

Performance Agreement Between
Bay City Community Development Corporation
and Dustin Clements Enterprises, LLC

Lender: Bay City Community Development Corporation
1112 7th Street
Bay City, TX 77414

Borrower: 3D Efficiencies LLC, DBA Fit for Life
2200 Avenue F
Bay City, TX 77414

THIS PERFORMANCE AGREEMENT between BAY CITY COMMUNITY DEVELOPMENT CORPORATION a non-profit economic development corporation created by the City of Bay City, Texas, as authorized by the Development Corporation Act of 1979 (“Lender”) and 3D Efficiencies LLC, DBA Fit for Life, a Texas Limited Liability Company, (“Borrower”), is made and executed on the following recitals, terms and conditions.

WHEREAS, Borrower intends to improve its business with property improvements to include renovation of existing structures, site work, infrastructure, and construction at 2200 Avenue F, Bay City, Texas;

WHEREAS, Lender at its Board Meeting on October 30, 2023, with final approval on January 29, 2024, after notice and public hearing, approved a loan to Borrower which loan provides incentives for Borrower to purchase such materials and make such improvements; and

WHEREAS, Borrower understands and agrees that: (a) in granting, renewing, or extending any Loan, Lender is relying upon Borrower's representations, warranties, and agreements, as set forth and provided for in this Agreement; (b) the granting, renewing, or extending of any Loan by Lender at all times shall be subject to Lender's sole judgment and discretion; and (c) all such Loans shall be and shall remain subject to the terms and conditions as set forth in this Agreement.

SECTION 1. TERM.

This Agreement shall be effective as of February 27, 2024, and shall continue thereafter until all obligations of Borrower to Lender have been performed in full and the parties terminate this Agreement in writing, or on the Loan Maturity Date, unless terminated sooner under the provisions hereof.

SECTION 2. DEFINITIONS.

The following words shall have the following meanings when used in this Agreement. Terms not otherwise defined in this Agreement shall have the meanings attributed to such terms in the Texas Uniform Commercial Code.

a. Agreement. The word "Agreement" means this Performance Agreement, together with all exhibits and schedules attached to this Performance Agreement from time to time, if any.

b. Borrower. The word "Borrower" means Dustin Clements Enterprises, LLC, a Texas Limited Liability Company.

c. City. The word "City" means the City of Bay City, Matagorda County, Texas.

d. Employee. The word "Employee" means a full-time employee of Borrower, working a minimum of thirty-two (32) hours per week, who shall be employed in a position physically based at the Facility, and shall include a combination of part-time equivalent positions. The word "Part-time employee" means a part-time employee of Borrower, working a minimum of twenty (20) hours per week, on average, who shall be employed in a position physically based at the Facility, and shall include a combination of part-time equivalent positions.

e. Event of Default. The words "Event of Default" mean and include any of the Events of Default set forth below in the section entitled "Events of Default."

f. Facility. The word "Facility" means the construction project at 2200 Avenue F, Bay City, Texas 77414.

g. Indebtedness. The word "Indebtedness" means and includes without limitation all Loans, together with all other obligations, debts and liabilities of Borrower to Lender, or any one or more of them, as well as all claims by Lender against Borrower, or any one or more of them; whether now or hereafter existing, voluntary or involuntary, due or not due, absolute or contingent, liquidated or unliquidated; whether Borrower may be liable corporately or jointly with others; whether Borrower may be obligated as a guarantor, surety, or otherwise; whether recovery upon such Indebtedness may be or hereafter may become otherwise unenforceable.

h. Lender. The word "Lender" means the BAY CITY COMMUNITY DEVELOPMENT CORPORATION, a non-profit economic development corporation created by the City of Bay City, Texas, as authorized by the Development Corporation Act of 1979.

i. Loan. The word "Loan" or "Loans" means and includes any and all loans and financial accommodations from Lender to Borrower, whether now or hereafter existing, and however evidenced, including without limitation those loans and financial accommodations

described in this Agreement and described on any exhibit or schedule attached to this Agreement.

j. Loan Maturity Date. The word "Loan Maturity Date" means the date five years after the date the initial payment is due.

k. Note. The word "Note" means the non-interest bearing Promissory Note of even date herewith executed by and between the parties hereto in the principal amount of EIGHTY THOUSAND AND NO/100 DOLLARS (\$80,000.00), due upon demand and payable on or before the Loan Maturity Date.

l. Property. The word "Property" means the parcel occupied by Borrower and located at 2200 Avenue F, Bay City, Texas 77414.

m. Related Documents. The words "Related Documents" mean and include without limitation all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgages, deeds of trust, and all other instruments and documents, whether now or hereafter existing, executed in connection with Borrower's Indebtedness to Lender.

n. Required Jobs. The words "Required Jobs" means three (3) jobs for Part-time Employees or Part-Time Equivalent positions at the Facility.

SECTION 3. AFFIRMATIVE COVENANTS.

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

a. Loan Advances. Upon execution of this Agreement, Borrower shall receive a one-time Loan Advance EIGHTY THOUSAND AND NO/100 DOLLARS (\$80,000.00).

b. Borrower Obligations.

(1) Required Jobs. Borrower shall create the Required Jobs for the Project within six months of the date of this agreement, and the Required Jobs shall be maintained at the Facility for at least five years.

(2) Certificate of Completion. If required by Bay City building code regulations then in effect, Borrower shall obtain a Certificate of Completion for the improvements within one year of the date of this agreement, 2024, or within ten days of completion.

c. Compliance Certificates. Borrower shall provide Lender with compliance certificates when requested, such certificates specifying or reflecting:

- (1) an existing and valid Certificate of Completion for the new improvements to the Facility if required by Bay City building code regulations then in effect; and
- (2) an annual verification of the Required Jobs, indicating the number of positions and the total gross pay for all employees; this obligation shall cease upon fulfillment of the agreement by either final payment or loan forgiveness.

d. Performance. Borrower agrees to perform and comply with all terms, conditions, and provisions set forth in this Agreement and in all other instruments and agreements between Borrower and Lender.

SECTION 4. CESSATION OF ADVANCES.

If Lender has made any commitment to make any Loan to Borrower, whether under this Agreement or under any other agreement, Lender shall have no obligation to advance or disburse Loan proceeds if:

- (1) Borrower becomes insolvent, files a petition in bankruptcy or similar proceedings, or is adjudged bankrupt; or
- (2) during the pendency of an Event of Default.

SECTION 5. LOAN FORGIVENESS.

The Loan Advance shall be eligible for forgiveness annually after the completion of the renovation. The dollar amount of eligible forgiveness shall be calculated by multiplying (i) the number of Required Jobs that were cumulatively created during the first year following the renovation and which same Jobs remain at the Facility on the one year anniversary date, by (ii) \$5,333.33, up to, but not exceeding, \$16,000.00 per year for up to five years. Notwithstanding the provisions hereof and the obligations contained in the Note executed incident hereto, provided Borrower has not defaulted under Section 6 during the Term of this Performance Agreement and is not in default on the Loan Maturity Date, all advances not otherwise forgiven as eligible forgiveness of the Loan Maturity Date pursuant to the foregoing sentence shall be due and payable on the Loan Maturity Date.

SECTION 6. EVENTS OF DEFAULT.

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

a. Certificate of Completion. Failure of Borrower to receive a Certificate of Completion if required by Bay City building code regulations then in effect in accordance with Section 3(b)(2) above;

b. False Statements: Any warranty, representation or statement made or furnished to Lender by or on behalf of Borrower under this Agreement or the Related Documents that is false or intentionally misleading in any material respect, either now or at the time made or furnished;

c. Insolvency. Borrower's insolvency, appointment of receiver for any part of Borrower's property, any assignment for the benefit of creditors of Borrower, any type of creditor workout for Borrower, or the commencement of any proceeding under any bankruptcy or insolvency laws by Borrower or against Borrower and not dismissed within sixty (60) days of filing thereof;

d. Ad Valorem Taxes. Failure of Borrower to pay, prior to delinquency, all taxes and assessments levied or assessed upon Borrower's real property improvements or business personal property; and/or

e. Undocumented workers. Borrower certifies that Borrower 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, Borrower is convicted of a violation under 8 U.S.C. § 1324a (f), Borrower shall be in default hereunder;

f. Other Defaults. Failure of Borrower after written notice and thirty (30) days opportunity to cure, 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 Borrower to comply with or to perform any other term, obligation, covenant or condition contained in any other written agreement between Lender and Borrower, and specifically, should Borrower sublet or assign any of its interest in any portion of the Facility to any unrelated or unaffiliated entity without Lender's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed.

SECTION 7. EFFECT OF AN EVENT OF DEFAULT.

If any Event of Default shall occur and upon thirty (30) days written notice and opportunity to cure Borrower has not cured such Event of Default within 30 days of written notice, then all commitments of Lender under this Agreement immediately shall terminate (including any obligation to make Loan advances), and all amounts previously advanced under the Loan, not otherwise forgiven under Section 5, will become immediately due and payable, all without notice of any kind to Borrower, at the option of Lender, except for an Event of Default described in the "Insolvency" subsection above, in which case such acceleration shall be automatic and not

optional. Any Default which may be cured by the payment of money shall not extend beyond the 30-day period referenced herein. Any amounts due and payable shall not accrue interest until they are deemed to be past due as provided in the Note.

SECTION 8. INDEMNIFICATION.

Borrower shall indemnify, save, and hold harmless Lender, its directors, officers, agents, attorneys, and employees (collectively, the "Indemnitees") from and against:

- (1) any and all claims, demands, actions or causes of action that are asserted against any Indemnatee if the claim, demand, action or cause of action relates to tortious interference with contract or business interference, or wrongful or negligent use of Lender's loan advances by Borrower or its agents and employees;
- (2) any administrative or investigative proceeding by any governmental authority related to a claim, demand, action or cause of action in which Lender is a disinterested party;
- (3) any claim, demand, action or cause of action which contests or challenges the legal authority of Lender or Borrower to enter into this Agreement; and
- (4) any and all liabilities, losses, costs, or expenses (including reasonable attorneys' fees and disbursements) that any Indemnatee suffers or incurs as a result of any of the foregoing; provided, however, that Borrower shall have no obligation under this Section to Lender with respect to any of the foregoing to the extent that such claims or liabilities arise out of the negligence or willful misconduct of Lender or the breach by Lender of this Agreement.

If any claim, demand, action or cause of action is asserted against any Indemnatee, such Indemnatee shall promptly notify Borrower, but the failure to so promptly notify Borrower shall not affect Borrower's obligations under this Section unless such failure materially prejudices Borrower's right to participate in the contest of such claim, demand, action or cause of action, as hereinafter provided. If requested by Borrower in writing, as so long as no default beyond notice and cure periods or Event of Default shall have occurred and be continuing, such Indemnatee shall in good faith contest the validity, applicability and amount of such claim, demand, action or cause of action and shall permit Borrower to participate in such contest. Any Indemnatee that proposes to settle or compromise any claim, demand, action, cause of action or proceeding for which Borrower may be liable for payment of indemnity hereunder shall give Borrower 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 Borrower's concurrence thereto.

SECTION 9. BORROWER'S REPRESENTATIONS.

By execution hereof, the signatories warrant and represent that they have the requisite authority to execute this Agreement and the Related Documents and that the representations made herein, and in the Related Documents, are true and accurate in all respects.

SECTION 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 has been delivered to Lender and accepted by Lender in the State of Texas. Borrower agrees to submit to the jurisdiction of the courts of Matagorda County, State of Texas, and that venue is proper in said County. This Agreement shall be governed by and construed in accordance with the laws of the State of Texas and applicable Federal laws.

c. Employee Hiring, Materials and Supplies Purchase. Although not an Event of Default or a condition to any disbursement or advance of the Loan or any portion thereof, Lender requests that Borrower use good faith efforts to satisfy its need for all additional employees from Bay City residents and purchase all materials, supplies and services necessary to affect the construction and subsequent occupancy of the Property from Bay City merchants and businesses.

d. Community Involvement. Although not an Event of Default or a condition to any disbursement or advance of the Loan or any portion thereof, Borrower agrees to use good faith efforts to actively participate in community and charitable organizations and/or activities, the purpose of which are to improve the quality of life in Bay City, and to actively encourage its Bay City employees to be involved in such organizations and/or activities.

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. Notices. All notices required to be given under this Agreement shall be given in writing and shall be effective when actually delivered or deposited in the United States mail, first class, postage prepaid, addressed to the party to whom the notice is to be given at the address shown above. Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the

party's address. For notice purposes, Borrower agrees to keep Lender informed at all times of Borrower's current address.

g. 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.

h. Survival. All warranties, representations, and covenants made by Borrower in this Agreement or in any certificate or other instrument delivered by Borrower to Lender under this Agreement shall be considered to have been relied upon by Lender and will survive the making of the Loan and delivery to Lender of the Related Documents, regardless of any investigation made by Lender or on Lender's behalf.

i. Attorney's Fees and Costs. In the event of any action at law or in equity between the parties to enforce any of the provisions hereof, to the extent allowed by law any unsuccessful party to such litigation shall pay to the successful party all costs and expenses, including reasonable attorneys' fees (including costs and expenses incurred in connection with all appeals) incurred by the successful party, and these costs, expenses and attorneys' fees may be included in and as part of the judgment. A successful party shall be any party who is entitled to recover its costs of suit, whether or not the suit proceeds to final judgment.

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

k. Counterparts. This Agreement may be executed in counterparts, and such counterparts together shall constitute but one original of the Agreement. Each counterpart shall be equally admissible in evidence, and each original shall fully bind each party who has executed it.

l. Waiver. No failure or delay by a party to insist upon the strict performance of any term, condition or covenant of this Agreement, or to exercise any right, power or remedy hereunder shall constitute a waiver of the same or any other term of this Agreement or preclude such party from enforcing or exercising the same or any such other term, conditions, covenant, right, power or remedy at any later time.

m. Authority. The undersigned officers and/or agents of the parties hereto are the properly authorized officials and have the necessary authority to execute this Agreement on behalf of the parties hereto and each party hereby certifies to the other that any and all necessary resolutions extending said authority have been duly passed and are not in full force and effect.

This Agreement is executed by BAY CITY COMMUNITY DEVELOPMENT CORPORATION upon and by the authority of the BAY CITY COMMUNITY DEVELOPMENT CORPORATION by formal action taken at a properly constituted meeting on January 29, 2024.

BORROWER ACKNOWLEDGES HAVING READ ALL OF THE PROVISIONS OF THIS PERFORMANCE AGREEMENT, AND BORROWER AGREES TO ITS TERMS. THIS AGREEMENT SHALL BE EFFECTIVE AS OF February 27, 2024, which is the date of approval of the Resolution approving the project by the City of Bay City.

SIGNED AND APPROVED:

BAY CITY COMMUNITY DEVELOPMENT CORPORATION

By: _____
JESSICA RUSSELL, Its Executive Director

Date: _____

3D EFFICIENCIES LLC, DBA FIT FOR LIFE, Maker

By: _____
DUSTIN CLEMENTS, Manager

Date: _____