

## PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** by and between \_\_\_\_\_, a Texas \_\_\_\_\_ (hereinafter referred to as “Developer”), and the **CANTON ECONOMIC DEVELOPMENT CORPORATION**, a Texas non-profit corporation (hereinafter referred to as the “EDC”), is made and executed on the following recitals, terms and conditions.

**WHEREAS**, on March 13, 2020, the President of the United States declared the COVID-19 outbreak a national health emergency beginning on March 1, 2020; and

**WHEREAS**, on March 13, 2020, the Governor of the State of Texas declared a state of disaster for all counties in Texas in response to the COVID-19 outbreak; and

**WHEREAS**, the Canton Economic Development Corporation (hereinafter referred to as the “EDC”) is a Type B economic development corporation, created pursuant to Chapter 505 of the Texas Local Government Code, as amended; and

**WHEREAS**, Section 505.103 of the Texas Local Government Code provides that “[a] Type B corporation may spend not more than 10 percent of the corporate revenues for promotional purposes”; and

**WHEREAS**, Section 505.158 of the Texas Local Government Code provides that “[f]or a Type B corporation authorized to be created by a municipality with a population of 20,000 or less, “project” also includes the land, buildings, equipment, facilities, expenditures, targeted infrastructure, and improvements found by the corporation’s board of directors to promote new or expanded business development.” Further, the statute provides that “[a] Type B corporation may not undertake a project authorized by this section that requires an expenditure of more than \$10,000 until the governing body of the corporation’s authorizing municipality adopts a resolution authorizing the project after giving the resolution at least two separate readings”; and

**WHEREAS**, Developer has applied to EDC for financial assistance to operate their business located on the Property, as defined herein, which is located within the City of Canton, Texas; and

**WHEREAS**, the EDC’s Board of Directors have determined the financial assistance provided to Developer pursuant to this Agreement is consistent and meets the definition of “project” or “promotional purposes” as those terms are defined in Chapters 501 and 505 of the Texas Local Government Code, and in particular Sections 505.103 and 505.158 of the Texas Local Government Code; and the definition of “cost” as that term is defined by Section 501.152 of the Texas Local Government Code.

**NOW, THEREFORE**, for and in consideration of the agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the EDC and Developer agree as follows:

## **SECTION 1. FINDINGS INCORPORATED.**

The foregoing recitals are hereby incorporated into the body of this Agreement and shall be considered part of the mutual covenants, consideration and promises that bind the parties.

## **SECTION 2. TERM.**

This Agreement shall be effective as of the Effective Date, as defined herein, and shall continue thereafter for one (1) year from the Effective Date of this Agreement, unless terminated sooner under the provisions hereof.

## **SECTION 3. DEFINITIONS.**

The following words shall have the following meanings when used in this Agreement.

- (a) **Act.** The word “Act” means Chapters 501 to 505 of the Texas Local Government Code, as amended.
- (b) **Agreement.** The word “Agreement” means this Performance Agreement, together with all exhibits and schedules attached to this Agreement from time to time, if any.
- (c) **Developer.** The word “Developer” means \_\_\_\_\_, a Texas [limited partnership] [corporation] [limited liability company], its successors and assigns, whose address for the purposes of this Agreement is \_\_\_\_\_.
- (d) **EDC.** The term “EDC” means the Canton Economic Development Corporation, a Texas non-profit corporation, its successors and assigns, whose corporate address for the purposes of this Agreement is 119 N. Buffalo Street, Canton, Texas 75103.
- (e) **Effective Date.** The words “Effective Date” mean the date of the latter to execute this Agreement by and between the Developer and the EDC.
- (f) **Event of Default.** The words “Event of Default” mean and include any of the Events of Default set forth below in the section entitled “Events of Default.”
- (g) **Full-Time Equivalent Employment Positions.** The words “Full-Time Equivalent Employment Position” or “Full-Time Equivalent Employment Positions” mean and include a job requiring a minimum of One Thousand Eight Hundred Twenty (1,820) hours of work averaged over a twelve (12) month period.
- (h) **Property.** The word “Property” means the property generally located at \_\_\_\_\_  
\_\_\_\_\_ City of Canton, Van Zandt County, Texas.
- (i) **Qualified Expenditures.** The words “Qualified Expenditures” mean those costs which meet the definition of “project” as that term is defined in Chapters 501 and 505 of the Act, and in particular Section 505.158 of the Act, and meet the definition of “cost” as that term

is defined in Section 501.152 of the Act. *(This includes rent, utilities and operating expenditures.)*

- (j) **Term.** The word “Term” means the term of this Agreement as specified in Section 2 of this Agreement.

#### **SECTION 4. AFFIRMATIVE COVENANTS OF DEVELOPER.**

Developer covenants and agrees with EDC that, while this Agreement is in effect, it shall comply with the following terms and conditions:

- (a) **Operate Business.** Developer agrees during the Term of this Agreement to maintain and keep open the Developer’s business located on the Property, to the extent allowed by the Governor of Texas during the COVID-19 disaster.
- (b) **Job Creation and Retention.** Developer agrees during the Term of this Agreement, the Developer shall employ and maintain a minimum of \_\_\_\_\_ (\_\_\_\_\_) Full-Time Equivalent Employment Positions working at the Developer’s facility located on the Property. Developer covenants and agrees within three (3) months of the Effective Date of this Agreement, and during the Term of this Agreement, Developer shall deliver to EDC a quarterly compliance verification signed by a duly authorized representative of Developer that shall certify the number of Full-Time Equivalent Employment Positions, and shall disclose and certify the average wage for all Full-Time Equivalent Employment Positions, as well as the amount of city sales and use taxes paid to the Texas Comptroller of Public Accounts (the “Quarterly Compliance Verification”). The Developer covenants and agrees beginning within three (3) months of the Effective Date of this Agreement, and quarterly thereafter during the Term of this Agreement, there will be a total of **four (4)** Quarterly Compliance Verifications due and submitted to the EDC covering the Full-Time Equivalent Employment Positions created and maintained during the Term of this Agreement. All Quarterly Compliance Verifications shall include quarterly IRS 941 returns, or Texas Workforce Commission Employer Quarterly Reports, and Texas Comptroller of Public Accounts sales tax statements, where applicable.
- (c) **Performance Conditions.** Developer agrees to make, execute and deliver to EDC such other instruments, documents and other agreements as EDC or its attorneys may reasonably request to evidence this Agreement.
- (d) **Performance.** Developer agrees to perform and comply with all terms, conditions, and provisions set forth in this Agreement and in all other instruments and agreements by and between the Developer and EDC.

#### **SECTION 5. AFFIRMATIVE COVENANTS OF EDC.**

EDC covenants and agrees with Developer that, while this Agreement is in effect, it shall comply with the following terms and conditions:

- (a) **Financial Assistance for Qualified Expenditures.** EDC covenants and agrees to provide financial assistance in the amount of \_\_\_\_\_ to Developer within fifteen (15) days of the Effective Date of this Agreement to be used by Developer for Qualified Expenditures.
- (b) **Performance.** EDC agrees to perform and comply with all terms, conditions, and provisions set forth in this Agreement and in all other instruments and agreements by and between Developer and EDC.

## **SECTION 6. CESSATION OF ADVANCES.**

If the EDC has made any commitment to provide any financial assistance to Developer, whether under this Agreement or under any other agreement, the EDC shall have no obligation to advance or disburse the financial assistance if: (i) Developer becomes insolvent, files a petition in bankruptcy or similar proceedings, or is adjudged bankrupt; or (ii) an Event of Default occurs.

## **SECTION 7. EVENTS OF DEFAULT.**

Each of the following shall constitute an Event of Default under this Agreement:

- (a) **General Event of Default.** Failure of Developer or EDC to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement, or failure of Developer or EDC to comply with or to perform any other term, obligation, covenant or condition contained in any other agreement by and between Developer and EDC is an Event of Default.
- (b) **False Statements.** Any warranty, representation, or statement made or furnished to the EDC by or on behalf of Developer under this Agreement that is false or misleading in any material respect, either now or at the time made or furnished is an Event of Default.
- (c) **Insolvency.** Developer's insolvency, appointment of receiver for any part of Developer's property, any assignment for the benefit of creditors of Developer, any type of creditor workout for Developer, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Developer is an Event of Default.

## **SECTION 8. EFFECT OF AN EVENT OF DEFAULT.**

In the event of default under Section 7 of this Agreement, the non-defaulting party shall give written notice to the other party of any default, and the defaulting party shall have thirty (30) days to cure said default. Should said default remain uncured as of the last day of the applicable cure period, and the non-defaulting party is not otherwise in default, the non-defaulting party shall have the right to immediately terminate this Agreement. In the event, Developer defaults and is unable or unwilling to cure said default within the prescribed time period, the amounts provided by the EDC to Developer pursuant to Section 5(a) of this Agreement shall become immediately due and payable by Developer to the EDC.

## SECTION 9. INDEMNIFICATION.

Developer shall indemnify, save, and hold harmless EDC, its directors, officers, agents, attorneys, and employees (collectively, the “Indemnitees”) from and against: (i) any and all claims, demands, actions or causes of action that are asserted against any Indemnatee if the claim, demand, action or cause of action directly or indirectly relates to tortious interference with contract or business interference, or wrongful or negligent use of EDC’s loan advances by Developer or its agents and employees; (ii) any administrative or investigative proceeding by any governmental authority directly or indirectly related, to a claim, demand, action or cause of action in which EDC is a disinterested party; (iii) any claim, demand, action or cause of action which directly or indirectly contests or challenges the legal authority of EDC or Developer to enter into this Agreement; and (iv) any and all liabilities, losses, costs, or expenses (including reasonable attorneys’ fees and disbursements) that any Indemnatee suffers or incurs as a result of any of the foregoing; provided, however, that Developer shall have no obligation under this Section to EDC with respect to any of the foregoing arising out of the gross negligence or willful misconduct of EDC or the breach by EDC of this Agreement. If any claim, demand, action or cause of action is asserted against any Indemnatee, such Indemnatee shall promptly notify Developer, but the failure to so promptly notify Developer shall not affect Developer’s obligations under this Section unless such failure materially prejudices Developer’s right to participate in the contest of such claim, demand, action or cause of action, as hereinafter provided. If requested by Developer in writing, as so long as no Default or Event of Default shall have occurred and be continuing, such Indemnatee shall in good faith contest the validity, applicability and amount of such claim, demand, action or cause of action and shall permit Developer to participate in such contest. Any Indemnatee that proposes to settle or compromise any claim, demand, action, cause of action or proceeding for which Developer may be liable for payment of indemnity hereunder shall give Developer written notice of the terms of such proposed settlement or compromise reasonably in advance of settling or compromising such claim or proceeding and shall obtain Developer’s concurrence thereto.

## SECTION 10. MISCELLANEOUS PROVISIONS.

The following miscellaneous provisions are a part of this Agreement:

- (a) **Amendments.** This Agreement constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.
- (b) **Applicable Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Van Zandt County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts of Van Zandt County, Texas.
- (c) **Assignment.** This Agreement may not be assigned without the express written consent of the other party.

- (d) **Binding Obligation.** This Agreement shall become a binding obligation on the signatories upon execution by all signatories hereto. Developer warrants and represents that the individual or individuals executing this Agreement on behalf of Developer has full authority to execute this Agreement and bind Developer to the same. EDC warrants and represents that the individual executing this Agreement on its behalf has full authority to execute this Agreement and bind it to the same.
- (e) **Caption Headings.** Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of the Agreement.
- (f) **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same document.
- (g) **Notices.** All notices required to be given under this Agreement shall be given in writing and shall be effective when actually delivered or when deposited in the United States mail, first class, postage prepaid, addressed to the party to whom the notice is to be given at the address shown in Section 3 of this Agreement. Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Developer agrees to keep EDC informed at all times of Developer's current address.
- (h) **Severability.** If a court of competent jurisdiction finds any provision of this Agreement to be invalid or unenforceable as to any person or circumstance, such finding shall not render that provision invalid or unenforceable as to any other persons or circumstances. If feasible, any such offending provision shall be deemed to be modified to be within the limits of enforceability or validity; however, if the offending provision cannot be so modified, it shall be stricken and all other provisions of this Agreement in all other respects shall remain valid and enforceable.
- (i) **Time is of the Essence.** Time is of the essence in the performance of this Agreement.
- (j) **Undocumented Workers.** Developer certifies that the Developer does not and will not knowingly employ an undocumented worker in accordance with Chapter 2264 of the Texas Government Code, as amended. If during the Term of this Agreement, Developer is convicted of a violation under 8 U.S.C. § 1324a(f), Developer shall repay the amount of the public subsidy provided under this Agreement plus interest, at the rate of eight percent (8%), not later than the 120<sup>th</sup> day after the date the EDC notifies Developer of the violation.
- (k) **Compliance with the Act.** Developer covenants and agrees to immediately repay to the EDC any financial assistance provided pursuant to this Agreement, if any, in the event of a petition received by the City of Canton, Texas, pursuant to Section 505.160 of the Act.

**[The Remainder of this Page Intentionally Left Blank]**

**THE PARTIES ACKNOWLEDGE HAVING READ ALL THE PROVISIONS OF THIS PERFORMANCE AGREEMENT, AND THE PARTIES AGREE TO ITS TERMS. THIS AGREEMENT IS EFFECTIVE AS OF THE EFFECTIVE DATE AS IS PROVIDED HEREIN.**

**EDC:**

**CANTON ECONOMIC  
DEVELOPMENT CORPORATION,**  
a Texas non-profit corporation

\_\_\_\_\_  
John T. McKeehan, II, President

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

**ATTEST:**

\_\_\_\_\_  
Stacy Crossley, Secretary

**DEVELOPER:**

\_\_\_\_\_,  
a Texas [limited partnership] [limited liability  
company] [corporation]

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

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

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

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