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November 5, 2013

**ATTORNEY-CLIENT PRIVILEGE**

City of Clovis, New Mexico  
Attn: Hon. David Lansford  
321 N. Connelly  
Clovis, New Mexico 88101

Re: Beauty Health & Science Innovations, Inc.

Dear Mayor Lansford and City Commissioners:

On or about August 1, 2013, the City of Clovis, New Mexico ("City") retained the Underwood Law Firm to (1) conduct an investigation into the economic incentive package, consisting of 2 forgivable loans, awarded to Beauty Health & Science Innovations, Inc. ("BHSI"), (2) determine if mistakes were made in the process of performing due diligence regarding the BHSI project, and (3) help develop future "best practices" to minimize the potential for future losses. Our investigation included reviews and analyses of both the written and unwritten economic development policies, procedures, and customs of the City, the Economic Development Tax Advisory Board ("EDTAB") and the Clovis Industrial Development Corporation ("CIDC").

During the course of this investigation, we have reviewed hundreds of pages of documents and interviewed over 20 people (some more than once). It is our opinion that we have been provided full access to the necessary information and all witnesses requested. Different witnesses had stories that appear inconsistent, but it is our opinion that the discrepancies were due to the passage of time and different levels of involvement in the process, and not dishonesty.

### **Planned Project**

In December 2011, Clovis city officials approved an economic incentive package consisting of up to \$3 million in interest-free forgivable loans to incentivize BHSI to locate a manufacturing facility in Clovis and create up to 350 jobs in the area over a five year period. This package was based on information provided by BHSI personnel and was the culmination of a courting and recruitment process undertaken by CIDC on behalf of EDTAB and the City. BHSI personnel informed CIDC Executive Director Chase Gentry that BHSI hoped to be operating in the Clovis area by April 2012.

BHSI personnel also informed Gentry that they hoped to begin renovating an existing Clovis facility in January 2012 and that BHSI would actually consist of two existing makeup manufacturers, COBE Chem Labs, which was in bankruptcy in California, and Z. Bigatti. Once combined, BHSI's Clovis facility would focus on both white label (generic) beauty-product manufacturing and research and development of new products.

BHSI personnel suggested to Gentry that the average annual wage for the jobs created by BHSI would be \$31,624, with entry level production positions starting at \$25,000. Eighty percent of the jobs would be in product production. There would also be approximately eight management-level positions paying between \$65,000 and \$250,000, and a number of administrative positions salaried between \$40,000 to \$75,000. All positions would offer benefits.

Gentry informed City Officials and the public that, according to BHSI, approximately six to eight outside professionals such as chemists and engineers would be brought to Clovis, but 98 to 99 percent of the company's employees would be picked from the local market. Dana Olson, CEO of EcoDev, a site selection and economic development analysis company working on behalf of BHSI, said a vast majority of the jobs such as shipping, warehouse, accounting and line production would be trainable positions.

BHSI personnel made it known to Gentry that site selection was a competitive process, and it also surveyed property in Florida and Texas.

### **Timeline of Events**

We constructed the following timeline of events from materials provided by the City, both voluntarily and at our request, along with interviews of City, EDTAB, and CIDC representatives. As mentioned previously, we believe that any discrepancies in individuals' accounts of the events below were merely the result of varying involvement and the passage of time.

1. May 4, 2000 – City Commission creates the Clovis Economic Development Advisory Board, a precursor to EDTAB, to enhance the City's economic

development efforts. The City Manager served as Chairman, and the duties of the Board were general in nature. **See Exhibit 1.**

2. December 20, 2001 – City Commission creates and designates EDTAB as the body responsible for reviewing applications for economic assistance and performing due diligence related to such applications. **See Exhibit 2.**
3. June 22, 2009 – City enters into a contract with CIDC for economic development activities.<sup>1</sup> **See Exhibit 3.**
4. September 14, 2011 – CIDC was contacted by Dana Olson of Ecodev about a pharma-cosmetic manufacturing company (BHSI) looking for a manufacturing location.<sup>2</sup> Mr. Olson informed CIDC the project had to be completed by the first week in December as a stipulation for Clovis to be considered.
5. October 18, 2011 – A reception to acquaint BHSI personnel with members of the Clovis community was held at Mayor Gayla Brumfield's home.
6. Last week of October, 2011 – EDTAB hosts a site visit with BHSI in Clovis. BHSI personnel also visited with members of CIDC during this trip. Mayor Brumfield and Commissioner Garza took a tour of the city with Brian Sperber, Owner and President of BHSI.
7. November 2, 2011 – BHSI submitted a Clovis/Curry County Application for Economic Development Project Assistance (the "Application") to City. **See Exhibit 4.**
8. November 7, 2011 – CIDC processed the Application.<sup>3</sup> CIDC requests an Economic Impact Report from the State of New Mexico as part of the review process.
9. November 10, 2011 – A conference call with Consultant Dana Olson, Brian Sperber, a BHSI finance consultant, Chase Gentry, CIDC Member Lee Malloy, and CIDC Member Kent Carruthers is held to review the Application and BHSI pro-formas.
10. November 11, 2011 - CIDC receives the Economic Impact Report back from the State of New Mexico.

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<sup>1</sup> The contract at different times purports to be between CIDC and the Curry County Chamber of Commerce. We understand any references to the Curry County Chamber of Commerce to be typographical errors.

<sup>2</sup> CIDC had a previous relationship with Mr. Olson, as CIDC had hosted Mr. Olson on site visits involving other economic development opportunities before the BHSI project.

<sup>3</sup> A list of CIDC members between September 2011 and December 2011 is included as **Exhibit 5.**

11. November 15, 2011 – A contract between Proessa and BHSI acknowledging a \$687,850.00 sale of equipment by Proessa to BHSI is presented to CIDC by BHSI. **See Exhibit 6.** The contract requires that the equipment be delivered to Clovis, New Mexico on or before January 31, 2011. The contract acknowledges payments from BHSI to Proessa as follows:
  - November 15, 2011 – Check No. 114 in the amount of \$135,853.00
  - November 15, 2011 – Check No. 115 in the amount of \$77,580.30
  - November 16, 2011 – Check No. 116 in the amount of \$50,000.00
  - November 17, 2011 – Check No. 117 in the amount of \$34,379.92
  - November 29, 2011 – Check No. 118 in the amount of \$46,111.78<sup>4</sup>

These amounts totaled \$343,925.00. The balance of \$343,925 was to be due on December 9, 2011.

12. November 16, 2011 – EDTAB held a meeting to consider whether the economic incentive package should be offered to BHSI. Mayor Gayla Brumfield, Commissioner Dan Stoddard, and City Manager Joe Thomas were also present at the meeting. A motion recommending that the incentive package be granted passed. The minutes reflect that Mr. Carruthers informed EDTAB that there was still due diligence to be performed. **See Exhibit 7.**
13. November 17, 2011 – The Clovis City Commission held a meeting during which the request for the approval of the BHSI incentive package and the City's authorization to enter into a Project Participation Agreement (“PPA”) with BHSI were introduced. The minutes reflect that EDTAB members unanimously recommended this project to the City Commission though Gentry stated that “... they have a little bit of work to do regarding due diligence for BHSI.” **See Exhibit 8.**
14. November 17, 2011 – CIDC requested that Brian Sperber submit a personal credit application and credit check authorization. CIDC created a personal credit application on November 17<sup>th</sup> and forwarded that application to BHSI. This

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<sup>4</sup> This amount differs from the amount shown for check no. 118 on the Banrural bank statement provided by Brian Sperber. It should also be noted that the bank statement provided to confirm these amounts is for a company named Promed Estetica, S.A., and not BHSI or Brian Sperber. **See Exhibit 17; see also Footnote 7.**

personal credit application was requested pursuant to Mr. Sperber's offer of a personal guarantee in favor of the City.<sup>5</sup>

15. November 23, 2011 – A draft of the PPA was sent to BHSI for review. Dana Olson notified CIDC personnel that Brian Sperber would be in Clovis to close on the 6<sup>th</sup> or 7<sup>th</sup> of December.
16. December 2, 2011 – Brian Sperber completed the personal credit application as requested by CIDC.
17. December 5, 2011 - Chase Gentry received the personal credit application from Dana Olson for Brian Sperber at 3:46 p.m. The application contains potentially harmful information such as references to past-due accounts. **See Exhibit 9.**
18. December 5, 2011 – A City Commission meeting is scheduled for 5:15 p.m. The Clovis City Commission was not informed of information contained in the personal credit application prior to or during its 5:15 p.m. meeting.
19. December 5, 2011 –Ordinance 1975-2011 is approved authorizing the PPA pursuant to the Local Economic Development Act and approving the Project Participation Agreement between BHSI and the City. The Commission meeting lasted approximately 7 minutes. **See Exhibit 10.**
20. December 6, 2011 – CIDC received Brian Sperber's personal credit report from one or more of the credit reporting agencies. **See Exhibit 11.** Like the credit application, the credit report contains potentially harmful information such as references to late payments, past-due accounts, and accounts in collection. Thereafter, the Clovis Police Chief was contacted and a National Crime Information Center ("NCIC") check on Brian Sperber was requested. CIDC receives no response to the NCIC request.
21. December 7, 2011 – CIDC Member Kent Carruthers, CIDC Member Lee Malloy, Mayor Brumfield, and City Manager Joe Thomas are contacted, presumably by Chase Gentry, in regard to the credit report. CIDC Member Kent Carruthers, City Manager Joe Thomas, City Attorney Dave Richards, Chamber of Commerce Representative Ernie Kos and Mayor Brumfield meet via conference call to discuss the credit report, the business credit, foreign credit references from Banrural (Brian Spurber's foreign bank), the Application, pro-formas, and project parameters with BHSI consultant Dana Olson. **See Exhibit 11.**

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<sup>5</sup> Although CIDC, EDTAB, and the City had previously considered similar economic incentives for other applicants, it is our understanding that the request of a personal credit application and credit check authorization was unique to this application process.

22. Brian Sperber arrived in Clovis on the night of December 7<sup>th</sup> for the anticipated closing of the agreement.
23. December 8, 2011 – Brian Sperber meets with CIDC Member Kent Carruthers, City Manager Joe Thomas, City Attorney Dave Richards, Chamber of Commerce Representative Ernie Kos, CIDC Executive Director Chase Gentry, and BHSI consultant Dana Olson (via phone). An additional meeting and conference call with Mayor Brumfield, Joe Thomas, David Richards, Chase Gentry, Kent Carruthers, and Brian Sperber is scheduled for 8:00 p.m. that evening. Brian Sperber reviewed and explained the project, pro-formas, and the business and personal credit reports with the group. Dana Olson and Brian Sperber discussed the Proessa equipment and down payments for the equipment.
24. December 8, 2011 – Kent Carruthers formulates additional conditions that Brian Sperber and/or BHSI must agree to before the incentive package will be issued. **See Exhibit 12.** Brian Sperber agreed to pay off the balance of the Proessa order in full. Dana Olson sent the Proessa Equipment invoices for the new equipment order to the group. City Attorney David Richards confirmed the Cobe bankruptcy closing requirements and verified the assets as security in favor of the City. Terms and Conditions of Disbursement of Funds with milestone dates are also discussed.
25. December 8, 2011 – BHSI and Brian Sperber, as Maker, and City, as Payee, executed a Promissory Note in the amount of \$2,000,000.00 (the “Note”). The Note is secured by a second mortgage and security agreement in favor of City. **See Exhibit 12.**
26. December 9, 2011 – Proessa invoices totaling \$411,350.00 and \$276,500.00, respectively, are due and payable on this date. **See Exhibit 13 and Exhibit 14.**
27. December 9, 2011 – the PPA is signed by BHSI and the City. The loan amount is personally guaranteed by Brian Sperber. **See Exhibit 15.**
28. December 9, 2011 – In his periodic update, the City Manager refers to the December 5 Special City Commission Meeting and the BHSI ordinance and PPA. The City Manager states that he and Mayor Brumfield spent the past couple of days working with Brian Sperber and CIDC regarding this project and writes, “... it appears that after a few “bumps” the project is once again moving forward.” **See Exhibit 16.**<sup>6</sup>

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<sup>6</sup> In separate interviews, interviewees confirmed that the “bumps” referred to in the December 9<sup>th</sup> update were the credit report and the credit application. It appears some Commissioners had an understanding of the credit problems, but others did not.

29. December 9, 2011 - Mr. Sperber reaffirms that BHSI hopes to close on the purchase of COBE Chem Labs next Monday (December 12, 2011) and begin the transition of company operations to Clovis by the end of March, 2012.
30. December 9, 2011 – Meetings with Brian Sperber, CIDC Consultant Dana Olson, City Manager Joe Thomas, City Attorney Dave Richards, Chamber of Commerce Representative Ernie Kos, CIDC Member Kent Carruthers, CIDC Executive Director Chase Gentry and Mayor Brumfield are held via conference call. A conference call with the finance consultant representing BHSI is also held to discuss project projections and timelines. A bank statement was received as proof of cash on hand and payments for new equipment.<sup>7</sup> **See Exhibit 17.** The City agreed to reimburse BHSI for equipment purchase upon submission of invoices and payment verification.
31. December 9, 2011 -- Bankruptcy closing was required by the bankruptcy judge by the close of business on December 9<sup>th</sup>. The City sent a letter from the Mayor to bankruptcy court stating the funds would be disbursed on Monday, December 12, 2011.
32. December 12, 2011 – A general affidavit is received from Brian Sperber asserting that he has placed orders with Proessa for equipment described in invoices A00031 (\$411,350.00) and A00032 (\$276,500.00) and confirming that he has paid \$687,850.00 for that equipment. This equipment was to be delivered to Clovis on or before January 31, 2011 (sic). **See Exhibit 18.** Sperber agreed to provide copies of the front and back of the checks used to pay for the equipment referenced in A00031 and A00032 on or before December 31, 2011.<sup>8</sup>
33. December 12, 2011 – CIDC receives a letter from Ana Avila with Proessa confirming that Mr. Sperber paid \$687,850 for the equipment described in invoices 0031 and 0032 on November 15, 2011<sup>9</sup> and December 12, 2011. **See Exhibit 19.**
34. December 12, 2011 – CIDC Executive Director Chase Gentry prepared a document justifying \$1,502,552.62 check to Aztec Abstract & Title. **See Exhibit 20.**
35. December 12, 2011 – The City of Clovis remits check no. 201249 to Aztec Abstract & Title in the amount of \$1,502,552.62. **See Exhibit 21.**

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<sup>7</sup> The bank statement was apparently not for an account owned or controlled by BHSI or Brian Sperber, but instead a company named Promed Estetica, S.A. Also, the address does not match the address for BHSI on the closing documents. Finally, check 118 is in a different amount than previously provided to CIDC. **See Footnote 4.**

<sup>8</sup> It does not appear that these requested documents were ever received. This is important in light of the different amounts attributed to check no. 118. **See Footnote 4; see also Footnote 7.**

<sup>9</sup> Other documents show a number of payments on November 15, 16, 17, and 29.

36. December 12, 2011 – Closing at Aztec Title on equipment and FrozFruit building. **See Exhibit 22.**
37. December 13, 2011 – CIDC Executive Director Chase Gentry submits a check request to Don Clifton for \$350,000.00 to reimburse BHSI for equipment. **See Exhibit 23.**
38. December 13, 2011 – Financing Statement in favor of City and relating to all equipment, machines, furnishings, raw material, inventory, work in process, products and accounts receivable of BHSI, now existing on herein after acquired is filed with the New Mexico Secretary of State. **See Exhibit 24.**
39. December 13, 2011 – City check no. 201251 to BHSI for reimbursement of \$350,000 for the equipment purchase is deposited into BHSI account at Wells Fargo. **See Exhibit 21.**

#### **The Official Meetings**

##### ***EDTAB Meeting, November 16, 2011***

EDTAB met on Wednesday, November, 16, 2011 to discuss a request from Chase Gentry for approval of a forgivable loan to BHSI. EDTAB members attending the meeting were:

- Mr. Jay Neff, County
- Mr. Lee Malloy, Industry
- Mr. Kent Carruthers, CIDC
- Mr. Jim Sours, Banking
- Mr. David Essex, Utilities
- Commissioner Dan Stoddard
- Mayor Gayla Brumfield
- Mr. Robert Telles, District 3
- Mr. Gene Hendrick, District 2
- Mr. Raymond Mondragon, District 4
- Mr. Tom Martin, Planning & Zoning

Absent members were:

- Mr. Blake Curtis, County
- Mr. Rube Render, District 1

Also present at the meeting were:



- Mr. Joe Thomas, City Manager (Chair)
- Ms. Clair Burroughes, Leg. & Com Dev. Dir.
- Mr. Chase Gentry, CIDC Executive Director
- Ms. Ernie Kos, Chamber of Commerce
- Clovis News Journal

Mr. Gentry informed EDTAB that a consultant (EcoDev) contacted CIDC regarding a potential project approximately eight weeks prior.<sup>10</sup> There was a site visit with BHSI, CIDC and "a few other folks" in mid to late October, 2011.

Mr. Gentry noted that BHSI intended to take two existing make-up manufacturing companies and combine them into one company with the manufacturing process to take place in Clovis. A sense of urgency was relayed regarding the purchase and movement of the COBE, but the minutes do not reflect any mention of its current bankruptcy. BHSI had located a potential building in Clovis to house its operation after moving to New Mexico, but Mr. Gentry withheld the location. Mr. Gentry did note that CIDC had been performing due diligence on the BHSI project.

Mr. Carruthers, a CIDC and EDTAB member, noted that BHSI had invested over \$1,000,000 in the project, which he felt was a requirement for moving forward with the project. CIDC had reviewed an appraisal of BHSI assets to pledge against the forgivable loan from the City. BHSI was also willing to offer a second mortgage on the Clovis property to be purchased at a later date.

Mayor Brumfield informed EDTAB that she had been in contact with the Clovis realtor involved in the building transaction and reported that the deal would eventually be "put together". She also reported that the persons involved to that point "... felt good about what we've seen so far." Commissioner Mondragon discussed his interactions with Mr. Sperber during visits and conversations with Mr. Sperber and noted he was impressed with what he had to offer.

Concern was raised by an EDTAB member related to prior failures to monitor previous projects to ensure that applicants actually met the requirements of their participation agreements. Mr. Gentry noted a change in policy that required the project participants to submit the necessary documentation to CIDC or be in default of their agreement. Mr. Gentry also noted that the BHSI project "moved pretty fast" because it was "on a tight timeline." The goal was to have EDTAB recommend the project to the City on November 16, 2011 and have the ordinance introduced by the City Commission on November 17, 2011. Despite the recommendation and assumed

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<sup>10</sup> It appears that that the initial contact between CIDC and personnel working on behalf of BHSI occurred on or about September 14, 2011.

introduction, there would still need to be further due diligence, including a final determination/verification of BHSI funds.<sup>11</sup>

EDTAB Board Members Mr. Mondragon and Mr. Carruthers made the First and Second Motions to approve a zero interest forgivable loan of \$2,000,000.00 initially and \$1,000,000 after BHSI reached the 300 employee mark for a period of at least 12 months for development of a manufacturing facility in Clovis. The Motion passed by acclamation.

*City Commission Meeting, November 17, 2011*

The City Commission met on Thursday, November 17, 2011 to discuss Chase Gentry's request for introduction of an ordinance approving the BHSI project and authorizing City to enter into a PPA between BHSI and City. Commission Members attending the meeting were:

- Mayor Gayla Brumfield
- Mayor Pro Tem Len Vohs
- Commissioner Fred Van Soelen
- Commissioner Juan Garza
- Commissioner Randy Crowder
- Commissioner Robert Sandoval
- Commissioner Chris Bryant
- Commissioner Fidel Madrid
- Commissioner Dan Stoddard

Also present at the meeting were:

- Mr. Joe Thomas, City Manager
- Ms. Clair Burroughes, Leg. & Com Dev. Dir.
- Mr. Chase Gentry, CIDC Executive Director
- Mr. Donald Clifton, Budget & Internal Operations Director
- Mr. Clint Bunch, Public Works Director
- Members of the Public
- News Media

Mr. Gentry advised the City Commission regarding the potential BHSI project. He noted BHSI would be investing approximately \$7,000,000 in its proposed Clovis operation with 120 employees the first year with expansion to 350 jobs over five years. He noted the job guarantee associated with any agreement would extend 10 years. Mr. Gentry also reported that EDTAB unanimously recommended this project for approval. There was again a note that there was "a quick time limit to make this happen" but no mention was made of the California bankruptcy.

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<sup>11</sup> It does not appear that any such verification was done. As discussed in **Footnote 7**, bank statement relied upon appears to be for another company.

The minutes do not mention any investigation by or report from EDTAB, but do note that CIDC had been working with BHSI to locate a business in Clovis.

The Commission was not provided copies of the application/proposal received from BHSI, but Mr. Gentry said he would provide it later.<sup>12</sup> Mr. Gentry also advised there was "a little bit of work to do regarding due diligence for BHSI."<sup>13</sup>

Mayor Brumfield and Commissioner Van Soelen complimented CIDC for their work. The introduction of the ordinance was unanimously approved. Mayor Pro Tem Vohs moved for approval, which was seconded by Commissioner Bryant before being approved unanimously.

***December 5, 2011 City Commission Meeting***

The City Commission met on Monday December 5, 2011 to discuss a request by City Attorney David Richards for approval of PPA between BHSI and City. Commission Members attending the meeting were:

- Mayor Pro Tem Len Vohs
- Commissioner Juan Garza
- Commissioner Robert Sandoval
- Commissioner Chris Bryant
- Commissioner Dan Stoddard

Also present at the meeting were:

- Mr. Joe Thomas, City Manager
- Ms. Clair Burroughes, Leg. & Com Dev. Dir.
- Mr. Chase Gentry, CIDC Executive Director
- Mr. Donald Clifton, Budget & Internal Operations Director
- Mr. Clint Bunch, Public Works Director
- Members of the Public
- News Media

The PPA had been introduced at the November 17, 2011 Commission meeting with proper notice in the Clovis News Journal. The City Manager approved/recommended the request. It appears the meeting lasted approximately seven minutes and resulted in the approval of Ordinance 1975-2011 authorizing the Project Participation Agreement and approval of Project Participation Agreement between City and BHSI.

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<sup>12</sup> There is no evidence that the application was provided to the City Commission.

<sup>13</sup> There is no evidence of further due diligence prior to the December 5, 2011 approval of the project.

## RELEVANT PARTIES

### EcoDev, LLC

Brian Sperber was introduced to Clovis by Dana Olson, founder and COO of EcoDev, LLC, based in Bloomington, Minnesota. According to the Minneapolis-St. Paul Business Journal, EcoDev is “a lifeline for companies facing layoffs or going out of business”. Acting as a site advisor, EcoDev helps these clients choose a new location by evaluating labor pools, tax incentives, and geographical considerations. Mr. Olson was familiar with the favorable aspects of Clovis, having had contact with CIDC on other potential projects in past years.

Although CIDC had a prior relationship with Mr. Olson, EcoDev actually worked for BHSI. This fact does not appear to have been well known, as multiple interviewees were supportive of this project based on Mr. Olson's involvement. Certain people even felt he had an obligation to, and in fact had performed the due diligence in this project. Mr. Olson's role in this matter could have been made more clear to the different groups reviewing the proposed project.

### Economic Development Tax Advisory Board

EDTAB was created to replace the Economic Development Finance Review Committee at the recommendation of City Administration. **See Exhibit 2.** City Manager Joe Thomas was the chairman of EDTAB between September and December, 2011. Duties and responsibilities of EDTAB include:

- a) Obtain information, analyze financial data, and report to City Commission concerning any industrial, economic, commercial or business project requesting or applying for financial assistance from the City;
- b) Require/accept a detailed application in writing, on a form approved by EDTAB;
- c) Require an application fee;
- d) Commence an investigation of the applicant and the matters contained in the application, including at a minimum:
  - i) The legal status of the project;
  - ii) The financial status of the applicant and its ability to perform project;
  - iii) The financial viability of the project;

- iv) Verification that project will serve the public benefit by providing its citizens with job opportunities and a source of additional income;
- v) The proposed technology of the project;
- vi) Upon completion of the investigation, formulate a written report concerning the application for submission to the City Commission:
  - a) Report shall include detailed findings of EDTAB;
  - b) Shall recommend to the City Commission whether financial assistance should be provided;
- e) If EDTAB recommends financial assistance be provided, the written report will be accompanied “by a suggested form of inducement resolution” inviting the establishment of the project.
- f) If the City Commission determines to give financial assistance, the City Commission shall advise EDTAB of the Commission’s decision.

As set forth above, EDTAB is a committee of City and has been assigned numerous obligations related to “due-diligence” of companies requesting financial assistance from the City, including a comprehensive investigation of the applicant and the project. Upon review of the records and interviews with numerous individuals, it appears undisputed that EDTAB failed to perform its required duties. Instead, these obligations were performed by certain individuals employed by or related to CIDC (a private company).

Interviewees revealed that certain members of EDTAB had knowledge of the BHSI project almost from its inception in September 2011. However, that knowledge appears to come from those individuals with CIDC involvement or relationship(s). For those persons without such relationships, their first knowledge of BHSI was November 16, 2011 at the lawfully called meeting of EDTAB. At the meeting, an oral presentation was made by Chase Gentry as a representative of CIDC in favor of funding the project. An oral motion of support was made, and the EDTAB Board Members unanimously voted to recommend the project to the City Commission.

During our investigation, we learned of no evidence supporting the premise that EDTAB performed its legal duties regarding the required investigation. Further, we found no evidence that EDTAB formulated a written report with its detailed findings and recommendation. Finally, EDTAB did not prepare a “suggested form of inducement resolution” inviting the establishment of the BHSI project. Indeed, it appears that EDTAB took no official action other than to

recommend that the City approve an incentive for the BHSI project. EDTAB's failure to discharge its lawful duties was a producing cause of the City's loss.

The Clovis Industrial Development Corporation

CIDC is a privately run non-profit group without any of the responsibilities or obligations of a governmental entity. CIDC began several decades ago to promote economic development in Clovis at a time when such activities were not coordinated under the authority of a governmental unit. CIDC employs a chief executive office, which is financed in part by an annual contribution from the City under the terms of a Professional Services Contract. **See Exhibit 3.** Interviews revealed that CIDC makes recommendations to EDTAB, and ultimately the City, on economic development projects. However, these recommendations are not the result of Board action by CIDC, as these matters are not taken before the CIDC Board as a whole.

The Professional Services Contract does not require or seem to even contemplate that CIDC will perform due diligence related to potential economic development assistance for potential projects. Further, it does not require CIDC to perform any post-award monitoring, investigation, or follow-up on publicity funded projects. Interviews with CIDC Board Members and employees confirm that no such obligations exist pursuant to the contract.

In spite of having no duty to perform due diligence in economic development projects, CIDC personnel have asserted in correspondence reviewed during this investigation that CIDC "...acts as the agent and representative of the City of Clovis in economic development matters." **See Exhibit 25; see also Exhibit 7.** While there is no statutory, legal or contractual designation of this agency/representation for the benefit of the City, it appears uncontroverted that CIDC regularly acts as the agent and representative of the City on economic development matters and performs whatever due diligence is done on potential economic development projects.

The BHSI project was no different, with the due diligence in this matter being conducted almost exclusively by persons affiliated with CIDC, including CIDC Director Chase Gentry. The initial conversations with Dana Olson, meetings with Brian Sperber, and review of the application and credit reports were conducted by CIDC representatives. Of course, the former Mayor was also involved in the BHSI project, along with one or more Commissioners and the City Manager at different meetings and events.

Of particular concern in this matter is the fact that the City Commission as a whole was not informed by CIDC of the serious concerns raised by the personal credit application and credit report of Brian Sperber. The Application revealed an income of \$15,000 per month (unverified), the lack of a savings account, \$253,000 in cash on hand (interesting in light of no savings account), Guatemalan land that he had owned for over 10 years (but with a representation that he had lived in Guatemala for only one year while working for a Guatemalan employer for two years), and remaining unverified assets of "closely held securities", "notes and contracts receivables" and "father's probate" totaling over \$7,000,000.00. We learned of no verification or even due diligence by CIDC centering on the actual existence of these assets.

The personal credit application submitted by Mr. Sperber was equally concerning regarding creditors and debt. Despite the supposed enormous wealth set forth above, Brian Sperber admitted he was not current on his monthly payments for at least one vehicle and was not current on his Capitol One Credit Card, which had monthly minimum payments of \$150. Mr. Sperber did not answer written inquiries into whether he was current on his other credit accounts, which included a Juniper Credit Card and Ally Financial account. We are aware of no evidence that CIDC or any other entity followed up on these missing answers. Mr. Sperber apparently eased the concerns that were raised by telling CIDC and City personnel that he would occasionally receive bills from U.S.-based creditors late because he lived outside of the United States. This excuse is difficult to accept in light of on-line access to bills and electronic payment options. Also, Mr. Sperber signed an affidavit, notarized by Chase Gentry, in which he claimed to be a resident of Miami Dade County, Florida. We also note that the credit report obtained by CIDC showed a number of other accounts with histories of late payments and collections.

The personal credit application was received immediately before the December 5, 2011 Commission meeting where the Project was approved. CIDC did not share the information with the Commission before their vote. At least one elected City official learned of the troubling information in the days after the vote, yet before the money was dispersed. The CIDC representatives, City official(s) and City employee(s) do not appear to have shared the information with the rest of the Commission, other than to reference certain “bumps” which had been resolved. **See Exhibit 16.**

Multiple people interviewed relayed that they had great faith in the CIDC review and decision involving the credit information because of the knowledge and experience of CIDC member Kent Carruthers, who had reviewed the information. Indeed, it seems that everyone involved in this process holds Mr. Carruthers (and his opinion) in high regard. However, interviews and documentation do not reveal Mr. Carruthers' absolute comfort with the decision to grant the incentive package to BHSI, suggesting that most if not all of the individuals involved maintained a “mission mindset” regarding the need to approve the project.

It is clear that CIDC had no official responsibility to perform due diligence involving economic development activities. However, because of its agency relationship with the City, its assumption of due-diligence responsibilities, and its members' collective knowledge that both EDTAB and the City were relying on its representatives to perform what due diligence was done, CIDC had an obligation to timely perform any due diligence and get relevant information to the Commission. It does not appear this was done. CIDC's failure to reasonably discharge the duties that it had assumed and share its knowledge of negative information were producing causes of the City's loss.

#### The City Commission

It is undisputed that at least some of the City's elected officials knew of the developing opportunity with BHSI. More than one city official was present at receptions, meetings, and on

conference calls as the matter developed. The November 17, 2011 Commissioner meeting where the matter was introduced took place within 24 hours of the EDTAB meeting recommending the project be funded. This decision to have back-to-back meetings was supposedly necessary because of the perceived rush being pushed by the bankruptcy court in California. The fact that the person or entity requesting economic development funds wants to expedite their request is not a proper basis to forego the legal requirements related to investigating the requestor of public funds. This is especially true in light of CIDC's concern that there was still due diligence to be performed.

It should have been obvious to the City Commission that EDTAB had not formulated a written report with its detailed findings and recommendation as required by City Ordinance. It should also have been obvious that EDTAB failed to forward a "suggested form of inducement resolution" inviting the establishment of the BHSI project. The City Commission acted on the BHSI project twice without the benefit of the required EDTAB investigation, written report, and proposal. In fact, the Commission was told on November 17, 2011 that there was still due diligence to be completed, but voted to approve the project on December 5, 2011 in a seven-minute meeting with little or no follow-up. Had the City Commission required EDTAB to properly investigate and report on BHSI and Brian Sperber, it is possible that the very real concerns present and developing might have been exposed. The City Commission's failure to require EDTAB to fulfill their lawful duties was a producing cause of the City's loss.

Gayla Brumfield

Ms. Brumfield served as Mayor of the City of Clovis in 2011. In addition to being Mayor, she was a 2011 member of CIDC and EDTAB. As a member of CIDC and EDTAB, Ms. Brumfield assuredly knew that EDTAB had not undertaken its investigatory duties involving BHSI and its proposed project.<sup>14</sup> It is our understanding that Ms. Brumfield was involved with the BHSI project from its inception. Ms. Brumfield's failure to notify the City Commission that EDTAB had not discharged its investigatory duties and fully share her knowledge of what the credit application and credit report had revealed was a producing cause of the City's loss.<sup>15</sup>

Joe Thomas

Mr. Thomas is a long time City employee who now serves as City Manager. He was a 2011 member of CIDC, 2011 Chairman of EDTAB, and served as the City Manager for Clovis at the time of the BHSI application and the resulting project award. Under the Clovis City Code, the City Manager shall be responsible to the governing body of the City for the proper administration of all the affairs of the City. He shall make recommendations to the City Commission on all matters concerning the welfare of the City, and in all cases, except when clearly undesirable or unnecessary, it shall be the duty of the City Commission to request the

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<sup>14</sup> As discussed elsewhere in this Report, whatever due diligence was done regarding Brian Sperber and BHSI was done by persons affiliated with CIDC.

<sup>15</sup> As discussed above, the City Commission should have realized that EDTAB had not discharged its duties.



opinion of the City Manager on any proposed measure. The City Manager shall have a seat but no vote at every meeting of the governing body.

As City Manager, Mr. Thomas recommended to the City Commission that they approve the BHSI project. **See Exhibit 10.** Mr. Thomas undoubtedly knew that EDTAB, which he chaired, had not discharged many, if any, of its lawful duties regarding the investigation of BHSI and its proposed project. Importantly, no Board action was ever taken by CIDC as to any recommendation involving the BHSI project. However, our interviews reveal that Mr. Thomas was aware of and involved with the BHSI project from the beginning.

Several interviewees stated that the City Commission should have been told of the serious concerns present in the credit application and credit report of Brian Sperber. These problems certainly cast doubt on Mr. Sperber's claims that he was a multi-millionaire international businessman. Based on excerpts from the City Manager Updates (and others including the Mayor at the time), Mr. Thomas was aware of concerns and played them off as "bumps". Although this information was apparently learned after approval of the project, it was known before funding of the project. One can reasonably assume that the City Commission would have, at a minimum, requested further investigation prior to funding if they had all of the information known to Mr. Thomas. The failure to share this information with the Commission was a contributing cause of the loss sustained by the City.

It is important to the authors of this letter that anyone reading it understand that Mr. Thomas' lack of deeper involvement in the investigation of BHSI does not appear to be a failure to fulfill his job duties. Despite the ordinance creating EDTAB, interviewees unanimously informed us that this project was investigated, reported, and approved like every other project in memory. Put another way, any involvement and responsibility related to EDTAB and the City Manager have been usurped, by agreement or other understanding, by CIDC. CIDC personnel (not the CIDC Board) investigate, make the recommendation to EDTAB, and carry it forward to the City Commission.

### **Collateral Information Regarding Brian Sperber**

Information relating to Brian Sperber and his companies may be found online. A cursory internet search reveals involvement in the following companies:

AcuMedSpa Holdings, Inc. filed in Florida  
Consumer Care of America, LLC, filed in Florida  
Duramed Consulting Services, LLC, filed in Florida  
Laserperfect Acquisition, LLC, filed in Florida  
Limitless Beauty Partners, LLC, filed in Florida  
Organic Plant Health, Inc., filed in Nevada  
QX Bio Tech Group, Inc., filed in Nevada

There is also information pertaining to AcuMedSpa Group, LLC which filed for bankruptcy in September 2010. The bankruptcy was later dismissed when the company failed to file complete schedules as required by the Court. There is no mention of Promed Estetica, S.A. which is the name on the bank statement provided by BHSI and which is also listed as Mr. Sperber's employer in his credit application.<sup>16</sup> **See Exhibit 9.**

There was also a discussion related to Brian Sperber on an online forum called Investors Hub in 2010. Apparently a poster was concerned about Sperber's manipulation of stock in Organic Plant Health in May 2010. The poster said that Sperber lied to him about his shares in the company. Another poster added that it was "rumored he comes from VERY big money" and that Sperber might be worried about saving face in a very successful family. The last poster in the chain questioned whether the "wealthy family" was in Guatemala because the domain for the internet page for AcuMedSpa.com was registered by Brian Sperber giving an address in Guatemala as 4 Ave 22-22 Zona 14, Guatemala City, NA 01014, Guatemala.

### Conclusions

1. Economic development by the City is regularly handled by and through CIDC as an agent of City.
2. While due diligence involving economic development applicants is not a part of CIDC responsibilities, CIDC and/or CIDC personnel regularly undertake those activities.
3. Economic development projects are not voted on by the CIDC Board.
4. EDTAB does not fulfill its obligations for investigating and performing due diligence as required under Section 2.50.035 (c) of Ordinance 1686-2001.
5. Because EDTAB does not investigate applicants, it likewise does not submit the required written reports to the City Commission.
6. CIDC, EDTAB, and the City have an unusually high number of overlapping representatives, which control the investigation of potential economic development projects from the request for funds through the disbursement of funds.
7. Had CIDC, EDTAB and the City performed their legal, contractual, and assumed duties and obligations, the chance of loss of public funds would have been greatly decreased.

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<sup>16</sup> Interestingly, the same company name shows up on a Clovis real estate broker's website as the purchaser of the FrozeFruit building. However, we have confirmed that the deed grants that property to BHSI, and not Promed Estetica, S.A. **See Exhibit 22.**

8. The City Commission's failure to require EDTAB to fulfill their lawful duties was a producing cause of the City's loss.
9. CIDC's failure to reasonably discharge its assumed duties was a producing cause of the City's loss.
10. EDTAB's failure to discharge its lawful duties was a producing cause of the City's loss.
11. Joe Thomas' failure to ensure EDTAB fulfilled its lawful duties and to timely share information known by him with the City Commission were producing causes of the city's loss.
12. Gayla Brumfield's failure to ensure EDTAB fulfilled its lawful duties and to timely share information known by her with the City Commission were producing causes of the city's loss.

#### **Recommendations**

1. Have a specific list of information to be sought when performing due diligence. A sample list is provided in **Exhibit 26**.
2. Limit or eliminate individuals' service on multiple boards or governing bodies, notably EDTAB, CIDC, and the City Commission.
3. Designate a city employee to oversee the application, review, and recommendation process.
4. Rules governing CIDC and EDTAB activities in these situations are in place. Following the rules as written, or changing them to a form that will be followed, likely would have prevented the loss sustained by the City in this instance.
5. EDTAB should not make recommendations on a project until due diligence is completed.
6. The City Commission should not introduce or vote on ordinances related to an economic development project until all due diligence has been completed.
7. There should be a paper trail of supporting documentation for any proposed project.
8. Rather than pursue reimbursement options with applicants, pay vendors directly.

### **Other Information**

As mentioned previously, information relating to Brian Sperber and his companies may be found online. We viewed the following sites when accessing information on Brian Sperber and/or BHSI:

- a) <http://www.marketwired.com/press-release/acumedspa-holdings-inc-is-proud-announce-appointment-dr-ronald-lubetsky-as-its-medical-1199881.htm>
- b) <http://www.trademarkia.com/map/hyper-dry-76562211.htm>
- c) <http://www.florida-companies-info.com/duramed-consulting-services-llc-26gmb/>
- d) <http://www.hotstockmarket.com/t/73657/amsz-accumedspa-holdings-inc/120>
- e) <http://www.dandb.com/businessdirectory/limitlessbeautypartnersllc-miami-fl-8491662.html>
- f) [http://investorshub.advfn.com/boards/read\\_msg.aspx?message\\_id=60139187](http://investorshub.advfn.com/boards/read_msg.aspx?message_id=60139187)
- g) [http://yahoo.brand.edgar-online.com/EFX\\_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=8336874-285943-290379&SessionID=nn4IFjaYAmHy2D7](http://yahoo.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=8336874-285943-290379&SessionID=nn4IFjaYAmHy2D7)
- h) <http://www.lawinsider.com/contracts/CpfID8cBCvSGDKf1pdlwv/organic-plant-health-inc/0/2011-09-07>

### **Conclusion**

Hindsight is a powerful and sometimes misleading tool to measure the success or failure of any process, particularly economic development efforts. The BHSI matter is no different. Mistakes were made by all involved, but the evidence suggests that many of these mistakes had become institutionalized through the years and were not tied to deliberate misconduct by any actor or entity in this matter.

Many interviewees shared the sentiment that New Mexico law restricts a city's ability to fully investigate economic development applicants. True or not, laws and local codes are in place and must be followed. This was not done in this case, and it is our opinion that all parties discussed herein share that blame.

Importantly, there is no way to rank blame in this matter through some type of hierarchy. Had any one person or entity stood up and demanded the rules that were in place at all times during this process be followed and due diligence be finished before recommendations were made and acted upon, the result might have been different. However, due to the overlap between

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board members, it also seems possible that the same people would have acted similarly if such a demand was made. Thus, the result might not have been different after all.

There is certainly evidence that people involved had concerns regarding the viability of this project, as personal guarantees were required and credit checks performed. However, no change in course was proposed or followed once the additional information was received. One must wonder how bad the credit application and report would have had to be to require a change in course. It simply appears that the potential promised upside of this project blinded all involved to the greater than usual risk and a "mission mindset" developed to push the project forward to funding. All of these concerns were exacerbated by the short timeline placed on this application approval. Had more time existed, some of these concerns might have resolved.

Finally, we heard many criticisms that the City was slow to respond to problems with the project, and a quicker response once deadlines were missed might have resulted in recovery of the distributed funds. We were not asked to explore this point. However, we doubt that quicker action to recover the funds would have resulted in greater recovery. Once the money was distributed, any meaningful recovery was simply unlikely.

Thank you for the opportunity to assist the City of Clovis on this matter. Should you have follow-up questions or thoughts, please contact us. We have prepared this document under the auspices of the attorney client privilege, but it is the Commission's right to decide whether it should be released to others. However, please be aware that, once it has been released to someone not covered under that privilege, others will likely be entitled to review it.

Sincerely,

The Underwood Law Firm, P.C.

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

  
Slater Elza

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

  
Audie Sciumbato

## Appendix A

### Corrections

Every effort was made to ensure that the details contained in this report are accurate. However, some discrepancies have been discovered and corrected since this document was first made available to City personnel. An exhaustive list of those corrections, made on November 7, 2013, and November 12, 2013, is included in this Appendix A.

1. November 7, 2013 - Item 28 in the Timeline of Events originally stated:

"December 9, 2011 – A Special Commission meeting is held to address the BHSI ordinance and PPA. Mayor Brumfield and Chase Gentry confirm that they spent the past couple of days working with Brian Sperber and CIDC regarding this project. Language included in notes states, "... it appears that after a few "bumps" the project is once again moving forward." **See Exhibit 16.** *Footnote reference omitted*

Item 28 in the Timeline of Events has been corrected to state:

"December 9, 2011 – In his periodic update, the City Manager refers to the December 5 Special City Commission Meeting and the BHSI ordinance and PPA. The City Manager states that he and Mayor Brumfield spent the past couple of days working with Brian Sperber and CIDC regarding this project and writes, "... it appears that after a few "bumps" the project is once again moving forward." **See Exhibit 16.** *Footnote reference omitted*

2. November 7, 2013 - Footnote 6 originally stated:

"In separate interviews, interviewees confirmed that the "bumps" referred to in the December 9<sup>th</sup> Special Commission Meeting were the credit report and the credit application. It appears some Commissioners had an understanding of the credit problems, but others did not."

Footnote 6 has been corrected to state:

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In separate interviews, interviewees confirmed that the “bumps” referred to in the December 9<sup>th</sup> update were the credit report and the credit application. It appears some Commissioners had an understanding of the credit problems, but others did not.”

3. November 7, 2013 - The list of attendees at the December 5, 2011 City Commission Meeting, found on Page 11, originally stated:

- Mayor Gayla Brumfield
- Mayor Pro Tem Len Vohs
- Commissioner Fred Van Soelen
- Commissioner Juan Garza
- Commissioner Randy Crowder
- Commissioner Robert Sandoval
- Commissioner Chris Bryant
- Commissioner Fidel Madrid
- Commissioner Dan Stoddard

The list of attendees at the December 5, 2011 City Commission Meeting has been corrected to read as follows:

- Mayor Pro Tem Len Vohs
- Commissioner Juan Garza
- Commissioner Robert Sandoval
- Commissioner Chris Bryant
- Commissioner Dan Stoddard

4. November 7, 2013 - The spelling of Mayor Brumfield's name on Page 16 has been corrected from "Brufield" to "Brumfield".

5. November 12, 2013 - The spelling of Mr. Render's first name on Page 8 has been corrected from "Ruhe" to "Rube".

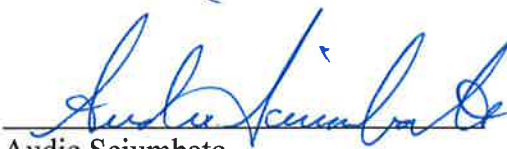
6. November 12, 2013 – The word "form" in the third sentence of the "Clovis Industrial Development Corporation" section on Page 14 has been changed to "from".

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7. November 12, 2013 – The word "were" in the third sentence of the third full paragraph under the "Joe Thomas" heading of the "Relevant Parties" section on Page 17 has been changed to "was".

We sincerely regret these errors. However, they do not, either individually or in their totality, affect the conclusions drawn from our investigation or the legitimacy of this report. The authors have at all times maintained full authority to accept or reject any suggestions or corrections, and the above changes are of our own volition.

  
\_\_\_\_\_  
Slater Elza

  
\_\_\_\_\_  
Audie Sciumbato