

STATE OF TEXAS	§
	§
COUNTY OF LUBBOCK	§

PERFORMANCE AGREEMENT

This Performance Agreement (the "Agreement") is made effective on Dec. 16, 2019 by and between LUBBOCK ECONOMIC DEVELOPMENT ALLIANCE, INC., a Texas nonprofit corporation (hereinafter referred to as "LEDA") and KEY ORGANICS, INC., a Texas corporation (hereinafter referred to as "Recipient") by and through their duly authorized officers and affiliate organizations under the terms and conditions that follow

1. **Applicable Law:** It is understood by and between the parties that the term "Act," as used herein, is intended to mean the Development Corporation Act of 1979, as amended (Sec 501.001 et seq. Local Government Code, formerly Sec 5190.6, VACS.) The parties hereto covenant and agree to comply with the terms of the Act applicable to this Agreement.

2. **Parties:**

A. LEDA, a Texas non-profit corporation as well as a tax exempt 501(c) 4 entity, was created by the City of Lubbock, Texas, as an Industrial Development Corporation under the Act for the purpose of creating and retaining positions and encouraging new businesses to be established in Lubbock, Texas, to stimulate business and commercial activities, as well as all other purposes allowed by the Act.

B. Recipient is preparing a new "Project" which shall include the construction of a new 31,000 sq. ft. building located in the Lubbock RailPort, Lubbock, Texas (NAICS 31-1211) with projected employment of 38 new employees. Its business project is anticipated to result in 38 new Primary Jobs for the City of Lubbock, with a Target Annual Compensation of \$1,140,000 annually. Total capital investment is estimated to be \$5,854,000.

C. Recipient is a Texas corporation authorized to do business in Texas.

3. **Purpose:** The purpose for this Agreement is to formalize the agreements between LEDA and Recipient for the payment of certain costs associated with Recipient's Project and specifically state the covenants, representations of the parties, and the incentives associated with Recipient's commitment to abide by the provisions of the Act and to abide by the terms of this Agreement which has been approved by the Board of Directors of LEDA as complying with the specific requirements of the Act. A failure to perform any obligation by Recipient may constitute a breach of the entire Agreement and terminate any further commitments by LEDA.

4. **Definitions:**

A. The "Act" shall refer to the Development Corporation Act of 1979, as amended, as Sec 501.001 et seq. Local Government Code, formerly Sec 5190.6, VACS.

B. "Layoff" is defined as an event, due to adverse or changing business conditions, that result in the loss of employment and shall exclude loss of employment due to a casualty at the Project if the Recipient chooses to rebuild the Project. Employees meeting this definition shall have lost their jobs through no fault of their own.

C. "LEDA" shall refer to Lubbock Economic Development Alliance, Inc., a Texas non-profit corporation, created by the City of Lubbock as an "Industrial Development Corporation," pursuant to the Act.

D. "Measurement Date" shall mean the date upon which the determination is made as to

whether Recipient is in compliance with this agreement. Measurement Dates shall be:

- (1) Year One: January 1 of the calendar year of the completion of Construction;
- (2) Year Two: January 1 of the calendar year following Year One;
- (3) Year Three: January 1 of the calendar year following Year Two.

- E. "Primary Jobs" shall refer to a job that produces goods and/or services for customers that are predominantly outside the community of Lubbock, Texas.
- F. "Project" shall mean the project identified in Paragraph 2B, above.
- G. "Recipient" shall refer to KEY ORGANICS, INC., and its subsidiaries, a Texas corporation authorized to do business in Texas, and the Recipient party to this Agreement.
- H. "Term", as used herein, shall begin with the Start Date of the date of this Agreement, and end on December 31 in Year Three (the "Termination Date") unless earlier breached by Recipient's failure to perform.

5. **Representations of Recipient:**

- A. Recipient represents that it is authorized to do business in Texas and has authorization to enter into this Agreement on its behalf.
- B. Recipient represents that it has sought from LEDA economic assistance pursuing Recipient's Project.
- C. Recipient represents that it has conferred with attorneys of its own choosing and is fully knowledgeable of the terms of the Act and understands the reporting requirements of the Act as set forth in Texas Code Ann. §313.032, as well as all conditions precedent and subsequent as required to be eligible for the incentives offered by LEDA.
- D. Recipient understands and agrees that any variations as to any term of this Agreement or any terms or conditions of the incentives as stated must be mutually agreed to in written supplements or addenda since no oral agreements, amendments, or representations will be binding on either party.
- E. Recipient agrees to participate in any LEDA sponsored wage and benefit surveys, and with Recipient's prior written approval, Recipient agrees to participate in any marketing materials that focus on economic development for the City of Lubbock.
- F. Recipient agrees to begin site development activities at the new location within nine (9) months of the date it receives title to the property from LEDA. Recipient agrees to commence construction within one year after the Closing Date as verified by providing documentation of proof of construction on the Project or a copy of their Notice to Proceed to LEDA, subject to extension for force majeure and, provided Recipient shall have made timely application for permits, subject to extension for delays in (i) issuance of governmental approvals required for construction of the Project, and (ii) any subdivision and/or re-platting necessary for the construction of the Project.

6. **Representations by LEDA:**

- A. LEDA represents that it is established as an Industrial Development Corporation under the Act and further represents that the costs applied toward Recipient's Project as stated in this Agreement have been found by the Board of Directors of LEDA sitting as fact finders have determined the Project to be in compliance with the requirements and purposes of the Act, the provisions of LEDA's charter, as well as for the benefit of the City of Lubbock, Lubbock County, Texas, and trade area.
- B. LEDA represents that it has authority to enter into this Agreement. LEDA understands and



agrees that any variation in terms of this Agreement or the incentives offered to Recipient or commitment by Recipient will only be binding if mutually agreed to in writing.

- C. LEDA represents and warrants that all utilities (water, gas, electric, sewer, communications) are provided adjacent to the Project.
- D. The site is eligible for Foreign Trade Zone designation. If Recipient would like to apply for Foreign Trade Zone designation, LEDA would facilitate the application and activation process on behalf of Recipient.
- E. Along with its partners, LEDA will provide assistance with workforce attraction, screening, and interviewing assistance to help Recipient in the initial hiring process.

7. **Conveyance of Real Property:**

- A. LEDA shall convey approximately 5.0 acres of land in Lubbock RailPort, currently known as Tract E, as identified by Special Warranty Deed attached as Exhibit B and pursuant to the terms and conditions as set forth in the "Purchase and Sale Agreement" attached as Exhibit A. Such conveyance shall take place at a simultaneously closing on or before _____. The obligations and rights of Recipient under this Agreement shall be conditioned upon the parties closing on the transfer under the Purchase and Sale Agreement.
- B. The value of the Property at the time of conveyance from LEDA to Recipient is stipulated to be \$337,500 (\$67,500 per acre) of land. It is acknowledged and agreed that, except for Payback Provisions set forth in Section 10 of this Agreement, no purchase price shall be required to be paid for the Property and the Property will be conveyed to the Recipient for no monetary consideration.

8. **AS IS PROVISION.** The deed to the Property shall include the following "as-is" provision:

THIS CONVEYANCE IS AN ARMS-LENGTH CONVEYANCE BETWEEN THE PARTIES. THE CONVEYANCE WAS BARGAINED ON THE BASIS OF AN AS IS, WHERE IS TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES, EXCEPT FOR THE SPECIAL WARRANTY OF TITLE TO THE REAL PROPERTY STATED IN THIS DEED AND LEDA'S REPRESENTATIONS AND WARRANTIES SET FORTH IN THE PERFORMANCE AGREEMENT BETWEEN THE PARTIES ("PERFORMANCE AGREEMENT").

EXCEPT FOR THE SPECIAL WARRANTY OF TITLE TO THE REAL PROPERTY STATED IN THIS DEED AND LEDA'S REPRESENTATIONS AND WARRANTIES SET FORTH IN THE PERFORMANCE AGREEMENT, THE PROPERTY IS CONVEYED TO GRANTEE IN AN AS IS, WHERE IS CONDITION, WITH ALL FAULTS. ALL WARRANTIES ARE DISCLAIMED, EXCEPT THE SPECIAL WARRANTY OF TITLE TO THE REAL PROPERTY IN THIS DEED AND LEDA'S REPRESENTATIONS AND WARRANTIES SET FORTH IN THE PERFORMANCE AGREEMENT.

GRANTEE SPECIFICALLY ACKNOWLEDGES THAT BY ACQUIRING THE PROPERTY, GRANTEE IS NOT RELYING ON ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND WHATSOEVER, EXPRESS OR IMPLIED, FROM LEDA, ITS AGENTS, OR BROKERS AS TO ANY MATTERS CONCERNING THE PROPERTY, OTHER THAN THOSE SET FORTH IN THE PERFORMANCE AGREEMENT.

9. **Conditions for Conveyance of Property:** It is specifically agreed and understood by and between the parties that LEDA has agreed to grant the Property to Recipient strictly upon the following terms and conditions:

- A. Any use of LEDA's name for publicity in connection with Recipient's business or



activities must be approved in advance by LEDA. It is understood that LEDA may make known its contributions to Recipient in whatever public manner LEDA deems appropriate.

- B. Recipient must maintain a business location in the City of Lubbock or Lubbock County and its legal status under federal and state law duly and remain qualified to do business in the State of Texas.
- C. The operations or activities of Recipient and its employees shall be performed and conducted in a professional and businesslike manner and shall be in keeping with federal and state laws and regulations, and any ordinances of the City of Lubbock and/or governmental entities which may have jurisdiction over operations and activities of the Project and the Recipient.
- D. Recipient certifies that the Recipient 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, Recipient is convicted of a violation under 8 U.S.C. § 1324a(f), Recipient shall repay the amount of the public subsidy provided under this Agreement, with interest at the legal pre-judgment interest rate, with attorney's fees, not later than the 120th day after the date LEDA notifies Recipient of the violation.
- E. Any information obtained by LEDA or its agents or assigns during negotiations leading up to the execution of the Agreement or otherwise about the business, have or will be returned upon the execution of this Agreement, subject to a right to a continuing examination by LEDA in order to comply with LEDA's reporting obligations, if any. Such information shall be considered confidential and beyond the scope of any Open Records request as proprietary information.
- F. Recipient will notify LEDA in writing within three (3) business days of any lay-off or reduction in force greater than 20% of the existing workforce, related to this specific project. The notification must include the number of employees being laid off, their job titles, the reasoning for the lay-off, and what the company is doing to assist the laid off employees.

10. **Development of Land:** Seller and Purchaser acknowledge and agree that Purchaser intends to develop the Property.

- A. **Construction:** Purchaser agrees to commence site development activities on the Property within nine (9) months after the Closing Date and commence construction within one year after the Closing Date. If Purchaser fails to timely commence site development activities or construction within the time frame set forth above, then Seller shall have the right to enter and take back possession of the Property. Furthermore, Purchaser agrees to promptly and diligently pursue the completion of the construction, subject to any delays caused by Seller or any force majeure event but, if Purchaser fails to complete the facility within twenty-four (24) months after the Closing Date, Seller shall have the right to enter and take back possession of the Property. As used herein, the term "complete the construction" shall mean that the facility shall have been completed in a reasonably commercial manner and received a Certificate of Occupancy from the City of Lubbock, Texas.
- B. **Architectural Review Committee (ARC):** Purchaser agrees to submit all Plans, including landscaping plans, prior to commencement of construction to Seller and the ARC. Approval of such plans by the ARC must be received prior to commencement of construction. Purchaser agrees to comply with the ARC's regulations and those covenants set forth on Exhibit C, attached hereto and made a part hereof for all purposes.

The covenants set forth in this Section shall survive Closing.

- C. It is agreed that the owner of the Property shall have the first right of refusal on the grant and conveyance of the 6 acre tract north of Tract E in the Lubbock Railport for a

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period of three (3) years following the completion of the Project and receipt of a certificate of occupancy by The City of Lubbock for the Project, to be purchased by the owner of the Property at fair market value. The right of first refusal runs with the land and benefits subsequent owners of the Property. Within thirty (30) days after the closing of the conveyance of Tract E, LEDA shall record a definitive right of first refusal agreement with the Lubbock County Clerk in a form mutually agreeable between the parties to this agreement.

11. **Payback Provisions and Events of Default:** Recipient acknowledges that LEDA and Recipient are required to remain in conformance with the statutory provisions of the Act. The parties hereto agree that in the event Recipient fails to comply with the provisions of this Agreement, including but not limited to Paragraphs 9C, 9D, or 11, and after written notice and failure to cure the violation within a reasonable period of time after such notice, then LEDA, in its sole discretion, may terminate this Agreement.

The Recipient has provided to LEDA an estimated capital investment cost of \$5,800,000 to be expended by the end of Year One in the form of new construction of a building and personal property located in Lubbock Business Park, Lubbock, Texas. LEDA based its decision to grant the incentive to Recipient partly upon such capital investment. If the actual capital investment amounts are significantly lower (15% or greater) than the estimated capital investment, LEDA may demand the sum of \$20,770 for every \$100,000 of capital investment below \$4,976,000 of capital investment. Capital investment will be measured either by documentation of construction or personal property purchased invoices or by the increased valuation of the Lubbock Central Appraisal District historic information reports.

12. **Assignment:** This Agreement shall not be assignable, either in whole or in part, except this Agreement may be assigned to any successor or assign of Recipient by merger, consolidation or transfer of all or substantially all of the assets. Any assignment not authorized by this Agreement shall not disqualify the remaining or new entity from applying to LEDA for new incentive consideration.

13. **No Privity of Endeavor Nor Joint Venture:** It is specifically agreed that there shall be no privity of endeavor nor joint venture whatsoever between LEDA and Recipient and the sole connection between the parties is the contribution of the economic assistance by LEDA under the restricted conditions as set forth herein and that such contributions as stated herein are for the sole purposes as set forth herein and it shall in no way be construed as a continuing basis of financial support by LEDA to Recipient. The parties hereto have entered into this Agreement in an arms-length transaction. No agency relationship or fiduciary relationship is intended to be created by this Agreement and no such relationship shall be determined to exist.

14. **Good Faith -Normal Business Operations:** The parties agree that this Agreement has been entered into in good faith and that each party shall act in good faith in complying with its provisions. The parties further agree to transact all their business under and that which relates to this Agreement in accordance with their normal business operations.

15. **Miscellaneous Provisions:**

A. **Notices:**

For the purposes of any notices to be given, pursuant to the terms of this Agreement, the parties shall use the following addresses or any other address as may be changed by the parties, upon written notice to the other party, as follows:

(1) John Osborne
CEO and President
LUBBOCK ECONOMIC DEVELOPMENT ALLIANCE, INC.
1500 Broadway, 6th Floor
Lubbock, TX 79401

(2) With a copy to:

Ann Manning
Attorney at Law



Underwood Law Firm, PC
P.O. Box 16197
Lubbock, Texas 79490

(3) With a copy to:

Key Organics, Inc.
ATTN: Rodrigo Ariceaga
5815 82nd Street, Suite 145, #308
Lubbock, Texas 79424

(4) With a copy to:

(attorney info)

Notices shall be deemed to be given upon the placing in the United States Mail, Certified Mail, Return Receipt Requested, to the above-described addresses or as may be changed, pursuant to the terms and conditions hereof.

- B. Entire Agreement: This instrument constitutes the entire agreement between the parties hereto and neither this Agreement nor any of the Exhibits attached hereto, if any, can be altered, changed, or amended in any respect except by an instrument in writing duly executed by both parties.
- C. Governing Law and Performance: This Agreement shall be governed by the laws of the State of Texas and shall be deemed to be executed in and performance called for in Lubbock, Lubbock County, Texas.
- D. Partial Invalidity: In the event that any portion of this Agreement should be found or declared to be invalid for any reason, the remaining provisions of this Agreement shall remain in full force and effect and shall be binding upon the parties. Notwithstanding anything contained herein to the contrary, should it be determined that LEDA cannot legally provide the benefit described in this Agreement and/or should funding for any of such benefits be terminated, then all future obligations of the Recipient shall be terminated.
- E. Binding Effect: This Agreement shall be binding upon the undersigned, their successors and assign by merger, subject to the express terms of this Agreement concerning assignment.
- F. Force Majeure: If any default or performance of any other covenant or term of this Agreement is delayed by reason of strike, riots, shortages of labor, materials, supplies, or transportation, war, civil commotion, act of God, governmental restrictions, regulations, or interference, fire, or other casualty, or any other circumstances beyond a signatory party's control, then the duty to do or perform the term or covenant, regardless of whether the circumstance is similar to any of those enumerated above or not, is excused during the delay period and all timeframes for performance under this Agreement shall be extended accordingly.
- G. Venue; Governing Law: All payments made pursuant to this Agreement and other obligations performed under this Agreement shall be made or performed in the City of Lubbock, Lubbock County, Texas. Exclusive venue for any action, cause of action, lawsuit, or other proceeding under or in connection with this Agreement shall be and lie in Lubbock County, Texas and the parties hereby submit themselves to the jurisdiction thereof; and this Agreement shall be governed by and construed in accordance with the laws of the State of Texas without respect to the conflict of laws rules thereof. Recipient hereby waives and agrees not to assert by way of motion, as a defense, or otherwise, in any suit,



action, or proceeding, any claim that (i) it is not subject to such venue or the jurisdiction of the courts of Lubbock County, Texas, (ii) the suit, action, or proceeding is brought in an inconvenient forum or (iii) the venue of the suit, action or proceeding is improper.

H. No Waiver of Immunity. Notwithstanding any other provision of this Agreement, including, without limitation, the provisions of Section 9 of this Agreement, nothing in this Agreement shall or may be deemed to be or shall or may be construed to be, a waiver or relinquishment of any immunity, defense or tort limitation to which LEDA and the City, its elected officials, its officers, employees, representatives and agents are or may be entitled, including without limitation, any waiver of immunity suit.

I. Time is of the Essence: The parties agree that time is of the essence in the execution of this Agreement.

EXECUTED in multiple counterparts, each of which is an original, on this 16th day of December, 2019

LUBBOCK ECONOMIC DEVELOPMENT
ALLIANCE, INC.



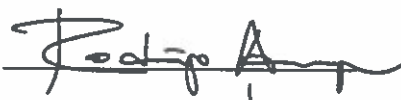
John Osborne, CEO and President

ATTEST:



RECIPIENT:

KEY ORGANICS, INC.

By: 
Its: PRESIDENT