

## PERFORMANCE AGREEMENT

This PERFORMANCE AGREEMENT (the "Agreement") is made and entered this \_\_\_\_ day of September, 2017, by and among the COUNTY OF SPOTSYLVANIA, VIRGINIA, a political subdivision of the Commonwealth of Virginia ("County") and EAR, NOSE AND THROAT AND FACIAL PLASTIC SURGERY CENTER OF FREDERICKSBURG, P.C., a Virginia Professional Corporation ("Company"), and the ECONOMIC DEVELOPMENT AUTHORITY OF THE COUNTY OF SPOTSYLVANIA, VIRGINIA, a political subdivision of the Commonwealth of Virginia ("Authority"), collectively referred to as the "Parties."

### WITNESSETH:

WHEREAS, the Company is engaged in the business of providing medical services to patients located within the County of Spotsylvania and surrounding localities, the Company also has offices in the City of Fredericksburg, Virginia, and Stafford County, Virginia; and

WHEREAS, the Company intends to expand its business operations to the County of Spotsylvania, consisting of an investment in real estate in the form of a ten-year lease of the property located at 4701 Spotsylvania Parkway, Suite 100, Fredericksburg, Virginia 22408, creating and maintaining at least 5 new full time employees at its new business operations in the County over the next ten years, and making \$200,000 in taxable personal property investments; and

WHEREAS, the Company will incur significant costs associated with the relocation and expansion of its medical practice in Spotsylvania County; and

WHEREAS, the County has determined that the promotion of commercial expansion and improvement of medical businesses and practices, including but not limited to job creation and retention, results in significant direct and indirect economic, physical and social benefits to the County; is consistent with the Authority's objectives, and is in the best interest of the citizens of Spotsylvania County; and

WHEREAS, the Authority desires to provide to the Company an economic incentive grant for the purpose of inducing the Company to locate and expand its business and create and increase new full time jobs in the County of Spotsylvania; and

WHEREAS, the County is willing to appropriate and provide funds to the Authority, in support of a grant, with the expectation that the Authority will provide the funds to or for the use of the Company, provided that the Company meets certain criteria described herein; and

WHEREAS, the County is authorized by Section 15.2-953 of the Code of Virginia and other laws, and the Authority is authorized by the Industrial Development and Revenue Bond Act, contained in Chapter 49, Title 15.2 of the Code of Virginia and other laws to perform the activities contemplated in this Agreement; and

WHEREAS, the County, the Authority and the Company desire to set forth their understanding and agreement as to the terms of the Incentive Grants, the obligations of the Company regarding the Company Commitments, and the repayment by the Company of the Incentive Grants under certain circumstances; and

NOW, THEREFORE, in consideration of the foregoing, the mutual benefits, promises and undertakings of the parties to this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties covenant and agree as follows:

## SECTION 1. INCORPORATION OF RECITALS

The "WHEREAS" statements above are fully incorporated herein by reference.

## SECTION 2. DEFINITIONS.

For the purposes of this Agreement, the following terms shall have the following definitions:

"Aggregate Annual Wage" means the gross salary paid to an employee together with any overtime payments and bonus payments received per year.

"Personal Property Investment" means the purchase and locating of taxable tangible personal property at the Company Facility including, but not limited to, furniture and fixtures. Personal Property Investment shall be evidenced by tax records showing the assessed value of the personal property including, but not limited to, furniture and fixtures and copies of paid invoices paid by or on behalf of the Company for any new personal property and, if requested by the County or the Authority, those invoices must be certified by the contractor or vendor providing the goods or services.

"Company Facility" means the real property and any buildings and structures located thereon located at 4701 Spotsylvania Parkway in the County of Spotsylvania.

"Incentive Period" means the five-year period commencing on the date that the Company receives a certificate of occupancy to occupy the Company Facility, which date shall be no later than October 1, 2017 through the final day of the last tax year for which the Company will receive incentives under this Agreement, December 31, 2022.

"Maintain" means that the New Jobs will continue without interruption from the date of creation. New Jobs will be treated as Maintained during periods in which such positions are not filled due to temporary reductions in the Company's employment levels in connection with a bona fide recruitment for open New Job positions so long as any New Job position does not remain vacant for more than six (6) months.

"New Job" means a regular full time or part-time position of an indefinite duration at the Company Facility for which the standard Company fringe benefits are paid by the Company for the employee and which pays an Aggregate Annual Wage of Forty Thousand Dollars (\$40,000)

or greater. Each current Company position which meets the foregoing requirements and which is relocated to the Company Facility will be considered a New Job.

### SECTION 3. COMPANY COMMITMENTS

In exchange for the Incentive Grants, the Company agrees to fully comply with each and every one of the following covenants ("Company Commitments") under the schedules set forth below:

3.1 The Company shall locate business operations, including office and patient care activities at the Company Facility in Spotsylvania County prior to October 1, 2017 and thereafter retain its business operations, including office and patient care activities at the Company Facility in Spotsylvania County during the duration of the Incentive Period and for five years thereafter - through December 31, 2027.

3.2 The Company shall create at least 5 New Jobs in Spotsylvania County within six (6) months from the date that the Company receives a certificate of occupancy for the Company Facility and Maintain those jobs during the Incentive Period and for five years thereafter - through December 31, 2027.

3.3 The Company shall make a Personal Property Investment of Two Hundred Thousand Dollars (\$200,000) at the Company Facility prior to October 1, 2017. Personal Property Investment shall be evidenced by tax records showing the assessed value of the personal property including, but not limited to, furniture and fixtures and copies of paid invoices paid by or on behalf of the Company and, if requested by the County or the Authority, those invoices must be certified by the contractor or vendor providing the goods or services.

3.4 The Company shall comply with all applicable County, State, and Federal laws and regulations.

3.5 In addition to other documentation and evidence required pursuant to other timelines set out herein, the Company shall provide the Authority with the following documentation no later than January 31<sup>st</sup> of the year following each year of the Incentive Period and each of the five years thereafter:

(a) Company shall provide copies of filings with the Virginia Employment Commission regarding the Company's aggregate unemployment compensation taxes for that applicable year including, but not limited to, all quarterly payroll reports as evidence of the number of New Jobs. In addition, the Company shall provide a list of all employed positions and corresponding dates of employment at the Company during the applicable year.

(b) Company shall at its own expense provide to the Authority copies of all records related to: the value of its personal property, the assessment of its personal property by the County, the payment of taxes and fees to the County.

(c) Company shall provide such other documentation necessary for the Authority and County to verify that the Company Commitments, eligibility for grants, and any other obligations have been met.

3.6 The Company covenants and agrees to use its reasonable efforts to identify and market its local business as located in Spotsylvania County and to assist the County and the Authority from time-to-time, at no additional cost to the Company, in promoting Spotsylvania County's attributes as a place to do business; and to identify the practice as being located in "Spotsylvania County" on all marketing and business materials and efforts on which the location of the Company is identified including, but not limited to the Company's website; and to utilize suppliers, contractors and employers located in Spotsylvania County when feasible; and to assist the County in recruiting other specialty practices to Spotsylvania County.

#### SECTION 4. INCENTIVE GRANTS.

4.1 To induce the Company to make the commitments described in Section 3 of this Agreement, the Authority agrees to provide the Company with the following incentive grants ("Incentive Grants") up to a maximum of FIFTY THOUSAND DOLLARS (\$50,000), subject to appropriation of sufficient funds to the Authority by the County for the purpose of funding the Authority's obligations under this Agreement:

(a) **BPOL Incentive Grant.** The Authority will provide a grant to the Company equal to 100% of the Business, Professional, and Occupational License ("BPOL") taxes paid by the Company to the County for five (5) consecutive tax years commencing with the 2018 tax year (the "BPOL Incentive Grant"). The total amount of the BPOL Incentive Grant described in this paragraph shall not exceed TWENTY THOUSAND DOLLARS (\$20,000). Once the total amount paid to the Company under this paragraph reaches \$20,000, even if such event occurs prior to the end of the Incentive Period, then the Authority shall have no further obligation to provide payments to the Company under this paragraph. The Authority will disburse such grant payments to the Company only after the Company makes a request in writing to the Authority and County and provides evidence satisfactory to the Authority and the County that (i) the Company's BPOL taxes for the appropriate tax year have been paid and trued up to the County and (ii) the Company has met all the applicable Company Commitments described in Section 3 of this Agreement. It is understood that this typically means that the grant payment for the first year's BPOL taxes paid by the Company, for example, would not be disbursed before June 30<sup>th</sup> of the following calendar year. If the BPOL tax is repealed, then the County and the Authority shall have no obligation to make these grant payments.

(b) **Personal Property Incentive Grant.** The Authority will provide a grant to the Company equal to 50% of the tangible personal property taxes, including furniture and fixtures, paid by the Company to the County for five (5) consecutive tax years commencing with the 2018 tax year the ("Personal Property Incentive Grant"). The total amount of the Personal Property Incentive Grant described in this paragraph shall not exceed TWENTY THOUSAND DOLLARS (\$20,000). Once the total amount paid

to the Company under this paragraph reaches \$20,000, even if such event occurs prior to the end of the Incentive Period, then the Authority shall have no further obligation to provide payments to the Company under this paragraph. The Authority will disburse such grant payments to the Company only after the Company makes a request in writing to the Authority and County and provides evidence satisfactory to the Authority and the County that (i) the Company's tangible personal property taxes for the appropriate tax year have been paid and trued up to the County and (ii) the Company has met all the applicable Company Commitments described in Section 3 of this Agreement. It is understood that this typically means that the grant payment for the first year's tangible personal property taxes paid by the Company, for example, would not be disbursed before June 30<sup>th</sup> of the following calendar year. If the tangible personal property tax is repealed, then the County and the Authority shall have no obligation to make these grant payments.

- (c) **Permit Incentive Grant.** The Authority will provide a grant in a total amount not to exceed TEN THOUSAND DOLLARS (\$10,000) to the Company equal to the permit fees related to the development of the Company Facility that were (i) paid to the County from the date the Company began making improvements to the Company Facility through the date the Company Facility receives its final certificate of occupancy for the Company Facility which shall be no later than October 12, 2017 and (ii) that the Company is expressly responsible for paying under the terms of its lease for the Company Facility exclusive of any payments for rent. Such permit fees may include: application fees, building permits, site plan submittal/reviews, water and sewer hookup/tap fees, and any County fees associated with planning, building, constructing, improving, up-fitting, or building out the Company Facility up to the time the Company receives the occupancy permit. Company will submit all invoices for reimbursement after payment of each county fee is paid in full by Company. Permit fees do not include any recording or other fees associated with transferring property or recording documents in the County's land records. The Authority will disburse such grant payment to the Company in one lump sum payment within 30 days from the date the Company Facility receives its certificate of occupancy provided that the Company provides evidence satisfactory to the Authority and the County that (i) all the applicable permit fees have been paid as called for herein and the County confirms such payment has been made in full and cleared the bank; (ii) that the Company is responsible for paying such permit fees under the terms of its lease for the Company Facility exclusive of any payments for rent; and (iii) the Company has met all the applicable Company Commitments described in Section 3 of this Agreement.

4.2 The Authority's obligation to undertake the activities herein is specially conditioned upon the County providing funding on a timely basis; provided, however, that any County obligation is subject to appropriation by the County Board of Supervisors and availability of funds. Should the County fail to timely appropriate funds sufficient to fully finance the Authority's obligations hereunder and the Company is not in default as provided for in Section 6, then this Agreement shall terminate immediately, and the Company shall have no further obligations under this Agreement. The termination of this Agreement allowed for herein shall be the only legal remedy available to the Company against the County or the Authority for

failure of the County to appropriate funds and the Company hereby waives any right it may have to any and all other legal remedies which may otherwise be available to it.

4.3 The Authority agrees to provide the County Administrator, or the designee thereof, with copies of all documents related to this Agreement, including, but not limited to, documents related to the administration of this Agreement, and will keep the County Administrator or his designee fully and timely informed in writing of all matters related to the Agreement.

4.4 The Authority agrees that all funds transferred by the County to the Authority for the Incentive Grants shall be used only and exclusively to satisfy the obligations contained in this Agreement related to the Incentive Grants.

4.5 It is the intent of the parties not to impose upon the Authority any responsibility, duty or obligation other than what may be required to implement the Incentive Grants. Accordingly, the Authority does not assume any responsibility or liability whatsoever except as specifically stated herein. If litigation involving the Incentive Grants is initiated or expected to be filed against the Authority, the Authority shall immediately notify the County Attorney and County Administrator.

4.6 The Authority shall keep records of its financial transactions, if any, related to the Agreement in accordance with generally accepted accounting principles. The Authority shall also retain any and all records related to this Agreement for the period of time required by the applicable retention schedules set by the Library of Virginia pursuant to the Virginia Public Records Act. In any event, the Authority shall retain any and all records related to this Agreement for three years beyond the last day of the fifth year after the Incentive Period which is December 31, 2027.

## SECTION 5. REPRESENTATIONS OF THE COMPANY

5.1 The Company is empowered to enter into this Agreement, to be bound hereby, and to perform according to the terms hereof.

5.2 Any and all actions necessary to enable the Company to enter into this Agreement, and to be bound hereby, have been duly taken.

5.3 The person or persons executing or attesting the execution of this Agreement on behalf of the Company has or have been duly authorized and empowered to so execute or attest.

5.4 The execution of this Agreement on behalf of the Company will bind and obligate the Company to the extent provided by the terms hereof.

5.5 There exists no litigation pending against the Company which if determined adversely, would materially and adversely affect the ability of the Company to carry out its obligations under this Agreement or the transactions contemplated hereunder.

## SECTION 6. DEFAULT AND REPAYMENT OBLIGATION

6.1 Events of Default. Each of the following events (hereinafter called an "Event of Default") shall be a default hereunder by the Company as follows:

(a) Failure by the Company to maintain its corporate existence or the declaration of bankruptcy by the Company;

(b) Failure to comply with any of the Company Commitments set out in Section 3 of this Agreement.

6.2 In the case of an occurrence of an Event of Default, the Incentive Grant provisions of this Agreement shall terminate immediately and neither the County nor the Authority shall have any further obligation relating thereto and the Company shall no longer be eligible for any Incentive Grants hereunder, provided, however, that Company will be provided with prior written notice and thirty (30) days opportunity to cure for subsection 6.1(b). Notwithstanding the foregoing, the provisions of Section 6.3 below shall survive the termination of this Agreement and the Company shall not be relieved from its obligations to make any repayments for non-compliance until all of the Company's obligations have been satisfied.

### 6.3 Repayment Obligation.

6.3.1 Upon an Event of Default, the Company shall repay to the Authority any and all amounts paid to it pursuant to this Agreement upon written demand by the Authority to the Company for such repayment.

6.3.2 Repayment shall be due from the Company to the Authority within thirty (30) days of the date of the written demand to the Company from the Authority. Any moneys repaid by the Company to the Authority hereunder shall be repaid by the Authority to the County. The Authority shall have no responsibility for the repayment to the County of any sums hereunder unless said sums have been received by the Authority from the Company.

## SECTION 7. GENERAL TERMS AND CONDITIONS.

7.1 Entire Agreement; Amendments. This Agreement constitutes the entire agreement among the parties hereto and may not be amended or modified, except in writing, signed by each of the parties hereto. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. The Company may not assign its rights and obligations under this Agreement without the prior written consent of the County and the Authority. The Company shall immediately notify the County and the Authority of any merger or acquisition by or of the Company; however, no such merger or acquisition shall constitute or be considered an assignment by the Company hereunder.

7.2 Governing Law; Venue. This Agreement is made, and is intended to be performed, in the Commonwealth of Virginia and shall be construed and enforced by the laws of the Commonwealth of Virginia. Jurisdiction and venue for any litigation arising out of or involving this Agreement shall lie in the courts of the County of Spotsylvania, and such litigation shall be brought only in such courts.

7.3 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be an original, and all of which together shall be one and the same instrument.

7.4 Severability. If any provision of this Agreement is determined to be unenforceable, invalid or illegal, then the enforceability, validity and legality of the remaining provisions will not in any way be affected or impaired, and such provision will be deemed to be restated to reflect the original intentions of the parties as nearly as possible in accordance with applicable law.

7.5 Subject-to-Appropriations. All payments and other performances by the County and the Authority under this Agreement are subject to appropriations by the County Board of Supervisors. It is understood and agreed among the parties that the County and the Authority shall be bound hereunder only to the extent of the funds available or which may hereafter become available for the purpose of this Agreement. Under no circumstances shall the County's or the Authority's total liability under this Agreement exceed the total amount of funds appropriated by the County Board of Supervisors for the payments hereunder for the performance of this Agreement.

7.6 Public Disclosure.

7.6.1 Applicable Law. The parties to this Agreement acknowledge that records maintained by or in the custody of the County and the Authority are subject to the provisions of the Virginia Public Records Act, Va. Code §§ 42.1-76 through 42.1-90.1, and the Virginia Freedom of Information Act, Va. Code §§ 2.2-3700 through 2.2-3714 and thus are subject to the records retention and public disclosure requirements set forth in those statutes.

7.6.2 Challenges to Nondisclosure. If a party submitting records to the County or the Authority requests that those records not be disclosed under applicable law and the County or the Authority consequently denies a request for disclosure of such records based on the submitting party's request, and the County's or the Authority's denial of a request for disclosure of records is challenged in court, the submitting party shall indemnify, hold harmless and defend the County or the Authority, their respective officers and employees from any and all costs, damages, fees and penalties (including attorney's fees and other costs related to litigation) relating thereto.

7.7 No Waiver. Neither failure on the part of the County or the Authority to enforce any covenant or provision contained in this Agreement nor any waiver of any right under this Agreement shall discharge or invalidate such covenant or provision or affect the right of the County or the Authority to enforce the same right in the event of any subsequent default.

7.8 Effective Date of the Agreement. The effective date of this Agreement shall be the date upon which it has been fully executed by the parties following approval by County Board of Supervisors and by the Authority's Board of Directors.

7.9 No Partnership or Joint Venture. It is mutually understood and agreed that nothing contained in this Agreement is intended or shall be construed in any manner or under any circumstance whatsoever as creating and establishing the relationship of copartners or creating



or establishing a joint venture between or among any of the parties or as designating any party to the Agreement as the agent or representative of any other party to the Agreement for any purpose.

7.10 No Third Party Beneficiaries. Notwithstanding any other provision of this Agreement, the parties agree that (i) no individual or entity shall be considered, deemed or otherwise recognized to be a third-party beneficiary of this Agreement; (ii) the provisions of this Agreement are not intended to be for the benefit of any individual or entity other than the County, the Authority, or the Company; (iii) no other individual or entity shall obtain any right to make any claim against the County, the Authority, or the Company under the provisions of this Agreement; and (iv) no provision of this Agreement shall be construed or interpreted to confer third-party beneficiary status on any individual or entity.

7.11 Nothing herein shall be interpreted or operate as a pledge of the full faith and credit of the County, or shall bind the County to appropriate funds for expenditures related to this Agreement. The Authority cannot expend funds unless appropriated by the Board, and one Board cannot obligate a future Board. Therefore, notwithstanding any provision of this Agreement to the contrary, if the Board fails to appropriate funds for the continuance of this Agreement, the Agreement and all obligations hereunder shall automatically terminate upon depletion to the then currently appropriated or allocated funds, and in accordance with Section 4.2 of this Agreement.

7.12 This Agreement contains the entire understanding of the parties and supersedes all prior oral or written agreements. No party has relied on any oral or written representation of the others unless such representation is incorporated in this Agreement. The recitations contained in the preface to this Agreement are consideration therefor and incorporated therein.

7.13 None of the parties shall be responsible for the debts, liabilities and other financial obligations incurred by any other party in performing its obligations under this Agreement.

7.14 The Incentive Grants are all subject to the Company being current on all taxes and fees it owes the County for any reason. If the Company is delinquent on any payment of any tax or fee owed to the County, the Authority shall not make any disbursement of the Incentive Grants until the Company pays the delinquent amounts owed to the County.

7.15 In the event that any party to this Agreement shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of Force Majeure (defined below), then performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. For the purposes hereof, "Force Majeure" means a delay or failure caused by occurrences which are beyond the control of the party responsible for such performance including acts of God, fire, flood, earthquake, hurricane, or strike. "Force Majeure" shall also include any unavailability of labor or materials, delay or unavailability of utilities, or delayed governmental approvals, only if any of the foregoing unavailability and delays are a result of any of the occurrences set forth in the previous sentence.

SECTION 8. NOTICES.

Any notices required or permitted under this Agreement shall be given in writing, and shall be deemed to be received upon receipt or refusal after mailing of the same in the United States Mail by certified mail, postage fully pre-paid or by overnight courier (refusal shall mean return of certified mail or overnight courier package not accepted by the addressee):

If to the Company, to:

Crystal Johnson, Practice Administrator  
1708 Fall Hill Avenue, Suite 100  
Fredericksburg, VA 22401

with a copy to:

Walsh, Colucci, Lubeley & Walsh, P.C.  
4310 Prince William Parkway, Suite 300  
Prince William, VA 22192  
Attn: Charles E. McWilliams

If to the County to:

County Administrator  
9104 Courthouse Road  
Spotsylvania, VA 22553

with a copy to:

County Attorney  
9105 Courthouse Road  
Spotsylvania, VA 22553

If to the Authority to:

Chair, Spotsylvania County Economic Development Authority  
9019 Old Battlefield Boulevard  
Suite 310  
Spotsylvania, VA 22553

with copy to:

Hefty Wiley & Gore, P.C.  
100 West Franklin Street, Suite 300  
Richmond, VA 23220


Spotsylvania, VA 22553  
Attn: Brendan Hefty

IN WITNESS WHEREOF, the parties, by their duly authorized representatives, hereto agree and have executed this Performance Agreement as of the date first written above.

COUNTY OF SPOTSYLVANIA, VIRGINIA a political subdivision of the Commonwealth of Virginia

By: \_\_\_\_\_  
Mark Taylor, County Administrator

Approved as to Form:

By:  \_\_\_\_\_  
County Attorney

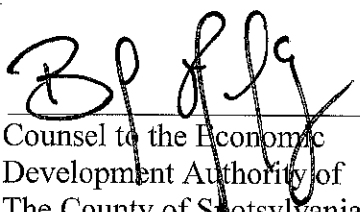
EAR, NOSE & THROAT & FACIAL PLASTIC SURGERY CENTER OF  
FREDERICKSBURG, P.C., a Virginia Professional Corporation

By:  \_\_\_\_\_  
Crystal Johnson, Practice Administrator

ECONOMIC DEVELOPMENT AUTHORITY OF THE COUNTY OF SPOTSYLVANIA,  
VIRGINIA, a political subdivision of the Commonwealth of Virginia

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

Approved as to Form:

By:  \_\_\_\_\_  
Counsel to the Economic  
Development Authority of  
The County of Spotsylvania