

STATE OF TEXAS

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COUNTY OF LUBBOCK

**PERFORMANCE AGREEMENT**

This Performance Agreement (the "Agreement") is made effective on July 1, 2017, by and between LUBBOCK ECONOMIC DEVELOPMENT ALLIANCE, INC., a Texas nonprofit corporation (hereinafter referred to as "LEDA") and HOVERSTATE 2.0, Inc., a Foreign Corporation, and its subsidiaries (hereinafter collectively 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 leasing a facility located in Lubbock, Texas (NAICS 541512) with projected employment of 50 new employees. Its business project is anticipated to result in 50 new Primary Jobs (as defined in Paragraph 4K, below) for the City of Lubbock, with a Target Annual Compensation as follows:

- (1) Year One: \$ 650,000 in the aggregate
- (2) Year Two: \$1,989,000 in the aggregate
- (3) Year Three: \$3,381,300 in the aggregate
- (4) Year Four: \$3,448,950 in the aggregate
- (5) Year Five: \$3,517,900 in the aggregate

or a total of \$12,987,150 over five years. Total capital investment is estimated to be \$20,000.

C. Recipient is a Foreign 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 that has been approved by the Board of Directors of LEDA as complying with the specific requirements of the Act. It is

LEDA  Hoverstate 

expressly agreed that this Agreement constitutes a single transaction; although, incentive payments thereunder are divided into multiple installments as annually earned. 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. "Annual Compensation" shall mean the higher of actual compensation or annualized base pay or actual annualized payment as reasonably determined by LEDA's accountants/representative.
- C. "Baseline Employment Level" is defined to mean the employee census on the day preceding the Term of this Agreement; the parties agree that the Baseline Employment Level shall be zero.
- D. "Baseline Measurement Date" shall mean the day preceding the execution of this agreement.
- E. "Census" is defined as a compilation listing of the employee name, address, date of hire, date of termination, position, base pay, and indication of full-time or part-time status. Such information is preferred to be presented in Excel format, which shall be made available to the Accountant in performing the review.
- F. "Full-Time Equivalent Employee" shall include individuals employed in Primary Jobs as defined in this Agreement, as well as contract or leased employees performing Primary Jobs at the Project in the City of Lubbock (or individuals who are directed or managed by management at the Project) on behalf of Recipient.
- G. "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.
- H. "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.
- I. "Measurement Date" shall mean the date upon which the determination is made as to whether Recipient is in compliance with creating and/or maintaining the Target Job Positions. Employees must be both employed and working on the Measurement Date. If an employee has been laid off but paid through the Measurement Date, his employment will be not counted towards incentive. Measurement Dates shall be:

- (1) Year One: January 1, 2018 – December 31, 2018.
- (2) Year Two: January 1, 2019 – December 31, 2019.
- (3) Year Three: January 1, 2020 – December 31, 2020.
- (4) Year Four: January 1, 2021 – December 31, 2021.
- (5) Year Five: January 1, 2022 – December 31, 2022.

- J. "Payback Provisions" shall mean forfeiture of all unpaid incentives in accordance with the terms of this Agreement.
- K. "Primary Jobs" shall refer to a job that produces goods and/or services for customers that are predominantly outside the community of Lubbock, Texas.
- L. "Project" shall mean the project identified in Paragraph 2B, above.
- M. "Recipient" shall refer to Hoverstate 2.0, Inc., and its subsidiaries, a Foreign Corporation authorized to do business in Texas, and the recipient party to this Agreement.
- N. "Target Job Positions" shall refer to an increase of 50 Primary Jobs in excess of the Baseline Employment Level.
- O. "Term" as used herein, shall begin with the Start Date of the date of this Agreement, and end on December 31 in the sixth year following the execution of the lease of the building under the Real Estate Grant identified in Section 7 herein (the "Termination Date") unless earlier breached by Recipient's failure to perform.

**5. Representations of Recipient:**

- A. Recipient represents that it will utilize the incentive for reimbursement of costs involved and associated with the Project.
- B. Recipient represents that it is authorized to do business in Texas and has authorization to enter into this Agreement on its behalf.
- C. Recipient represents that it has sought from LEDA economic assistance pursuing Recipient's Project.
- D. 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 Tax Code Ann. §313.032, as well as all conditions precedent and subsequent as required to be eligible for the incentives offered by LEDA, including the Payback Provisions.
- E. Recipient represents that it acknowledges that its failure to perform any reporting requirements within a reasonable period of time after the request is made and/or its failure to maintain the Baseline Employment Level could result in payment adjustments.

- F. 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.
- G. 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.
- H. Recipient agrees to work with LEDA's Director of Workforce Development or Workforce Solutions of the South Plains to facilitate the posting and advertisement of new jobs at their location, as well as for the recruitment of potential qualified applicants from the City of Lubbock and Lubbock County for these positions, provided that Recipient is not obligated under this Agreement to ultimately hire candidates sourced through these advertisements. Workforce Solutions of the South Plains offers other employer services, such as assessment of basic skills and work aptitudes of potential employees, job matching services, labor market information, assistance in arranging workforce training and outplacement services which the recipient may access. During the Term of this Agreement, LEDA's Director of Workforce Development or Workforce Solutions of the South Plains will not, directly or indirectly, initiate any contact or communication with, solicit the employment of, or hire any employee of Recipient with whom LEDA had contact while conducting any yearly review, routine inspection, or audit of Recipient.

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. Along with its partners, LEDA will provide assistance with workforce attraction, screening, and interviewing assistance to help Recipient in the initial hiring process.

7. **Real Estate Grant:**

- A. LEDA will make a Real Estate Grant in the amount of \$38,400 for lease payments for a site outside of downtown Lubbock, awarded over a two-year period: \$19,200 at the end of year one and \$19,200 at the end of year two;

**OR**

if Recipient selects a downtown Lubbock site as its software development location, LEDA will make a Downtown Real Estate Grant of \$105,000 to be awarded over a three-year period: \$35,000 at the end of year one; \$35,000 at the end of year two, and \$35,000 at the end of year three.

Awards will be made at the end of the year following the execution of the lease and on the anniversary date thereafter so long as Recipient occupies the leased property and remains in business.

- B. A copy of the lease must be submitted to LEDA's attorney prior to payment being remitted.

8. **Capital Incentive to be Awarded and Terms of Award:**

**Initial Capital Investment (exclusive of Real Property, if any):**

LEDA hereby grants to Recipient a potential incentive of \$125,000 (through job creation) payments to be expressly made under the following terms and conditions:

A. **Job Creation:**

1. LEDA agrees to pay up to a maximum of \$125,000 for Job Creation incentives at the rate of \$2,500 for each created Primary Job over a period of five (5) years. Recipient agrees that it will employ an estimate of 50% employees at an average wage of \$60,000.
2. The payments are conditioned upon the creation of Primary Jobs after Recipient's written substantiation of such employment and under the following terms and conditions:
  - a. Recipient agrees to establish a Baseline Employment Level and Census and shall timely provide such information to LEDA or its designated accounting representative when requested; the parties agree that the Baseline Employment Level is zero. Recipient agrees to maintain the Baseline Employment Level through the term of this Agreement and create and maintain the additional full-time Target Job Positions intended to qualify for the additional Project cost incentive, as offered by LEDA.

- b. Recipient shall earn one-fifth (1/5) of the additional Project cost incentive at each Measurement Date. Such earned portion shall be paid within a reasonable time following the completion of a yearly review by LEDA, or its designated representative, which payment shall be made within fifteen (15) days after LEDA's board review and approval of the Accountant's review. LEDA and its representative agree to maintain confidentiality of all of Recipient's records and to return all such records unless other mutually agreeable arrangements are made regarding record retention by Recipient or inspection access to LEDA.
  3. Each annual incentive installment shall be considered as earned as of each Measurement Date during the Agreement when, by review, it is confirmed that Recipient attained the Target Job Positions and the Target Annual Compensation.
  4. Should Recipient fail to meet its Target Job Positions during any year or years, but ultimately meet its overall Target Job Positions, LEDA, shall, at its discretion, have the right to allow recapture of forfeited incentives not to exceed the maximum amount approved by the Board. Should Recipient exceed its Target Job Positions during any year or years, LEDA, shall, at its discretion, have the right to allow accelerated job creation incentive payments, not to exceed the maximum amount approved by the Board.
  5. Recipient understands and agrees that in the event, other than as a result of a force majeure (as defined in Paragraph 14F, below), there is a failure to attain its Target Job Positions, then LEDA shall have the right to make all necessary adjustments.
- B.** LEDA will award a Recruitment Grant of \$80,000 to assist with any recruitment efforts or relocation needs of current or future employees to Lubbock payable as follows:
1. \$40,000 will be awarded upon Recipient's announcement of Lubbock's relocation as their software development location;
  2. the balance of \$40,000 will be awarded upon the hiring of twenty (20) full-time employees; and
  3. Should recipient fail to hire 20 full-time employees within five (5) years of Recipient's announcement of its relocation to Lubbock as its software development location, LEDA, at its discretion, shall have the right to recapture a portion of the \$40,000 Recruitment Incentive paid to Recipient in an amount of \$2,000.00 for each full-time position of the guaranteed 20 positions that are not filled.
- C.** LEDA will provide an Employee Training Grant of \$5,000 per employee once the company has presented to LEDA a Certificate of Completion of the designated training curriculum Recipient selects, up to a maximum of \$150,000.

- D. Recipient agrees to timely provide information to LEDA's designated accounting representative when requested. LEDA and its representative agree to maintain confidentiality of all of Recipient's records and to return all such records unless other mutually agreeable arrangements are made regarding record retention by Recipient or inspection access to LEDA.

9. **Conditions for Payment of Incentives:** It is specifically agreed and understood by and between the parties that LEDA has agreed to make the project payments 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.
- B. Recipient shall have delivered to LEDA evidence of its authority for the execution and performance of this Agreement, as well as timely delivery of all other information expressly called for in this Agreement.
- C. For the duration of this Agreement, in order to receive benefits hereunder, 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.
- D. The operations or activities of Recipient and its employees shall be performed and conducted in accordance with standards customary of the industry and 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.
- E. Recipient agrees to, in good faith, engage in a confidential review and examination of all material records by LEDA's accountants, and the Parties mutually agree that such review is necessary to ensure compliance with the conditions of the incentive payments (including base salary, overtime, and fringe benefits). Recipient agrees to timely provide to LEDA's accountants all information reasonably requested by the accountants. Should Recipient fail to provide to the accountants the information necessary to complete the review within six months from the measurement date, the job creation incentives for the year being reviewed may be forfeited by Recipient. All such reviews and examinations shall be subject to the Recipient's confidentiality and security policies.
- F. 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.



- G. Any information about the business, obtained by LEDA or its agents or assigns during negotiations leading up to the execution of the Agreement or otherwise, has been 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.
- H. Recipient will notify LEDA in writing within three (3) business days of any layoff 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 layoff, and what the company is doing to assist the laid off employees. Likewise, if an announcement is made that the Recipient is closing its doors and ceasing business operations at the Project during the review of job creation incentives, LEDA, in its sole discretion, may elect to suspend payment to Recipient.

10. **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 5E, 9C, 9D, 9E or Section 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 and permanently suspend all future payments to Recipient.

11. **Assignment:** This Agreement shall not be assignable, either in whole or in part without the mutual written consent of the parties, 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 or without mutual written consent of the parties shall not disqualify the remaining or new entity from applying to LEDA for new incentive consideration.

12. **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.

13. **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.



14. **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, 6<sup>th</sup> 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) Hoverstate 2.0, Inc.:  
Robert Fauver  
21031 Ventura Blvd. #320  
Woodland Hills, CA 91364

(4) With a copy to:

Gilbert Bradshaw  
The Bradshaw Law Group  
353 West 48<sup>th</sup> Street, 4<sup>th</sup> Floor  
New York, NY 10036

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. **Venue, Governing Law:** All payments made pursuant to this Agreement and other obligations performed under this Agreement shall be made or performed in 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 constructed in accordance with the laws of the State of Texas without respect to the conflict of laws, rules thereof.

Hoverstate 2.0, Inc., 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.

- D. 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 of relinquishment of any immunity, defense, or tort limitation to which the City, its elected officials, its officers, employees, representatives and agents are or may be entitled, including without limitation, any waiver of immunity to suit.
- E. 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.
- F. Binding Effect: This Agreement shall be binding upon the undersigned, their successors and assigns by merger, subject to the express terms of this Agreement concerning assignment.
- G. 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.
- H. Time is of the Essence: The parties agree that time is of the essence in the execution of this Agreement.
- I. Confidential Information: LEDA agrees to hold in confidence and not to disclose to any person, other than its directors, officers, employees, and other persons or entities as required by Texas State law, as such disclosure is described below, without the prior written consent of Recipient, any and all information of any kind or nature relating directly or indirectly to the Project that is proprietary or confidential to Recipient, and that is disclosed to LEDA directly or indirectly by Recipient or any of its affiliates and any of their officers, directors, employees or representatives. For purposes of this Agreement, Confidential Information includes, but is not limited to, all information not generally known to the public, in spoken, printed, electronic or any other form or medium, relating directly or indirectly to: business processes, practices, methods,

policies, plans, publications, documents, research, operations, services, strategies, techniques, agreements, contracts, terms of agreements, transactions, potential transactions, negotiations, pending negotiations, know-how, trade secrets, computer programs, computer software, applications, operating systems, software design, web design, work-in-process, databases, manuals, records, articles, systems, material, sources of material, supplier information, vendor information, financial information, results, accounting information, accounting records, legal information, marketing information, advertising information, pricing information, credit information, design information, payroll information, staffing information, personnel information, employee lists, supplier lists, vendor lists, developments, reports, internal controls, security procedures, graphics, drawings, sketches, market studies, sales information, revenue, costs, formulae, notes, communications, algorithms, product plans, designs, styles, models, ideas, audiovisual programs, inventions, unpublished patent applications, original works of authorship, discoveries, experimental processes, experimental results, specifications, customer information, customer lists, client information, client lists, manufacturing information, factory lists, distributor lists, and buyer lists of the Recipient or its businesses, or any existing or prospective customer, supplier, investor or other associated third party, or of any other person or entity that has entrusted information to the Recipient in confidence, and any other information concerning the Project. All of the above types of information that are confidential or proprietary to Recipient shall hereinafter be collectively referred to as "Confidential Information;" provided, however, such term shall not include the following: (1) Information that LEDA can show that at the time of disclosure is generally available to the public; (2) Information that LEDA can show that after disclosure is published or otherwise becomes generally available to the public through no fault of LEDA (but only after, and only to the extent that, it is published or otherwise becomes generally available to the public); (3) Information that LEDA can show already was in the possession of LEDA at the time of disclosure and was not obtained from Recipient or any of its affiliates (whether in conjunction with the Project or previously disclosed), and that without breach of any obligation to a third party which obligation is known to LEDA, LEDA is free to disclose to others; or (4) Information that LEDA is required to disclose through applicable law, but only after notice of such required disclosure is given in writing to Recipient and Recipient having a period of time as prescribed by the Texas Public Information Act, Text Govt. Code §552.305 to seek an opinion by the Texas Attorney General to keep such information confidential.

- J. Authority: The parties represent and warrant that each party that is signatory to this Agreement has authority to execute and bind their respective entities.
- K. Counterparts: This Agreement may be executed in several counterparts and it shall not be necessary for each party to execute each of such counterparts, but when all of the parties have executed and delivered one of such counterparts, the counterparts, when taken together, shall be deemed to constitute one and the same instrument, enforceable against each party in accordance with its terms.

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- L. **Facsimile Signatures:** The parties hereto agree that this Agreement may be executed by facsimile signatures and such signatures shall be deemed originals. The parties further agree that within ten days following the execution of this Agreement, they shall exchange original signature pages.

[signature page follows]

EXECUTED in multiple counterparts, each of which is an original, on this 28th day of March, 2017.

LUBBOCK ECONOMIC DEVELOPMENT  
ALLIANCE, INC.


  
John Osborne, CEO and President

ATTEST:



RECIPIENT:

HOVERSTATE 2.0, INC.

  
By: Robert Fauver  
Its: Managing Partner, Chief Strategy Officer