

EXHIBIT

"A"

ECONOMIC DEVELOPMENT PROGRAM AGREEMENT

This Economic Development Program Agreement ("**Agreement**") is entered into this ___ day of _____, 2019, by and between the **City of Round Rock, Texas**, a Texas home rule municipal corporation ("**City**"), and **Phlur, Inc.**, a Delaware Corporation ("**Phlur**").

WHEREAS, the City has adopted Resolution No. _____, attached as **Exhibit A** ("**City Resolution**"), establishing an economic development program and authorizing the Mayor to enter into this Agreement with Phlur in recognition of the positive economic benefits to the City through Phlur's agreement to (i) lease a facility in the City ("**Facility**"), (ii) create at least 35 new jobs within 5 years, (iii) invest at least \$2,000,000 in improvements to the Facility, and (iv) invest at least \$650,000 in business personal property to be located in the Facility; and

WHEREAS, the purpose of this Agreement is to promote economic development as contemplated by Chapter 380 of the Texas Local Government Code whereby Phlur intends to accomplish the foregoing; and

WHEREAS, the City agrees to provide performance-based Economic Incentive Payments ("**EIP's**") (as defined below);

NOW, THEREFORE, in consideration of the mutual benefits and promises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and Phlur agree as follows:

1. **Authority.** The City's execution of this Agreement is authorized by Chapter 380 of the Texas Local Government Code, and the City Resolution, and constitutes a valid and binding obligation of the City in the event Phlur proceeds with the lease, improvement, occupation, and staffing of the Facility. The City acknowledges that Phlur is acting in reliance upon the City's performance of its obligations under this Agreement in making its decision to commit substantial resources and money to lease, improve, and occupy the Facility.
2. **Definitions.**
 - 2.1. "**Economic Incentive Payment(s)**" ("**EIPs**") means the amount paid by the City to Phlur under the Program.
 - 2.2. "**Effective Date**" is the date this Agreement is executed to be effective by the City and Phlur.
 - 2.3. "**Facility**" means the space that Phlur is leasing in the building located at 900 E. Old Settlers Blvd., Suite 180, Round Rock, Texas, 78664.
 - 2.4. "**Full Time Equivalent Employee**" ("**FTE**") means a combination of employees, each of whom individually is not a full-time employee because they are not employed on average at least 35 hours per week, but who, in combination, are

counted as the equivalent of a full-time employee. FTE's shall include original hires or their replacements over time.

- 2.5. **"Improvements Cost"** includes the following costs of the real property investment provided in 5.2: the cost of designing the improvements, cost of materials, the cost of labor, and the cost of inspections. It does not include any other costs, such as financing cost, attorney fees, insurance, and other similar costs.
- 2.6. **"Program"** means the economic development program established by the City pursuant to Chapter 380 of the Texas Local Government Code and under the City Resolution to promote local economic development and stimulate business and commercial activity within the City.
- 2.7. **"Recapture Liability"** means the total amount of all EIP's that are paid as result of this Agreement that are subject to recapture by the City from Phlur in the event of a Phlur default.
- 2.8. **"Year 1"** means the calendar year following the City's issuance of a Certificate of Occupancy for the Facility.

3. **Intention of Parties.** The City Council of Round Rock has previously determined that one of its priority goals is to encourage economic development within the City. To further this goal, the City is willing to provide EIP's to assist Phlur in the leasing and improving of the Facility.

4. **Term.** This Agreement shall become enforceable upon its Effective Date and shall terminate on December 31, 2024.

5. **Rights and Obligations of Phlur.**

5.1. Lease. Phlur agrees to lease the Facility.

5.2. Real Property Investment. Phlur agrees to invest at least \$2,000,000 in Improvements Cost to the Facility. Phlur agrees to provide the City with documentation that shows proof that this obligation has been satisfied, and the City shall have the right to audit Phlur's records to verify same.

5.3. Personal Property Investment. Phlur agrees to invest at least \$650,000 in business personal property for the Facility. As used herein, "business personal property" shall be defined as fixtures, equipment, and furniture purchased for the purpose of supporting Phlur's business operation at the Facility. In order to show proof that Phlur has complied with this obligation, on or before April 15 of Year 1, Phlur agrees to provide the City with a copy of Texas Comptroller of Public Accounts Form 50-144 which it has filed with the Williamson Central Appraisal District showing business personal property with a taxable value of at least \$650,000.

5.4. Jobs. Phlur agrees to employ at least 35 full-time employees and/or FTE's, within five years of occupying the Facility, in accordance with the schedule set forth below. As used in the below schedule "jobs" shall include full-time employees and/or FTE's.

<u>Year</u>	<u>Retained Jobs</u>	<u>New Jobs</u>	<u>Total Jobs</u>
Year 1	0	05	05
Year 2	05	07	12
Year 3	12	07	19
Year 4	19	08	27
Year 5	27	08	35

The requirement to provide the above jobs shall survive the termination of this Agreement.

5.5. Job Compliance Affidavit. On or before April 15 of Year 2 and each calendar year thereafter of this Agreement, Phlur agrees to provide to the City a Job Compliance Affidavit, a copy of such Job Compliance Affidavit being attached hereto as **Exhibit B**. City shall have the right, following reasonable advance notice to Phlur, to audit Phlur's records to verify that this obligation has been satisfied.

5.6. Compliance with regulations. Phlur agrees that it will comply with the City's development approval processes, and shall construct and install the improvements and lease and operate the Facility consistent with City ordinances, development regulations and legal requirements.

5.7. Clawback. In the event that Phlur fails to comply with any of the actions as described in Section 5.1 through 5.6 above, Phlur will immediately pay to the City an amount equal to, but not to exceed, the Recapture Liability.

6. **Economic Incentive Payments**. In consideration of Phlur's compliance with this Agreement, the City agrees as follows:

6.1. Schedule for EIPs. City shall, subject to Phlur's satisfaction of its obligations set forth herein, make EIPs to Phlur as set forth herein. Beginning with Year 2, the EIP's shall be made in annual payments on or before June 1 of each year. The amount of the EIP's shall be as follows:

<u>Year</u>	<u>Amount of EIP</u>
Year 2	\$25,000.00
Year 3	\$25,000.00
Year 4	\$25,000.00

6.2. EIP Subject to Future Appropriations. This Agreement shall not be construed as a commitment, issue or obligation of any specific taxes or tax revenues for payment

to Phlur. The EIPs by the City under this Agreement are subject to the City's appropriation of funds for such payments in the budget year for which they are made. The EIPs to be made to Phlur, if paid, shall be made solely from annual appropriations from the general funds of the City or from such other funds of the City as may be legally set aside for the implementation of Article III, Section 52a of the Texas Constitution or Chapter 380 of the Local Government Code or any other economic development or financing program authorized by statute or home rule powers of the City under applicable Texas law, subject to any applicable limitations or procedural requirements. In the event that the City does not appropriate funds in any fiscal year for the EIP due under this Agreement, such failure shall not be considered a default under Section 7.3, and the City shall not be liable to Phlur for such EIP, however, the City shall extend this Agreement for another year(s), until Phlur has received all of the EIPs provided for herein. In addition, Phlur shall have the right but not the obligation to rescind this Agreement. To the extent there is a conflict between this paragraph and any other language or covenant in this Agreement, this paragraph shall control.

- 6.3. EIP Recapture. In the event the City terminates this Agreement as a result of Phlur's default, the City may recapture and collect from Phlur the Recapture Liability. Phlur shall pay to the City the Recapture Liability within thirty (30) days after the City makes demand for same, subject to any and all lawful offsets, settlements, deduction, or credits to which Phlur may be entitled. Notwithstanding anything herein to the contrary, such Recapture Liability shall not exceed, in the aggregate, an amount equal to all EIPs that were paid pursuant to this Agreement from the Effective Date to the date of termination (together with interest thereon to be charged at the statutory rate for delinquent taxes as determined by Section 33.01 of the Property Tax Code of the State of Texas, but without the addition of a penalty). The City shall have all remedies for the collection of the Recapture Liability as provided generally in the Tax Code for the collection of delinquent property taxes.

7. **Miscellaneous.**

- 7.1. Mutual Assistance. The City and Phlur will do all things reasonably necessary or appropriate to carry out the terms and provisions of this Agreement.
- 7.2. Representations and Warranties. The City represents and warrants to Phlur that the Program and this Agreement are within its authority, and that it is duly authorized and empowered to establish the Program and enter into this Agreement, unless otherwise ordered by a court of competent jurisdiction. Phlur represents and warrants to the City that it has the requisite authority to enter into this Agreement.
- 7.3. Default. If either the City or Phlur should default in the performance of any obligations of this Agreement, the other party shall provide such defaulting party such default, prior to instituting an action for breach or pursuing any other remedy for default. If the City remains in default after notice and opportunity to cure,

Phlur shall have the right to pursue any remedy at law or in equity for the City's breach. If Phlur remains in default after notice and opportunity to cure, City shall have the right to pursue any remedy at law or in equity for Phlur's breach, but only up to an amount equal to the Waived Fees.

- 7.4. Attorney's Fees. In the event any legal action or proceeding is commenced in a court of competent jurisdiction between the City and Phlur to enforce provisions of this Agreement and recover damages for breach, the prevailing party in such legal action shall be entitled to recover its reasonable attorney's fees and expenses incurred by reason of such action, to the extent allowed by law.
- 7.5. Entire Agreement. This Agreement contains the entire agreement between the parties. This Agreement may only be amended, altered or revoked by written instrument signed by the City and Phlur.
- 7.6. Binding Effect. This Agreement shall be binding on and inure to the benefit of the parties, their respective successors and assigns.
- 7.7. Assignment. Phlur may not assign all or part of its rights and obligations to a third party without the express written consent of the City provided, however, that this Agreement may be assigned by either party without the consent of the other to an affiliate or to any third party who succeeds to substantially all of its business or assets.
- 7.8. Amendment. This Agreement may be amended by the mutual written agreement of the parties.
- 7.9. Termination. In the event Phlur elects not to lease the Facility or install the improvements as contemplated by this Agreement, Phlur shall notify the City in writing, and this Agreement and the obligations on the part of both parties shall be deemed terminated and of no further force or effect.
- 7.10. Notice. Any notice and or statement required and permitted to be delivered shall be deemed delivered by actual delivery, facsimile with receipt of confirmation, or by depositing the same in the United States mail, certified with return receipt requested, postage prepaid, addressed to the appropriate party at the following addresses:

If to City: City of Round Rock

 221 E. Main Street
 Round Rock, TX 78664
 Attn: City Manager
 Phone: (512) 218-5400
 Email: lhadley@roundrocktexas.gov

With a required copy to:

Sheets & Crossfield
309 E. Main Street
Round Rock, TX 78664
Attn: Stephan L. Sheets
Phone: (512) 255-8877
Email: steve@scrrlaw.com

If to Phlur:

Phlur Inc.
2400 E. Cesar Chavez St.
Austin, Texas 78792
Attn: Shawn Freeman, Chief Operations Officer
Phone: (347) 697-9856
Email: shawn@phlur.com

Either party may designate a different address at any time upon written notice to the other party.

- 7.11. Applicable Law. This Agreement is made, and shall be construed and interpreted, under the laws of the State of Texas and venue shall lie in Williamson County, Texas.
- 7.12. Severability. In the event any provisions of this Agreement are illegal, invalid or unenforceable under present or future laws, and in that event, it is the intention of the parties that the remainder of this Agreement shall not be affected. It is also the intention of the parties of this Agreement that in lieu of each clause and provision that is found to be illegal, invalid or unenforceable, a provision be added to this Agreement which is legal, valid or enforceable and is as similar in terms as possible to the provision found to be illegal, invalid or unenforceable.
- 7.13. Paragraph Headings. The paragraph headings contained in this Agreement are for convenience only and will in no way enlarge or limit the scope or meaning of the various and several paragraphs.
- 7.14. No Third-Party Beneficiaries. This Agreement is not intended to confer any rights, privileges or causes of action upon any third party.
- 7.15. Force Majeure. Except as otherwise provided herein, an equitable adjustment shall be made for delay or failure in performing if such delay or failure is caused, prevented, or restricted by conditions beyond that Party's reasonable control (a "*force majeure* event"). A *force majeure* event for the purposes of this Agreement shall include, but not be limited to, acts of God, fire; explosion, vandalism; storm or similar occurrences; orders or acts of military or civil authority; litigation; changes in law, rules, or regulations outside the control of the affected Party;

national emergencies or insurrections; riots; acts of terrorism; or supplier failures, shortages or breach or delay. Except as otherwise expressly provided, herein, there shall be an equitable adjustment allowed for performance under this Agreement as the result of any event of *force majeure*.

- 7.16. No Joint Venture. It is acknowledged and agreed by the parties that the terms hereof are not intended to and shall not be deemed to create any partnership or joint venture among the parties. The City, its past, present and future officers, elected officials, employees and agents of the City, do not assume any responsibilities or liabilities to any third party in connection with the development of the Facility or the design, construction or operation of any portion of the Facility.

EXECUTED to be effective as of the 9 day of September, 2018.⁹

(SF)

CITY OF ROUND ROCK, TEXAS

By: _____
Craig Morgan, Mayor

APPROVED as to form:

Stephan L. Sheets, City Attorney

PHLUR INC.

By: _____
Shawn Freeman, COO

EXHIBIT "A"

RESOLUTION NO. R-_____

WHEREAS, the City Council has determined that one of its priority goals is to encourage economic development within the city of Round Rock; and

WHEREAS, Phlur Inc. ("Phlur") has expressed an interest in leasing a building located at 900 E. Old Settlers Blvd., Suite 180, Round Rock (the "Facility"); and

WHEREAS, the Council wishes to promote economic development as contemplated by Chapter 380 of the Texas Local Government Code whereby Phlur will lease and improve the Facility; and

WHEREAS, Phlur intends to add at least 35 employees within five years of the occupancy of the Facility;

WHEREAS, §380.001 Local Government Code provides that a municipality may establish an economic development program ("Program") to promote local economic development and to stimulate business and commercial activity in the municipality, and

WHEREAS, the City Council has determined that the Program described in Exhibit "A" will encourage economic development within the City and will also meet the goals set forth in said §380.001

NOW THEREFORE

**BE IT RESOLVED BY THE COUNCIL OF THE CITY OF ROUND ROCK,
TEXAS,**

That the City offers to Phlur a §380.001 Program whereby the City will grant certain Economic Incentive Payments ("EIP's"), and

BE IT FURTHER RESOLVED

That the offer of the Program shall be as generally outlined in Exhibit "A" attached hereto and incorporated herein for all purposes.

The City Council hereby finds and declares that written notice of the date, hour, place and subject of the meeting at which this Resolution was adopted was posted and that such meeting was open to the public as required by law at all times during which this Resolution and the subject matter hereof were discussed, considered and formally acted upon, all as required by the Open Meetings Act, Chapter 551, Texas Government Code, as amended.

RESOLVED this _____ day of _____, 2019.

CRAIG MORGAN, Mayor
City of Round Rock, Texas

ATTEST:

SARA L. WHITE, City Clerk

EXHIBIT A TO RESOLUTION
ECONOMIC DEVELOPMENT PROGRAM

The terms of the §380.001 Economic Development Program to be offered to Phlur in exchange for Phlur's lease of a building located at 900 E. Old Settlers Blvd., Suite 180, Round Rock, Texas, 78664 are as generally outlined below:

1. Phlur's intentions and obligations:
 - 1.1. Lease. Phlur intends to lease and occupy the building located at 900 E. Old Settlers Blvd., Suite 180, Round Rock, Texas.
 - 1.2. Real Property Investment. Phlur agrees to invest at least \$2,000,000 in the real estate improvements to the Facility.
 - 1.3. Business Personal Property Investment. Phlur agrees to invest at least \$650,000 in business personal property for the Facility.
 - 1.4. Jobs. Phlur intends to create at least 35 new jobs within five years of its occupancy of the Facility.
 - 1.5. Compliance with regulations. Phlur agrees that it will comply with the City's development approval processes and shall construct and install the improvements and lease and operate the Facility consistent with City ordinances, development regulations and requirements.
2. City's obligations:
 - 2.1. Economic Incentive Payments. In consideration of Phlur's compliance with the aforesaid intentions, the City agrees to grant annual Economic Incentive Payments to Phlur in the amount of \$25,000 per year for three years.
3. The terms and provisions of this Program will be set out in more detail in the Economic Development Program Agreement of even date herewith.

EMPLOYEE ID NO.

JOB POSITION OR TITLE

TOTAL JOBS _____

DATED THIS ____ DAY OF _____, 20__.

By: _____ (Signature)

_____ (Printed Name)

_____ (Title)

SUBSCRIBED AND SWORN TO BEFORE ME ON THIS THE ____ DAY OF _____, 20__.

NOTARY PUBLIC, STATE OF TEXAS