for it or for all or any part of its property; or to take any action in contemplation of or to authorize any of the foregoing actions; or

(d) After a period of sixty (60) days following written notice from Owner, Operator shall fail to discharge any mortgage, security interest, pledge, lien, charge, encumbrance or claim as described in Section 2.12.

8.3 Termination by the Owner. In the event of an Event of Default by the Operator not cured within any applicable cure period, the Owner may at its sole option have the right to exercise concurrently or separately any one or more of the following remedies, and without any election of remedies being deemed to have been made:

(a) Terminate this Agreement at any time by providing Operator written notice of termination specifying the effective date of termination (which date may not be earlier than the date that all conditions and contingencies to termination have been satisfied and the Owner is entitled to terminate this Agreement);

(b) With written notice or demand and with appropriate legal process, enter into the Installment Site where any Solar Lenses may be located and take possession of and remove the same (in the event of entry and repossession, Operator hereby expressly waives all rights to possession and all claims for damages or loss by reason of such entry and repossession);

(c) Retain a replacement operator to perform the Work; and

(d) Proceed by appropriate action either at law or in equity or bankruptcy to enforce performance by Operator of its obligations under this Agreement or to recover damages for breach thereof.

8.4 Termination by the Operator. In the event of an Event of Default by Owner not cured within any applicable cure periods, the Operator may terminate this Agreement at any time by providing Owner written notice of termination specifying the effective date of termination (which date may not be earlier than the date that all conditions and contingencies to termination have been satisfied and the Operator is entitled to terminate this Agreement).

8.5 Transition to New Operator. In the event of any termination under Section 8.3, in the event that the Owner retains a replacement Operator to perform the Work, the Owner may request that the Operator continue to maintain a sufficient number of local and expatriate employees to assist in training a replacement operator and to perform such other transition work as the Owner may reasonably request, and the Operator shall comply with any such request for a period not to exceed three (3) months. In addition, the Operator shall execute any and all assignments and other documents necessary to allow for such replacement operator to continue to perform the Work and operate the Solar Lenses in a manner consistent with the operation

planned under this Agreement, including by way of example, but not limitation, an assignment of rights under any power purchase agreement; assignment of rights under any leases relating to the structures on which the Solar Lenses are installed, the real property on which such structures are located, the receivers collecting energy from the Solar Lenses and all other equipment relating thereto; and assignments of intellectual property rights necessary for operation of the Solar Lenses and any related equipment.

8.6 Surrender. Upon the termination of this Agreement with respect to any Solar Lens, Operator shall, at its own cost and expense, deinstall, package, load and return the Solar Lenses to Owner at the address specified by Owner.

#### ARTICLE 9 LIMITATIONS OF LIABILITY

NEITHER OF THE PARTIES SHALL HAVE LIABILITY FOR ANY INCIDENTAL, CONSEQUENTIAL, SPECIAL, INDIRECT OR EXEMPLARY DAMAGES TO THE OTHER ARISING OUT OF THIS AGREEMENT OR THE TRANSACTIONS, EVENTS OR OCCURRENCES RELATED THERETO, EXCEPT IN THE EVENT OF SUCH PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, AND EACH HEREBY WAIVES ANY AND ALL SUCH CLAIMS FOR INDIRECT, CONSEQUENTIAL, SPECIAL, INDIRECT OR EXEMPLARY DAMAGES AGAINST THE OTHER.

#### ARTICLE 10 CONSULTATION AND ARBITRATION

##### 10.1 Arbitration.

(a) If any claim, dispute or controversy arises between the Parties with respect to the Agreement (a "Dispute") that cannot be resolved by the Parties, then such Dispute shall be resolved by binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be the sole and exclusive forum for resolution of such Dispute, and the award rendered shall be final and binding. Judgment on the award rendered may be entered in any court having jurisdiction thereof.

(b) The arbitration shall be conducted in English and shall be held in Salt Lake City, Utah.

(c) Any award of the arbitrator(s) (i) shall be in writing, (ii) shall state the reasons upon which such award is based and (iii) may include an award of costs, including reasonable attorneys' fees and disbursements.

(d) The arbitrators shall have no authority to award consequential damages or punitive damages or any other damages not measured by the prevailing Party's actual direct

damages, and the arbitrators may not, in any event, make any ruling, finding or award that does not conform to the term and conditions of this Agreement.

(e) Any Party may make an application to the arbitrators seeking injunctive relief to maintain the status quo until such time as the arbitration award is rendered or the dispute, controversy or claim is otherwise resolved. Any Party may also apply to any court having jurisdiction and seek injunctive relief in order to maintain the status quo until such time as the arbitration award is rendered or the dispute, controversy or claim is otherwise resolved.

In the course of resolving Disputes, to the extent practicable, the Parties shall continue to perform the terms and conditions of this Agreement that are not in dispute.

## ARTICLE 11 REPRESENTATIONS AND WARRANTIES

11.1 By the Owner. In order to induce the Operator to enter into this Agreement the Owner makes the following representations and warranties as of the date hereof, which survive the execution and delivery hereof:

(a) it is a \_\_\_\_\_ duly organized, validly existing and in good standing under the laws of the State of \_\_\_\_\_ and has all requisite \_\_\_\_\_ power and authority to enter into and perform this Agreement;

(b) the individual executing this Agreement on behalf of Owner is an authorized representative of Owner having all requisite power and authority to enter into and perform this Agreement;

(c) the execution, delivery and performance of this Agreement (i) have been duly authorized by all necessary actions on the part of the Owner, and (ii) will not result in any violation of or conflict with or constitute a default under any provision of applicable law or of any judgment, decree or order of a court or governmental instrumentality applicable to the Owner or any material agreement or other instrument to which the Owner is a party or by which it is bound, including the Purchase Agreement; and

(d) this Agreement constitutes a valid and binding obligation of the Owner enforceable against the Owner in accordance with its terms.

11.2 By the Operator. In order to induce the Owner to enter into this Agreement, the Operator makes the following representations and warranties as of the date hereof, which survive the execution and delivery hereof:

(a) it is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Nevada and has all requisite limited liability company power and authority to enter into and perform this Agreement;



(b) the individual executing this Agreement on behalf of Operator is an authorized representative of Operator having all requisite power and authority to enter into and perform this Agreement;

(c) the execution, delivery and performance of this Agreement (i) have been duly authorized by all necessary actions on the part of the Operator and (ii) will not result in any violation of or conflict with or constitute a default under any provision of applicable law or of any judgment, decree or order of a court or governmental instrumentality applicable to the Operator or any material agreement or other instrument to which the Operator is a party or by which it is bound; and

(d) this Agreement constitutes a valid and binding obligation of the Operator, enforceable against the Operator in accordance with its terms.

**ARTICLE 12  
MISCELLANEOUS**

12.1 Governing Law. This Agreement is governed by and construed in accordance with the laws of the State of Utah, without regard to its conflicts of law principles.

12.2 Notices. All notices, requests, demands, and other communications required under this Agreement shall be in writing, in English, and shall be deemed to have been duly given if delivered (i) personally, (ii) by facsimile transmission with written confirmation of receipt, (iii) by overnight delivery with a reputable national overnight delivery service, or (iv) by mail or by certified mail, return receipt requested, and postage prepaid. If any notice is mailed, it shall be deemed given five business days after the date such notice is deposited in the United States mail. Any notice given shall be deemed given upon the actual date of such delivery. If notice is given to a party, it shall be given at the address for such party set forth below. It shall be the responsibility of the Parties to notify the other Party in writing of any name or address changes.

If to Owner:

\_\_\_\_\_  
\_\_\_\_\_

Attn: \_\_\_\_\_

If to Operator:

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LTB, LLC  
3838 Rymert Drive, Suite #10  
Las Vegas, NV 89121  
Attn: Neldon Johnson

12.3 Entire Agreement. This Agreement sets forth the entire agreement and understanding of the Parties related to the subject matter hereof.

12.4 Severability. The invalidity of any provision hereof shall not affect the validity, force or effect of the remaining provisions hereof.

12.5 Amendment. This Agreement may be amended, modified, superseded, rescinded, or canceled only by a written instrument executed by the Parties.

12.6 Waivers. The failure of any Party to this Agreement at any time or times to require performance of any provision under this Agreement shall in no manner affect the right at a later time to enforce the same performance. A waiver by any Party to this Agreement of any such condition or breach of any term, covenant, representation, or warranty contained in this Agreement, in any one or more instances, shall neither be construed as a further or continuing waiver of any such condition or breach nor a waiver of any other condition or breach of any other term, covenant, representation, or warranty contained in this Agreement.

12.7 Assignment/Subcontracting. Neither Party may assign or subcontract any of its rights or obligations under this Agreement without the prior written consent of the other Party.

12.8 Headings. Section headings of this Agreement have been inserted for convenience of reference only and shall in no way restrict or otherwise modify any of the terms or provisions of this Agreement.

12.9 Counterparts. This Agreement may be executed in one or more counterparts, each of which when executed shall be deemed to be an original, and such counterparts shall together constitute one and the same instrument. Each counterpart may be delivered by facsimile transmission or e-mail (as a .pdf, .tif or similar un-editable attachment), which transmission shall be deemed delivery of an originally executed counterpart hereof.

12.10 Binding Agreement. This Agreement shall be binding upon the successors and assigns of each of the parties.

*[Signature Page Follows]*

IN WITNESS WHEREOF, the Parties hereto have caused this Operation and Maintenance Agreement to be duly executed on the day and year first above written.

**OWNER**

\_\_\_\_\_

a \_\_\_\_\_

\_\_\_\_\_  
(Signature)

Title: \_\_\_\_\_

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

**OPERATOR**

LFB, LLC

a Nevada limited liability company

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

\_\_\_\_\_  
(Signature)

Title: \_\_\_\_\_

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

For Internal Use Only:

AEPA # \_\_\_\_\_

**Exhibit A**

**Solar Lenses Purchase Agreement**

[See Attached]

KM00191

KM00191

**Exhibit B**

**Operating and Safety Guidelines**

[See Attached]

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SECURED PROMISSORY NOTE

\$ \_\_\_\_\_ (U.S.)

Salt Lake City, Utah  
\_\_\_\_\_, 20\_\_

FOR VALUE RECEIVED, \_\_\_\_\_, a \_\_\_\_\_  
("Borrower") promises to pay, in lawful money of the United States of America, to the order of  
SOLCO I, LLC, a Utah limited liability company ("Lender"), at such place as Lender may  
designate in writing from time to time, the principal sum of \_\_\_\_\_  
DOLLARS (U.S.) (\$ \_\_\_\_\_), plus interest on the unpaid principal balance as  
described in Section 2 below.

1. Term and Repayment. The term of this Note shall commence on date hereof (the  
"Effective Date") and shall mature on the date that is thirty (30) years from the Effective Date  
(the "Maturity Date"). Repayment of this Note shall be made as follows:

a. Borrower shall make thirty (30) substantially equal annual payments  
consisting of principal and interest on each anniversary of the Effective Date (**unless it  
falls on a weekend or holiday in which case the payment shall be due on the  
next business day**) in an amount not less than \_\_\_\_\_  
Dollars (\$ \_\_\_\_\_) until the unpaid principal balance and all accrued interest thereon  
has been paid in full;

b. **As soon as commercially reasonable following the execution of  
this Note, the parties shall establish a system of electronic payment transfer  
so that payments from Borrower to Lender are made electronically;**

c. Any unpaid principal or accrued interest that has not been paid as of the  
Maturity Date shall be paid by Borrower to Lender on the Maturity Date.

2. Interest. This Note shall bear interest at a rate equal to \_\_\_\_\_ percent  
(\_\_\_\_%).

3. Security. This Note is secured by the Solar Lenses (as such term is defined in the  
Solar Lenses Purchase Agreement of even date herewith between Borrower and Lender (the  
"Purchase Agreement")).

4. Application of Payments. Unless otherwise agreed to in writing, or otherwise  
required by applicable law, payments will be applied first, to costs of collection incurred after an  
Event of Default, including reasonable attorney's fees; second, to payments made by Lender  
after an Event of Default to preserve any collateral securing this Note; third, to any accrued  
interest; if any, and fourth, to the principal. All payments due hereunder shall be made (i)  
without deduction of any present and future taxes, levies, imposts, deductions, charges or  
withholdings, all of which amounts shall be paid by the Borrower, and (ii) without any other set  
off.

5. Prepayment. This Note may be prepaid in whole or in part without penalty at any time as long as any accrued but unpaid interest is fully paid with the principal.

6. Late Payments. There shall be a late fee equal to ten percent (10%) imposed upon any payment that is not made within ten (10) days of its initial due date; provided, however, that after there have been three (3) late payments the late fee shall be imposed without such ten (10) day grace period.

7. Default.

a. Events of Default. The occurrence of any one or more of the following shall be an "Event of Default" under this Note:

(i) The failure to make any payment of principal, interest or other sums due under this Note or the Purchase Agreement or any other document or instrument executed in connection with this Note when due; or

(ii) The failure by Borrower to perform any of the monetary or nonmonetary provisions of the Purchase Agreement (subject to any cure period expressly set forth therein).

b. Remedies. Upon the occurrence of an Event of Default, and after any applicable notice period, at the option of the Lender, the entire principal amount of this Note together with all accrued interest thereon, if any, without demand or notice, shall immediately become due and payable. Upon the occurrence of an Event of Default (and so long as such Event of Default shall continue), the entire principal amount of this Note, together with all accrued interest thereon, if any, all other amounts due, and any judgment for the principal, interest, if any, and other amounts shall bear interest at the Default Rate (as defined below). No delay or omission on the part of the Lender in exercising any right under this Note shall operate as a waiver of such right.

c. Default Rate. If payments of interest, fees or principal under this Note shall remain overdue and unpaid after the expiration of any applicable payment period, Lender shall be entitled to damages for the detriment caused thereby, and interest shall thereafter accrue on the principal amount at the rate of rate of one and one-half percent (1.5%) per month, or the maximum rate permitted by applicable law, whichever is less (the "Default Rate") until such amounts are paid. On the occurrence of an Event of Default (inclusive of any cure periods with respect thereto), Lender shall be entitled to demand as damages interest at the Default Rate until the Event of Default is cured. Borrower recognizes that its default in making payments when due as provided herein, or otherwise causing an Event of Default to occur hereunder, will require Lender to incur additional expense in servicing the Loan and loss to Lender of the use of the money due and that damages caused thereby would be extremely difficult and impractical to ascertain. Borrower agrees that the accrual of interest at the Default Rate is a reasonable estimate of the damage to Lender in the event of late payment and that the accrual of interest at the Default Rate following any other default is a reasonable estimate of the damage to Lender in the event of such other default. Nothing in this paragraph shall be construed as an obligation on

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the part of Lender to accept, at any time, less than the full amount then due hereunder, or as a waiver or limitation of Lender's right to compel prompt performance.

9. Collection Expenses. After an Event of Default, Borrower shall reimburse Lender within ten (10) days of written demand for all reasonable legal fees and other costs and expenses incurred in collecting or enforcing this Note and protecting or realizing upon any collateral. Without limitation, such shall include fees, costs and expenses incurred with or without suit and in any appeal, proceeding, bankruptcy action, state receivership, or in any post-judgment collection proceedings.

10. Governing Law. This Note shall be construed, enforced and otherwise governed by the laws of the State of Utah.

11. Binding Effect. This Note shall bind the successors and assigns of Borrower and all endorsers hereto and shall inure to the benefit of Lender, and Lender's successors and assigns. This Note may not be modified except by written agreement signed by both Lender and Borrower.

12. Time. Time is of the essence with respect to each and every term and provision of this Note.

IN WITNESS WHEREOF, Borrower has executed this Promissory Note on the date first above written.

**BORROWER**

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



KIRTON | McCONKIE

MEMORANDUM

DATE: October 31, 2012

TO: SOLCO I, LLC  
Attn: Neldon Johnson

FROM: Kenneth W. Birrell

SUBJECT: Tax Issues Relating to Purchase of Solar Lenses

INTRODUCTION

This memorandum is in response to your request for our analysis of certain tax consequences for the buyers (the "Buyers") of solar lenses from SOLCO I, LLC (the "Seller") based on factual circumstances that are substantially similar in all material respects to the Facts (as such term is defined below). Please note that the analysis in this memorandum is based upon the existing provisions of the Internal Revenue Code of 1986, as amended (the "Code") and regulations thereunder (including final, temporary and proposed) and upon current Internal Revenue Service ("Service") published rulings and existing court decisions, any of which could be changed at any time. Any such changes may be retroactive and could significantly modify the analysis set forth herein. Similarly, any change in the Facts or the assumptions stated below, upon which our analysis is based, could modify our conclusions.

EXECUTIVE SUMMARY

The solar lenses that Buyers purchase from Seller (the "Solar Lenses") will qualify as "energy property" that is eligible for the energy tax credit under Code Section 48. For purposes of calculating the energy credit, the basis of each Solar Lens will be Three Thousand Five Hundred Dollars (\$3,500) and the energy percentage will be thirty percent (30%) so long as the energy credit is claimed prior to January 1, 2017 (and will be ten percent (10%) if claimed after that date). Buyers will be able to claim the energy credit in the year that the Solar Lenses are placed into service. The Solar Lenses will be eligible for depreciation under Code Section 168(a) as 5-year property.

FACTUAL BACKGROUND

The Solar Lenses will be purchased by Buyers that are (i) corporations or limited liability companies organized in the United States, (ii) neither tax-exempt nor governmental entities and (iii) taxed as subchapter C corporations for federal income tax purposes. The Solar Lenses will

ATTORNEYS AT LAW  
www.kmclaw.com

Kirton McConkie Building, 50 East South Temple, Salt Lake City, UT 84111  
1800 Eagle Gate Tower, 60 East South Temple, Salt Lake City, UT 84111  
Pinchurst Business Park, 418 West 800 North, Suite 204, Orem, UT 84057

801.320.3690 /f/ 801.321.4893 /f/v  
801.378.3600 /f/ 801.321.4893 /f/v  
801.426.7100 /f/ 801.426.2101 /f/v

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be purchased pursuant to a Solar Lenses Purchase Agreement that is substantially similar to the agreement set forth in Exhibit A hereto (the "Purchase Agreement"). The Solar Lenses were manufactured by International Automated Systems or one of its affiliates and consist of thin-film solar lenses that focus the sun's energy, which energy is collected and transmitted to produce heated steam for power generation and other uses. The Treasury Department has made a grant under Section 1603 of the American Recovery & Reinvestment Act of 2009 with respect to the same model of solar lenses as the Solar Lenses and related equipment, which grant required a finding by the Treasury Department that such solar lenses and related equipment constituted property described in Code Section 48(a)(3)(A)(i) or (ii).

According to the Purchase Agreement, the purchase price ("Purchase Price") for each Solar Lens shall be Three Thousand Five Hundred Dollars (\$3,500). Buyer shall pay thirty percent (30%) of the Purchase Price upon execution of the Purchase Agreement and provide Seller with a Promissory Note that is substantially similar to the promissory note set forth in Exhibit B hereto (the "Promissory Note") for the remaining balance of the Purchase Price. The Promissory Note provides for payment of the remaining balance of the Purchase Price in substantially equal annual installment payments over a period of thirty (30) years (the "Installment Payments") with interest at a rate equal to the long-term applicable federal rate determined in accordance with Code Section 1274 as such rate is in effect for the month in which the Solar Lenses are acquired.

All of the Solar Lenses will be new at the time of their purchase by the Buyer. No person will have put the Solar Lenses to any type of use prior to the Buyer's purchase of the Solar Lenses. No person will have claimed any credits under Code Section 45 or 48 or received a Section 1603 grant with respect to the Solar Lenses prior to the Buyer's purchase of the Solar Lenses. All of the Solar Lenses will be installed at projects located within the United States.

The Buyer will enter into an Operation and Maintenance Agreement that is substantially similar to the agreement attached hereto as Exhibit C (the "O&M Agreement") with LTB, LLC, a Nevada limited liability company (the "Operator") to oversee the operation and maintenance of the Solar Lenses. The Operator is a for-profit commercial enterprise that is not related to either Buyer or Seller through common ownership. The Operator will also lease from Seller or an affiliate of Seller the towers in which the Solar Lenses will be installed, receivers to collect the energy from the Solar Lenses and certain other equipment relating thereto. The Operator shall be responsible for performing the services described in the O&M Agreement, including the collection of all income generated from the operation of the Solar Lenses, including any revenue generated from the use or sale of thermal energy or electric power generated using the Solar Lenses (the "Gross Revenue"). As compensation for its services, the Operator shall be entitled to retain an amount equal to the Gross Revenue minus an annual rental payment as set forth in the O&M Agreement (the "Rental Payment"). The Rental Payment shall be a fixed amount and shall not be a function of the net profits generated by the Solar Lenses.

The Purchase Agreement, Promissory Note and O&M Agreement are referred to herein as the "Transaction Documents." The factual matters set forth above along with the Transaction Documents shall be referred to collectively herein as the "Facts."

#### EXPLANATION OF THE LAW AND APPLICATION OF THE FACTS TO THE LAW

##### I. Sale vs. Lease

The Buyer's tax treatment with respect to the Solar Lenses depends in part upon whether the overall transaction constitutes a sales transaction in which the Buyer becomes and remains the owner of the Solar Lenses for tax purposes and therefore is the party entitled to claim the energy tax credits and depreciation deductions relating to the Solar Lenses. Although there is no bright-line test for determining whether a transaction constitutes a sale or a lease for tax purposes, the Service and the courts have developed various factors that they use to guide this determination. For example, in Rev. Rul. 55-540 the Service stated that the determination of whether a transaction constitutes a sale or a lease "depends upon the intent of the parties as evidenced by the provisions of the agreement, read in light of the facts and circumstances existing at the time the agreement was executed." The Service noted that although "no single test, or any special combination of tests, is absolutely determinative," it provided a list of several conditions that, if present, "in the absence of compelling persuasive factors of contrary implication [evidence] an intent warranting treatment of a transaction for tax purposes as a purchase and sale rather than as a lease or rental agreement."

One of the conditions indicating a sale is that "[p]ortions of the periodic payments are made specifically applicable to an equity to be acquired by the lessee." Rev. Rul. 55-540, citing *Truman Bowen v. Commissioner*, 12 T.C. 446, acquiescence, C.B. 1951-2. The Purchase Agreement specifies that the Promissory Note represents payment of the Purchase Price that remains due after receipt of the Down Payment. Conversely, no part of the Rental Payment due under the O&M Agreement is specifically applicable to the Operator acquiring an equity interest in the Solar Lenses since the parties do not anticipate the Operator ever acquiring such an equity interest.

Another and related condition indicating a sale is that "[s]ome portion of the periodic payments is specifically designated as interest or is otherwise readily recognizable as the equivalent of interest." Rev. Rul. 55-540, citing *Judson Mills v. Commissioner*, 11 T.C. 25, acquiescence, C.B. 1949-1. As noted above, the Purchase Agreement and Promissory Note specifically designate a portion of the Installment Payments as interest, but there is no corresponding specific designation of interest within the O&M Agreement. Moreover, no portion of the Rental Payments appear to be readily recognizable as the equivalent of interest.

A third condition indicating a sale is that "[t]he lessee will acquire title upon the payment of a stated amount of 'rentals' which under the contract he is required to make." Rev. Rul. 55-540, citing *Hervey v. Rhode Island Locomotive Works*, 93 U.S. 664 (1876); *Taft v. Commissioner*, 27 B.T.A. 808; *Truman Bowen v. Commissioner*, 12 T.C. 446, acquiescence, C.B. 1951-2. Under the terms of the Purchase Agreement and the O&M Agreement, the Buyer will receive title to the Solar Lenses from Seller and not pass that title to the Operator under any conditions. Therefore, the Buyer will hold title to the Solar Lenses throughout the term of both agreements.

In general, courts look to whether the benefits and burdens of ownership have passed to the purported buyer/lessor when determining how to classify sale-leaseback transactions for tax purposes. One important factor has been whether the buyer-lessor truly had an economic investment that would be meaningful if it abandoned the property. For example, in *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978), a key factor in the Supreme Court's decision to uphold a sale-leaseback transaction was the substantial economic investment made by the buyer/lessor. The buyer/lessor purchased a building for \$7.64 million with a \$500,000 down payment

(representing 6.5% of the purchase price) and took out a mortgage for the remaining purchase price. The buyer/lessor then leased the building back to the seller/lessee with the annual rent exactly equal to the buyer/lessor's annual mortgage payments. The seller/lessee had options to purchase the building at various times at a price equal to the sum of the unpaid mortgage plus the buyer/lessor's \$500,000 plus 6% interest. The Supreme Court's decision to uphold the sale-leaseback transaction was based in large measure the significance of the buyer/lessor's economic investment, with the court finding that the buyer/lessor's financial position was substantially affected due to the \$500,000 investment and long-term debt and the buyer/lessor was exposed to real and substantial risk. Conversely, sale-leaseback transactions that have not been upheld by the courts typically involve minor down payments, nonrecourse financing and inflated sales prices. See e.g., *Franklin Estate v. Commissioner*, 64 T.C. 752 (1975), *aff'd*, 544 F.2d 1045 (9th Cir. 1976). Here, the Buyer will make a substantial economic investment in the Solar Lenses. For example, the Buyer's down payment is thirty percent (30%) of the Purchase Price, nearly five times as large as the down payment in *Frank Lyon*, and the financing on the remainder of the Purchase Price is fully recourse.

Another important factor for the courts is the existence of repurchase options at favorable prices, which indicate that the seller/lessee has not truly relinquished its interest in the property. See e.g., *Sowby v. Commissioner*, 47 T.C.M. 897 (1984). Here, neither the Seller nor the Operator will have an option to purchase the Solar Lenses at any price, let alone a favorable price.

Another important factor for the courts has been the relative cash flows, such as situations where the rental income stream is tailored to match the debt payments without any significant positive cash flow for the buyer/lessor. See e.g., *Larsen v. Commissioner*, 89 T.C. 1229 (1987). Here, it is anticipated that the annual revenue stream (from the Rental Payments) will be substantially greater than the annual debt payments (the Installment Payments), which means that the Buyer should have substantial positive cash flows.

Finally, the Purchase Agreement provides that all parties shall, for tax purposes, report the transactions provided for in the Purchase Agreement and O&M Agreement as a sale of the Solar Lenses to the Buyer followed by a thirty (30) year operating lease of the Solar Lenses to the Operator. Thus, the parties clearly intend for the transactions to constitute a sale of the lenses to Buyer with the Buyer bearing the economic benefits and burdens of ownership of the Solar Lenses. Given the substantial economic investment being made by the Buyer, the specific designation of principal and interest payments by the Buyer to Seller and no such designation of with respect to payments by the Operator to the Buyer, the fact that the Buyer will have title to the Solar Lenses, the fact that neither the Seller nor the Operator will have an option to acquire the Solar Lenses from the Buyer and the fact that the Buyer will recognize substantial positive cash flow from the Solar Lenses, we believe that the transactions should be treated as a sale of the Solar Lenses to Buyer for tax purposes. Accordingly, the Buyer should be the person entitled to claim the energy credit and depreciation deductions relating to the Solar Lenses.

## II. Energy Tax Credit

Code Section 38 provides as a credit against a taxpayer's federal income taxes an amount equal to various credits, including "the investment credit determined under section 46." Code Section 46 defines the investment credit as the sum of various credits, including "the energy credit." Code Section 48(a) provides that, subject to certain exceptions not applicable to the

Solar Lenses, that "the energy credit for any taxable year is the energy percentage of the basis of each energy property placed in service during such taxable year."

#### A. Energy Property

Code Sections 48(a)(3) and 50(b) contain six (6) requirements that property must satisfy in order to qualify as "energy property." As summarized below, the Solar Lenses satisfy each of these requirements.

##### 1. Solar Energy Property

First, the property must consist of property described in Code Section 48(a)(3)(A). Among the types of property described therein is "equipment which uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat, excepting property used to generate energy for the purposes of heating a swimming pool" Code Section 48(a)(3)(A)(i). Such solar energy property includes equipment and materials, as well as parts related to the function of that equipment, that use solar energy directly to perform these functions, generally through the use of equipment such as collectors (to absorb sunlight and create hot liquids or air), storage tanks (to store hot liquids), rockbeds (to store hot air), thermostats (to activate pumps or fans that circulate the hot liquids or air) and heat exchangers (to utilize hot liquids or air to create hot air or water). See Treas. Reg. Section 1.48-9(d)(1). Solar energy property includes equipment that uses solar energy to generate electricity, and includes storage devices, power conditioning equipment, transfer equipment, and parts related to the functions of those items, which are part of the process involving the transformation of sunlight into electricity through the use of such devices as solar cells or other collectors so long as such equipment is used up to (but not including) the state that transmits or uses electricity. See Treas. Reg. Section 1.48-9(d)(3). Equipment that uses solar energy beyond the distribution stage is eligible only if specially adapted to use solar energy. See Treas. Reg. Section 1.48-9(d)(5).

It is not necessary for solar energy property to comprise a completely functional solar system in order to qualify for the energy credit. In *Cooper v. Commissioner*, 88 T.C. 84 (1987), the Tax Court held that property within the meaning of Code Section 48(a)(3)(A)(i) is any equipment that uses solar energy to generate electricity, to heat, cool, or provide hot water for use in a structure, or to provide solar process heat, and includes parts solely related to the functioning of such equipment; the court found that an incomplete system made up of qualifying parts, such as collectors, storage tanks, thermostats, heat exchangers, etc. can qualify for the credit.

The Solar Lenses will be capable of using solar energy to generate electricity and/or solar process heat once they have been properly installed in a tower and otherwise incorporated into a larger solar energy system. As explained by the Tax Court in *Cooper v. Commissioner*, 88 T.C. 84 (1987), the fact that the Solar Lenses must be installed and incorporated into a larger solar energy system does not prevent them from qualifying as energy property. Finally, it is our understanding that the Solar Lenses will not be used for the purposes of heating a swimming pool except to the extent that electricity generated by the Solar Lenses is sold to an end-user who uses such electricity to heat a swimming pool. Therefore, the Solar Lenses are described in Code Section 48(a)(3)(A)(i) and thereby satisfy this first requirement to being classified as energy property.

## 2. Acquisition and Original Use

Second, the Property must either be (i) constructed, reconstructed or erected by the taxpayer or (ii) acquired by the taxpayer if the original use of such property commences with the taxpayer. Code Section 48(a)(3)(B). Treas. Reg. Section 1.48-2(b)(6) provides that property is deemed to be acquired when reduced to physical possession or control. Treas. Reg. Section 1.48-2(b)(7) provides that original use means the first use to which the property is put, whether or not such use corresponds to the use of such property by the taxpayer.

The Buyer will not construct, reconstruct or erect any of the Solar Lenses itself. However, the Buyer will acquire control of the Solar Lenses pursuant to the terms of the Purchase Agreement. Therefore, the Buyer will have acquired all of the Solar Lenses within the meaning of Code Section 48(a)(3)(B) and Treas. Reg. 1.49-2(b)(6). As noted in the Facts, none of the Solar Lenses will have been put to any use by any other person prior to their acquisition by the Buyer. Therefore, the original use of the Solar Lenses will commence with the Buyer within the meaning of Code Section 48(a)(3)(B) and Treas. Reg. 1.49-2(b)(6). Accordingly, the Solar Lenses satisfy this second requirement to being classified as energy property.

## 3. Qualify for Depreciation

Third, the property must qualify for depreciation (or amortization in lieu of depreciation). Code Section 48(a)(3)(C). Treas. Reg. Section 1.48-1(b)(1) provides that property qualifies for depreciation within the meaning of Code Section 48(a)(3) "if the property is of a character subject to the allowance for depreciation under section 167 and the basis (or cost) of the property is recovered through a method of depreciation, including, for example, . . . methods of depreciation which measure the life of the property in terms of years."

As summarized in greater detail in Section III.A below, the Solar Lenses are of a character subject to allowance for depreciation under Code Section 167 and the Buyer's basis in the Solar Lenses will be recovered through a method of depreciation. Therefore, the Solar Lenses satisfy this third requirement to being classified as energy property.

## 4. Satisfy Performance Standards

Fourth, the property must satisfy the performance standards, if any, which the Service has prescribed by regulation and are in effect at the time of the acquisition of the property. Code Section 48(a)(3)(D). However, taxpayers need not wait for issuance of performance standards before proceeding with the acquisition of the property or the claiming of the energy credit. See Information Release 2014-1979-28 I.R.B. 36.

To date the Service has not published any performance standards that would apply to the Solar Lenses. Because a Buyer need to wait until performance standards are issued, until such time as the Service publishes performance standards, the Solar Lenses will satisfy this fourth requirement to being classified as energy property.

## 5. No Claiming of Code Section 45 Credit

Fifth, taxpayer cannot have claimed a renewable electricity production credit under Code Section 45 for the taxable year or any prior taxable year with respect to the property. Code Section 48(a)(3). Code Section 45 provides a credit to certain facilities that use renewable resources, such as solar energy, to produce electricity. However, Code Section 45(d)(4) provides that such a facility "shall not include any property described in section 48(a)(3) the basis of which is taken into account by the taxpayer for purposes of determining the energy credit under section 48." In essence, the taxpayer has to choose between claiming a tax credit under Code Section 48 (which is based upon the basis of the property) or Code Section 45 (which is based upon the amount of electricity sold).

No person has claimed a credit under Code Section 45 with respect to the Solar Lenses. So long as the Buyer does not attempt to claim such a credit in the future, the Solar Lenses will satisfy this fifth requirement to being classified as energy property.

#### 6. No Disqualifying Use

Property does not qualify as energy property if it is used (i) predominantly outside of the United States, (ii) predominantly to furnish lodging or in connection with the furnishing of lodging, (iii) by certain tax-exempt organizations, (iv) a governmental entity or (v) a foreign person or entity. Code Section 50(b).

The Solar Lenses will all be installed in projects located within the United States; therefore the Solar Lenses will not be predominantly outside of the United States. Given the nature of the Solar Lenses, they are not capable of furnishing lodging within the meaning of Code Section 50(b), therefore their use will not be predominantly to furnish lodging or in connection with the furnishing of lodging. Neither the Buyer nor the Operator is a tax-exempt organization, governmental entity or foreign person. Moreover, under the terms of the O&M Agreement the Operator is not permitted to sublet any of the Solar Lenses or assign any of its rights or obligations under such agreement without the prior written consent of the Buyer, so the Operator cannot cause the Solar Lenses to be used by a tax-exempt organization, governmental entity or foreign person or entity without the Buyer's consent. Therefore, so long as the Solar Lenses are subject to the O&M Agreement, they will not be used by a tax-exempt organization, governmental entity or foreign person or entity without the Buyer's prior consent. Accordingly, the Solar Lenses satisfy this sixth and final requirement to being classified as energy property.

#### B. Energy Percentage

Code Section 48(a)(2)(A)(i)(II) provides that the energy percentage is thirty percent (30%) for various types of properties, including energy properties described in Code Section 48(a)(3)(A)(i) for periods ending before January 1, 2017 and ten percent (10%) for periods beginning on January 1, 2017. As summarized in Section II.A.1 above, the Solar Lenses are described in Code Section 48(a)(3)(A)(i). Therefore, so long as the energy credit is claimed before January 1, 2017, the energy percentage for the Solar Lenses will be thirty percent (30%). If the energy credit is claimed on or after January 1, 2017, then the energy percentage will be ten percent (10%).

#### C. Basis

##### 1. In General

The basis of the Solar Lenses for purposes of the energy credit will initially be determined in accordance with Code Section 1012(a), which provides that basis of the Solar Lenses is their cost. Because the Purchase Price for each Solar Lens will be Three Thousand Five Hundred Dollars (\$3,500), such amount will be the cost basis of each Solar Lens for purposes of Code Section 1012(a).

## 2. At-Risk Limitation

For purposes of calculating the amount of the energy tax credit under Code Section 48(a), the cost basis amount determined in accordance with Code Section 1012 must be reduced to the extent required by the at-risk rules of Code Section 49. Code Section 49(a)(1)(A) provides that in computing the investment credit amount, the basis of property placed in service by a taxpayer described in Code Section 465(a)(1) and used in an activity with respect to which any loss is subject to limitation under Code Section 465 must be reduced by the amount of nonqualified nonrecourse financing relating to such property as of the close of the tax year in which the property is placed in service.

Taxpayers described in Code Section 465(a)(1) include individuals and subchapter C corporations with respect to which the stock ownership requirement of Code Section 542(a)(2) are met. The stock ownership requirement of Code Section 542(a)(2) is met if more than fifty percent (50%) of the corporation's stock is owned, directly or indirectly, by not more than five (5) individuals. Code Section 544 includes various attribution rules for determining stock ownership for purposes of Code Section 542(a)(2) which, among other things, deem an individual to hold all of the stock held by various members of the individual's family (including brothers, sisters, spouse, ancestors and lineal descendants) and various corporations, partnerships, estates and trusts. In terms of the type of activity requirement, if a corporation satisfies the ownership requirements of Code Section 542(a)(2), then essentially all of its activities are activities with respect to which losses are subject to limitation under Code Section 465. Thus, whether a Buyer will be described in Code Section 465(a)(1) will depend upon the Buyer's ownership structure. If a Buyer's stock is widely held, then it will not be subject to the at-risk limitations of Code Section 49; if a Buyer's stock is closely held (as defined in Code Section 542(a)(2)), then the Buyer will be subject to Code Section 49.

However, even if a Buyer is described in Code Section 542(a)(2) and therefore subject to Code Section 49, the amount of its basis in the Solar Lenses will not be reduced. Code Section 49(a)(1)(F) provides that the at-risk rules of Code Section 49 do not apply to qualified energy property as such term was defined for purposes of Code Section 46(c)(8) as such was in effect prior to the enactment of the Revenue Reconciliation Act of 1990 ("RRA-1990") on November 5, 1990. Qualified energy property is any property that satisfies each of the four (4) conditions summarized in the following sections.<sup>1</sup>

### a. At-Risk Limitations Would Otherwise Apply

<sup>1</sup> Note: The rules set forth in pre-1990 RRA Code Section 46(c)(8)(F) included a fifth condition that precluded exclusion from applying to all energy property. Pre-1990 RRA Code Section 46(c)(8)(F)(ii)(I). However, the repeal of pre-1990 RRA Code Section 46(c)(8)(F) was accompanied by a narrowing of eligible energy property, with the result that property that qualifies for the energy credit necessarily satisfies the fifth condition in all events. Pre-1990 RRA Code Section 46(c)(8)(F)(ii).



First, the property must be energy property to which the at-risk limitation on the investment credit would otherwise apply. Pre-1990 RRA Code Section 46(c)(8)(F). As described above, the at-risk limitation rules generally apply to property that is placed in service by a taxpayer that is described in Code Section 465(a)(1) and is used in connection with an activity with respect to which losses are subject to limitation under Code Section 465. Whether the Solar Lenses are qualified energy property is only an issue if they would otherwise be subject to the at-risk limitation, so the Solar Lenses will satisfy this first requirement for being qualified energy property.

**b. Energy Percentage Greater than Zero**

Second, the energy percentage for the property must be more than zero at the time it is placed in service. Pre-1990 RRA Code Section 46(c)(8)(F)(ii). As noted in Section II.B. above, the energy percentage for the Solar Lenses will be either thirty percent (30%) or ten percent (10%). Therefore, the Solar Lenses satisfy this second requirement for being qualified energy property.

**c. No More Than 75% Qualified Nonrecourse Financing**

Third, as of the close of the tax year in which the property is placed in service, no more than seventy-five percent (75%) of the basis of the property may be attributable to nonqualified nonrecourse financing. Pre-1990 RRA Code Section 46(c)(8)(F)(ii). To be nonqualified nonrecourse financing, the financing must, among other things, be nonrecourse financing. Code Section 49(a)(1)(D)(i). Financing is "nonrecourse financing" if (i) the borrower/taxpayer is protected against loss through guarantees, stop-loss agreements or other similar arrangements or (ii) any amount borrowed from a person who has an interest (other than as a creditor) in the activity in which the property is used or from a person related to such a person. Code Section 49(a)(1)(D)(iii). A person has an interest other than as a creditor only if the person has either a capital interest in the activity or an interest in the net profits of the activity. Treas. Reg. Section 1.465-8(b)(1). For this purpose, a capital interest means an interest in the assets of the activity that is distributable to the owner of the capital interest upon liquidation of the activity. Treas. Reg. Section 1.465-8(b)(2).

The Buyer is not protected against loss through guarantees, stop-loss agreements or other similar arrangements – the Buyer is the only person that is liable with respect to the Installment Payments. Thus, the Buyer is not protected against loss through guarantees, stop-loss agreements or other similar arrangements within the meaning of such terms for purposes of Treas. Reg. Section 1.465-8(b)(2).

Likewise, Seller, the person providing the financing for the Solar Lenses, will not have an interest other than as a creditor in the activity in which the Solar Lenses will be used. Seller will not have a capital interest in such activity since it will not be entitled to receive any portion of the Solar Lenses in the event the Buyer decides to liquidate the activity. For example, if the Buyer decides to sell the Solar Lenses and liquidate, the Seller would not be entitled to a portion of the sale or liquidation proceeds except that Seller would be entitled to payment of the remaining balance of the Purchase Price, which right is consistent with the interests of a creditor. Similarly, Seller will not have an interest in the net profits of the activity since the amounts that it receives, both from Buyer in the form of Installment Payments and from Operator in the form of rental payments for the solar towers, receivers and other equipment, is not a function of the

net profits, as opposed to the gross receipts, from the activity. Therefore, the Installment Payments do not constitute either nonrecourse financing or nonqualified nonrecourse financing and the Solar Lenses satisfy this third requirement for being qualified energy property.

#### d. Level Payment Loan

Fourth, any nonqualified nonrecourse financing in connection with the property must consist of a loan in which each installment is substantially equal, a portion of each installment must be attributable to the repayment of principal, and that portion must be increased commensurately with decreases in the portion of the payment attributable to interest. Pre-1990 RRA Code Section 46(c)(8)(F)(ii)(II). Because the Installment Payments do not constitute nonqualified nonrecourse financing, there is no nonqualified nonrecourse financing with respect to the Solar Lenses. Therefore, the Solar Lenses satisfy this fourth requirement for being qualified energy property. Accordingly, Code Section 49 does not require any reduction in the basis of the Solar Lenses as determined in accordance with Code Section 1012 irrespective of whether the Buyer is described in Code Section 465(a)(1).

#### D. Placed in Service

Property is placed in service when it is "placed in a condition or state of readiness and availability for a specifically assigned function." Treas. Reg. Section 1.46-3(d)(1)(ii). However, the Tax Court has held that for property purchased for lease to others to be placed in service, "it is not necessary that the property actually be used during the taxable year in the taxpayer's profit-motivated venture. It is sufficient that the property be available for use." *Waddell v. Commissioner*, 86 T.C. 848 (1986), citing *Seas Oil Co. v. Commissioner*, 359 F.3d 191, 198 (2d Cir. 1966) and *Grow v. Commissioner*, 80 T.C. 314, 326-327 (1983). An important factor in the court's decision in *Waddell* was the fact that the taxpayers executed distribution agreements simultaneously with the purchase, thereby showing that the equipment was actually available for lease at the time of purchase even though it was not actually leased until more than a year later.

The Buyer will enter into the O&M Agreement, which effectively leases the Solar Lenses to the Operator, simultaneously with the execution of the Purchase Agreement. Thus, the Solar Lenses will be available for use in the Buyer's leasing operations as soon as they are manufactured and Buyer acquires them. Therefore, given the holdings in *Waddell* and the cases cited therein, the Solar Lenses will be considered to have been placed in service as soon as they are acquired by the Buyer even though they will not be installed and actually used by the Operator to generate electricity or solar process heat until some later date.

### III. Depreciation

#### A. In General

Code Section 167(a) permits taxpayers to claim a depreciation deduction with respect to certain types of property used in a trade or business or held for the production of income. Code Section 168(a) provides that the depreciation deduction authorized by Code Section 167(a) for any tangible personal property is determined by using (i) the applicable depreciation method, (ii) the applicable recovery period and (iii) the applicable convention.

Code Section 168(b)(1) provides that the applicable depreciation method for property generally is the double declining balance method. There are exceptions to this general rule for various types of properties listed in Code Section 168(b)(2) and (3), but the Solar Lenses would not fall into any of the listed property types. Therefore, unless the Buyer elects otherwise, the applicable depreciation method for the Solar Lenses will be the double declining balance method.

Code Section 168(c) provides that the applicable recovery period for a property is determined by the recovery class of the property. Code Section 168(e)(B)(vi) provides that the 5-year recovery class includes property that is described in Code Section 48(a)(3)(A). Code Section 168(c) provides that the applicable recovery period for 5-year property is five (5) years. Therefore, the applicable recovery period for the Solar Lenses will be five (5).

Code Section 168(d) provides that the applicable convention for tangible personal property such as the Solar Lenses is generally the half-year convention. However, the applicable convention becomes the mid-quarter convention if the aggregate bases of depreciable property placed in service during the final three (3) months of the taxable year exceed forty percent (40%) of the aggregate bases of all depreciable property placed in service during such taxable year. Therefore, the applicable convention for the Solar Lenses will be either the half-year or the mid-quarter convention.

Code Section 167(c) provides that the basis for depreciation purposes is the property's adjusted basis determined in accordance with Code Section 1011 for purposes of determining the gain on the sale or other disposition of the property. Code Section 1011 provides that such basis is the basis as determined under Code Section 1012 and adjusted as provided in Section 1016 (and certain other provisions not applicable to the Solar Lenses). As noted above, Code Section 1012 provides that the basis of property is the cost of such property. Code Section 1016 provides that the cost basis must be adjusted by certain amounts, including the adjustment required by Code Section 50(c) for investment credit property. Code Section 50(c) provides that if an investment credit (including the energy credit) is claimed with respect to a property, that the basis of such property shall be reduced by an amount equal to fifty percent (50%) of the credit.

As noted above, the Buyer's cost basis in each Solar Lens will be the Purchase Price of Three Thousand Five Hundred Dollars (\$3,500). Assuming the Buyer claims the energy tax credit prior to January 1, 2017, such that the energy credit would be equal to thirty (30%) of such basis amount, the reduction to basis required by Code Section 50(c) would be an amount equal to fifteen percent (15%). Therefore, the basis of each Solar Lens would be reduced to Two Thousand Nine Hundred Seventy-Five Dollars (\$2,975) for purposes of calculating its depreciation deductions under Code Section 168(a).

#### IV. Limitations upon Use of Credits and Depreciation Deductions

##### A. At-Risk Limitations

Code Section 465(a) provides that the losses (in this case, depreciation deductions in excess of the Rental Payments) of certain taxpayers from certain activities are only allowed to the extent of the aggregate amount with respect to which the taxpayer is at risk with respect to such activity. The taxpayers subject to Code Section 465(a) include a subchapter C corporation that meets the ownership requirements of Code Section 542(a)(2), which are summarized above.

For purposes of Section 465(a), a taxpayer is considered to be at risk for an activity in amount equal to the sum of the amount of money or property contributed to the activity and certain amounts borrowed with respect to the activity. Code Section 465(b)(1). Taxpayers are considered to be at risk for borrowed amounts only if the taxpayer is personally liable for the repayment of such amounts or has pledged property (other than property used in such activity) as security for such borrowed amounts; provided that a taxpayer will not be considered to be at risk with respect to borrowed amounts to the extent such amounts are borrowed from a person who has an interest in the activity (other than as a creditor) or from a person who is related to such a person. Code Section 465(b)(2) and (b).

Whether an obligation constitutes debt for tax purposes ultimately depends upon whether there was "a genuine intention to create a debt, with a reasonable expectation of repayment, and did that intention comport with the economic reality of creating a debtor-creditor relationship." *Jensen v. Commissioner*, 208 F.2d 226 (10th Cir. 2000) (citing *Dixie Dairies Corp. v. Commissioner*, 74 T.C. 476, 494 (1980)). Courts consider a variety of factors in making this determination, including (i) whether the promise to repay was evidenced by a written agreement, (ii) interest was charged, (iii) a fixed maturity date and/or a fixed schedule for repayments was set forth in the instrument or by agreement, (iv) security or other collateral was given to ensure repayment, (v) repayments were made, (vi) the borrower was not insolvent at the time of the advance and (vii) the parties otherwise acted consistently with such transfer being a loan. See e.g., *Fisher v. United States*, 54 T.C. 905 (1970) and *Miller v. Commissioner*, T.C. Memo 1982-629. Of course, not every factor is relevant in every situation, and the weight assigned to each factor varies from situation to situation. As noted by the Supreme Court, "[t]here is no one characteristic . . . which can be said to be decisive in the determination of whether the obligations are . . . debts" for tax purposes." *John Kelley Co. v. Commissioner*, 326 U.S. 521, 530 (1946).

It is our understanding that the parties genuinely intend to create a debt in the form of the Promissory Note and Buyer's obligation to make the Installment Payments and that the parties intend for the Installment Payments to be made. Similarly, the economic relationship between the Buyer and Seller appears to comport with the economic reality of creating a debtor-creditor relationship. For example, the Buyer and Seller have evidenced their intent for the Buyer to make the Installment Payments in both the Purchase Agreement and the Promissory Note; they have agreed that the Installment Payments will bear interest at the long-term applicable federal rate; they have agreed upon a fixed schedule for repayments; the Buyer's obligation to make the Installment Payments is secured by the Solar Lenses, which the Seller may repossess in the event the Buyer fails to make the Installment Payments when due; the Buyer will not be insolvent when it enters into the Purchase Agreement and is expected to have sufficient cash flow to make the Installment Payments; and the parties have acted consistently with treating the Installment Payments as a loan. Therefore, the Installment Payments appear to be a bona fide debt for tax purposes.

As discussed in Section II.C.2.c above, the Buyer is personally liable for the Installment Payments and such amounts are not borrowed from a person who has an interest in the activity (other than as a creditor) in which the Solar Lenses will be used or from a person who is related to such a person. Therefore, the Buyer's amount at risk with respect to the Solar Lenses for purposes of Code Section 465 shall be an amount equal to the aggregate Purchase Price for the Solar Lenses.

**B. Passive Activity Limitations**

Code Section 469(a) provides that certain losses (in this case, depreciation deductions in excess of the Rental Payments) and credits associated with passive activities of certain taxpayers are only allowed to the extent of the taxpayer's income from passive activities. The taxpayers subject to Code Section 469 include closely-held subchapter C corporations. Code Section 469(a)(2). However, Code Section 469(e)(2) provides that a closely held subchapter C corporation that is not a personal service corporation can offset active income with passive activity losses and credits. Code Section 269A(b)(1) defines a personal service corporation as a corporation the principal activity of which is the performance of personal services and such services are substantially performed by employee-owners. Code Section 269A(b)(3) provides that all related persons, within the meaning of Code Section 144(a)(3), are treated as a single entity. Code Section 144(a)(3) defines a related person as anyone described in Code Sections 267, 707(b) or 1563(a) (except that 80% is substituted for 50% everywhere it appears in Code Section 1563(a)).

So long as a Buyer's principal activity is something other than the performance of personal services, the Buyer will be able to use the credits and losses attributable to the Solar Leases to offset active income from other sources.

**CIRCULAR 230 DISCLOSURE**

The analysis set forth in this memorandum was not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of avoiding United States federal tax penalties that may be imposed on the taxpayer. The analysis was written to support the promotion or marketing of the transactions or matters addressed in this memorandum. Each taxpayer should seek advice based upon the taxpayer's particular circumstances from an independent tax advisor. The foregoing language is intended to satisfy the requirements under the regulations in Section 10.35 of Circular 230.

