

ECONOMIC INCENTIVE AND PERFORMANCE AGREEMENT

THIS Economic Development Agreement (“Agreement”) is made and entered into by and between the Forney Economic Development Corporation, a Texas non-profit corporation (“FEDC”), and Best Massage Ever, LLC (“Applicant”), effective as of the date the authorized representative for the FEDC countersigns this Agreement (“Effective Date”).

RECITALS

WHEREAS, the Forney EDC is a Type B economic development corporation, and a Texas non-profit corporation operating pursuant to Chapter 505 of the Texas Local Government Code, as amended (also referred to as the “Act”), and the Texas Non-Profit Corporation Act, as codified in the Texas Business Organizations Code, as amended; 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.”; and

WHEREAS, Section 501.158 of the Texas Local Government Code prohibits the provision of a direct incentive unless Forney EDC enters into an Agreement with Applicant providing at a minimum a schedule of additional payroll or jobs to be created or retained by Forney EDC’s investment; a schedule of capital investments to be made as consideration for any direct incentives provided by Forney EDC to Applicant; and a provision specifying the terms and conditions upon which repayment must be made should Applicant fail to meet the agreed to performance requirements specified in this Agreement; and

WHEREAS, the Applicant has applied to the FEDC for financial assistance necessary for the creation of new jobs and construction of new facilities, located on the Property (as defined below); and

WHEREAS, the Forney EDC approved the provision of financial assistance to Applicant consistent with this Agreement declaring the “project” by the City Council of the City of Forney, Texas in accordance with Section 505.158 of the Texas Local Government Code, which will provide, subject to Applicant’s satisfaction of certain conditions set forth herein, the Applicant the necessary financial assistance for the Applicant to create a minimum of seven (7) Full-Time Equivalent Employment Positions (hereinafter defined); and

WHEREAS, the Applicant understands and agrees that: (a) in granting the financial assistance provided pursuant to this Agreement, FEDC is relying upon Applicant’s representations, warranties, and agreements, as set forth and provided for in this Agreement, and in the application presented to the FEDC; and

WHEREAS, the FEDC’s Board of Directors have determined the financial assistance provided to Applicant pursuant to this Agreement is consistent, and meets the definition of

“project” as that term is defined in Sections 501.103 and 505.158 of the Texas Local Government Code, as amended, and meets the definition of “cost” as that term is defined in Section 501.152 of the Texas Local Government Code, as amended; and

WHEREAS, Applicant agrees and understands that Section 501.073(a) of the Texas Local Government Code requires the City Council of the City of Forney, Texas, to approve all programs and expenditures of the FEDC, and accordingly this Agreement is not effective until the City Council has approved this project and expenditure at a City Council meeting called and held for that purpose. The FEDC shall present this Agreement to the City Council of the City of Forney, Texas for formal approval within ten (10) days following the execution of this Agreement.

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 FEDC and Applicant agree as follows:

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.

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

(a) **Act.** The word “Act” means Chapter 501 to 505 of the Texas Local Government Code, as amended.

(b) **Agreement.** The word “Agreement” means this Economic Incentive and Performance Agreement, together with all exhibits attached hereto from time to time, if any.

(c) **Applicant.** The word “Applicant” means Best Massage Ever, LLC, whose address is 530 Pinson Road, Forney, Texas 75126, and his successors, grantees, transferees (except where otherwise noted herein), and permitted assigns.

(d) **City.** The word “City” means the City of Forney, Texas. For purposes of this Agreement, the City’s address is P.O. Box 826, 101 E. Main Street, Forney, Texas 75126.

(e) **Event of Default.** The phrase “Event of Default” means and includes any of the Events of Default set forth below.

(f) **FEDC.** “FEDC” shall mean the Forney Economic Development Corporation, a Type B economic development corporation, and a Texas non-profit corporation, its successors and assigns, whose corporate address for the purposes of this Agreement is P.O. Box 826, 101 E. Main Street, Forney, Texas 75126.

(g) **Full-time Equivalent Employment Positions.** The words “Full-Time Equivalent Employment Position” mean a combination of employees with jobs located within the corporate

limits of the City, each of which individually is not a Full-Time Employment Position because the employee is not employed a minimum of One Thousand Five Hundred and Sixty (1,560) hours averaged over a twelve (12) month period, but which, in combination, are counted as the equivalent for a Full-Time Employment Position. For example, two jobs, each providing Seven Hundred and Eighty (780) hours averaged over a twelve (12) month period are considered one Full-Time Employment Position for purposes of this Agreement.

(h) Project Grants. The words “Project Grants” means the direct economic grant payments paid by the FEDC to Applicant in accordance with this Agreement.

(i) Property. The word “Property” means 1,800 square feet of retail space owned or leased by the Applicant, upon which the Applicant currently operates a spa and massage parlor, located at 522 Pinson Road, Forney, Texas 75126, located within the City of Forney, Kaufman County, Texas.

(j) Related Documents. The phrase “Related Documents” means without limitation all ancillary agreements and all other instruments and documents relating to the subject matter of this Agreement, whether now or hereafter existing, executed in connection with the Applicant’s obligations to the FEDC under this Agreement.

3. Term. This Agreement shall be effective as of the Effective Date, as is provided herein, and shall continue thereafter for a period of 1 year, unless terminated sooner under the provisions hereof.

4. Title/Interest to Property Established. Applicant represents and warrants that it is currently the owner of record of the Property in fee simple or a tenant under a valid lease agreement for the Property. Any substantial (outside of normal surveyor error or boundary dispute) misrepresentation or breach of the above representation and warranty shall entitle FEDC to terminate the Agreement.

5. Obligations of the Parties.

(a) Obligations of FEDC.

(1) Financial Assistance. FEDC shall issue Project Grants to the Applicant up to a maximum amount of Ten Thousand Dollars (\$10,000.00) for the creation of seven (7) Full-Time Equivalent Employment Positions, contingent upon the position being filled by the employee for one (1) year. Employees shall not be considered independent contractors. The Project Grants shall be payable to Applicant upon delivery by Applicant to FEDC of reasonable documentation verifying the creation of seven (7) Full-Time Equivalent Employment Positions to serve the Property. Payment of the Project Grants shall be made to the Applicant in the full grant amount within 30 days of FEDC’s receipt of reasonable documentation verifying the creation of the seven (7) Full-Time Equivalent Employment Positions.

(b) Obligations of Applicant.

(1) The Applicant covenants and agrees through the exercise of commercially reasonable efforts to maintain its Certificate of Occupancy(s) from the City for a minimum of 1, 800 gross square feet of restaurant space on the Property.

(2) The Applicant covenants and agrees to use commercially reasonable efforts to cause the employ and maintenance of Full-Time Equivalent Employment Positions.

(3) The Applicant expressly acknowledges that by entering into this Agreement, the Applicant, its successors, assigns, vendors, grantees, and/or trustees, shall not construe any language contained herein as waiving any of the requirements of the Zoning Ordinance or Subdivision Ordinance applicable to the Project at the time of development.

6. Event of Default. The following shall constitute an Event of Default under this Agreement:

(a) Certificate of Occupancy. Failure of the Applicant to maintain its Certificate of Occupancy from the City for a retail or commercial site on the Property in accordance with Paragraph 5(b)(1) of this Agreement.

(b) Job Creation and Retention. Failure of the Applicant to utilize commercially reasonable efforts to cause the operators of the retail or commercial sites on the Property to employ and maintain Full-Time Equivalent Employment Positions for a minimum of one year.

(c) False Statements. Any warranty, representation, or statement made or furnished to one party by or on behalf of the other party under this Agreement or the Related Documents that is false or misleading in any material respect, either now or at the time made or furnished.

(d) Insolvency. Applicant's or FEDC's insolvency, appointment of receiver for any part of the Applicant's property, any assignment for the benefit of creditors of the Applicant or FEDC, any type of creditor workout for the Applicant or FEDC, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against the Applicant or FEDC.

(e) Other Defaults. Failure of the Applicant or FEDC to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents, or failure of the Applicant or FEDC to comply with or to perform any other term, obligation, covenant or condition contained in any other agreement between FEDC and the Applicant.

7. Effect of an Event of Default. Following an Event of Default, the non-defaulting party shall give written notice to the other party of any Event of Default, and the defaulting party shall have thirty (30) days to cure said Event of Default. Should said Event of Default remain uncured as of the 31st day following the receipt of notice of default and the non-defaulting party is not otherwise in default, the non-defaulting party shall have the right to exercise the rights and remedies set forth in this Paragraph 7. In the event, Applicant defaults and is unable or unwilling to cure said Event of Default within the prescribed time period, Applicant shall immediately cease to be entitled to receive the payments set forth herein, until such time as Applicant cures

such default, if at all, and shall reimburse FEDC the payments made per Full-Time Equivalent Employment Position that terminated within one (1) year, as the remedy for any default by Applicant hereunder. In the event, FEDC defaults and is unable or unwilling to cure said Event of Default within the prescribed time period, Applicant shall have the right to exercise all rights and remedies available at law or in equity, including, but not limited to, the right of specific performance.

8. Termination of Agreement by FEDC Without Default. FEDC may terminate this Agreement without an Event of Default by Applicant and effective immediately if any state or federal statute, regulation, case law, or other law renders this Agreement ineffectual, impractical or illegal.

Termination of this Agreement by FEDC under this Paragraph 8 shall render this Agreement null and void from that point forward with each party having no further rights against each other under this Agreement or at law; provided, however, that (i) Applicant shall be entitled to receive from FEDC any financial assistance due Applicant through the date of termination; and (ii) FEDC and Applicant agree to negotiate in good faith a remedy that preserves the intent of the parties hereunder as much as reasonably possible under applicable state law.

9. Indemnification. Applicant shall indemnify, save, and hold harmless FEDC, its directors, officers, agents, attorneys, and employees (collectively, the “FEDC Indemnitees”) from and against: (i) any and all claims, demands, actions or causes of action that are asserted against any FEDC Indemnitee 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 FEDC’s financial assistance by Applicant 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 FEDC is a disinterested party; (iii) any claim, demand, action or cause of action which directly or indirectly contests or challenges the legal authority of FEDC or Applicant to enter into this Agreement; and (iv) any and all liabilities, losses, costs, or expenses (including reasonable attorneys’ fees and disbursements) that any FEDC Indemnitee suffers or incurs as a result of any of the foregoing; provided, however, that Applicant shall have no obligation under this Paragraph to FEDC with respect to any of the foregoing arising out of the negligence or misconduct of FEDC or the breach by FEDC of this Agreement. If any claim, demand, action or cause of action is asserted against any FEDC Indemnitee, such FEDC Indemnitee shall promptly notify Applicant, but the failure to so promptly notify Applicant shall not affect Applicant’s obligations under this Paragraph unless such failure materially prejudices Applicant’s right to participate in the contest of such claim, demand, action or cause of action, as hereinafter provided. If requested by Applicant in writing, as long as no Default or Event of Default shall have occurred and be continuing, such FEDC Indemnitee shall in good faith contest the validity, applicability and amount of such claim, demand, action or cause of action and shall permit Applicant to participate in such contest. Any FEDC Indemnitee that proposes to settle or compromise any claim, demand, action, cause of action or proceeding for which Applicant may be liable for payment of indemnity hereunder shall give Applicant 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 Applicant's concurrence thereto.

10. Miscellaneous Provisions. The following miscellaneous provisions are a part of this Agreement:

(a) Amendments. This Agreement, together with any Related Documents, 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 Kaufman County, Texas. Exclusive venue for any action arising under this Agreement shall lie in the state district courts of Kaufman County, Texas.

(c) Assignment. The obligations of Applicant under this Agreement may not be assigned by Applicant without the express written consent of FEDC, which consent shall not be unreasonably withheld, conditioned or delayed. Applicant shall have the right to retain or assign the right to receive all or a portion of the payments due to Applicant under this Agreement without the consent of FEDC.

(d) Binding Obligation. This Agreement shall become a binding obligation on the signatories upon execution by all signatories hereto. Applicant warrants and represents that the individual or individuals executing this Agreement on behalf of Applicant has full authority to execute this Agreement and bind Applicant to the same. FEDC warrants and represents that the individual executing this Agreement on its behalf has full authority to execute this Agreement and bind FEDC 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. Any notice or other communication required or permitted by this Agreement (hereinafter referred to as the "Notice") is effective when in writing and (i) personally delivered either by facsimile (with electronic information and a mailed copy to follow) or by hand or (ii) three (3) days after notice is deposited with the U.S. Postal Service, postage prepaid, certified with return receipt requested, and addressed to the addresses for the parties as provided for in this Agreement.

(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) Survival. All warranties, representations, and covenants made by Applicant and the FEDC in this Agreement or in any certificate or other instrument delivered by one party to the other party under this Agreement shall be considered to have been relied upon by the parties hereto and will survive the making of this Agreement, regardless of any investigation made by either party or on either party's behalf.

(j) Time is of the Essence. Time is of the essence in the performance of this Agreement.

(k) Undocumented Workers. The Applicant certifies that the Applicant 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, Applicant is convicted of a violation under 8 U.S.C. § 1324a(f), Applicant 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 120th day after the date Applicant is convicted of such violation.

[Signature Page to Follow]

EXECUTED to be effective as of the ____ day of _____, 2021.

APPLICANT

Best Massage Ever, LLC

By: _____
Victoria Mayhew, Owner

STATE OF TEXAS

COUNTY OF DALLAS

BEFORE ME, the undersigned authority, in and for said County, on this day personally appeared Victoria Mayhew, in his capacity as Owner of Best Massage Ever, LLC, known to me to be the person whose name is subscribed to the foregoing instrument, and averred that he executed the same on behalf of in his stated capacity.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, THIS THE ____ DAY OF _____, 2021.

Notary Public, State of Texas
My commission expires _____

FEDC

Forney Economic Development Corporation,
A Texas non-profit corporation

By: _____
Joe Dan McBeth, President

APPROVED AS TO FORM:

Jon Thatcher, City Attorney

STATE OF TEXAS

COUNTY OF KAUFMAN

This instrument was acknowledged before me on the ____ day of _____, 2021, by Joe Dan McBeth, Board President for the Forney Economic Development Corporation, a Texas non-profit corporation, on behalf of said corporation.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, THIS THE ____ DAY OF _____, 2021.

Notary Public, State of Texas
My commission expires _____