

**AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF BROWNSBURG
APPROVING A FORBEARANCE AGREEMENT
WITH VORTEK SURGICAL, LLC
AND GRANTING ENFORCEMENT AUTHORITY**

WHEREAS, the Town of Brownsburg, Indiana (the "Town"), is authorized by Indiana Code 6-3.5-7 et seq. and Indiana Code 36-7-12, et seq. (collectively as supplemented and amended the "Act") to issue loans to developers for the financing of economic development facilities, the funds from said financing to be used for the acquisition, construction, installation and/or equipping of such facilities; and

WHEREAS, the Brownsburg Economic Development Commission (the "Commission") and the Brownsburg Town Council (the "Council") approved the issuance of certain economic development loans to Vortek Surgical, LLC (the "Borrower") to assist in the financing of a new specialty medical device manufacturing development and distribution facility to be located in the Town pursuant to an Economic Development Loan Agreement dated March 5, 2010 (the "Agreement"); and

WHEREAS, the Borrower has been unable to fulfill the requirements of the Agreement, and has entered into negotiations with the Town to induce the Town to forbear the exercise of its rights under the Agreement pursuant to the Forbearance Agreement attached hereto and incorporated herein as Exhibit "A."

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF BROWNSBURG, INDIANA, THAT:

1. The Forbearance Agreement by and between the Town of Brownsburg, Indiana and Vortek Surgical, LLC in the form attached hereto is hereby approved in every way.
2. The President of the Council and the Town Clerk are hereby authorized, empowered and directed to execute multiple copies of the Forbearance Agreement and all documents relating to the transactions contemplated therein. Pursuant to the provisions of I.C. 36-7-12-25(c), the President of the Council and the Town Clerk may, by their signatures thereon, approve such changes to any of the foregoing documents as are allowable by law without further authorization of this Council or the Commission.
3. The Commission is further authorized, empowered and directed to take all action necessary to implement the terms of the Forbearance Agreement, including, but not limited to, taking all actions necessary to enforce the Forbearance Agreement and/or the Agreement and all documents related thereto by and in the name of the Town, without further action of the Council.

4. This Ordinance shall be in full force and effect upon its passage, approval and publication according to law.

Passed by the Town Council of the Town of Brownsburg, Indiana this _____ day of _____, 2012.

Dwayne Sawyer, President

ATTEST:

Jeanette M. Brickler, Clerk-Treasurer

FORBEARANCE AGREEMENT AND RELEASE

This Forbearance Agreement and Release (the "Agreement") is made effective as of the ____ day of June, 2012, by and between the Town of Brownsburg, Indiana (the "Town") and Vortek Surgical, LLC, an Indiana limited liability company ("Borrower").

R E C I T A L S

A. On or about March 5, 2010, the Town and Vortek entered into an Agreement for Economic Development Loan (the "Loan Agreement") by which the Town agreed to loan to Vortek the principal amount of \$500,000.00 (the "Loan").

B. Pursuant to the Loan Agreement, on or about March 10, 2010 Vortek executed and delivered to the Town a Promissory Note (the "Note") in the principal amount of the Loan.

C. Pursuant to the terms of the Loan Agreement, the Town and Vortek entered into an Escrow Agreement dated March 10, 2010 with Wells Fargo Bank, National Association as Escrow Agent (the "Escrow Agreement") by which terms the principal amount of the Loan was deposited with the Escrow Agent to be distributed to Vortek in accordance with the terms thereof.

D. To secure the indebtedness owed to the Town evidenced by the Note, Vortek executed a Security Agreement granting the Town a security interest in all tangible personal property and equipment purchased with Loan proceeds, all money and securities deposited in the Escrow Agreement, all tangible and intangible personal property of the Borrower of whatever nature and the proceeds thereof, along with a Leasehold Mortgage, Security Agreement and Fixture Filing related to the leasehold estate of Vortek in property commonly known as 481 Southpointe Circle, Suite 10, Brownsburg, Indiana (collectively the "Secured Collateral"), which security interests were perfected by the Town.

E. Pursuant to the Loan Agreement and the Escrow Agreement, the total sum of \$166,014.40 was distributed to or for the benefit of Vortek leaving a balance of \$333,985.60 in the Escrow Agreement as set forth in Exhibit "A" attached hereto.

F. The Town contends that Borrower has defaulted under the terms and conditions of the Note and the Loan Documents (the "Existing Defaults"), and Borrower denies such contentions.

G. Borrower has requested, and Town has agreed, to forbear from exercising certain of its rights under the Note and the Loan Documents (defined below) pursuant to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein and the acts to be performed hereunder, Town and Borrower agree as

follows:

1. **Obligations Defined.** As used herein, the term "Obligations" shall mean all present and future indebtedness, obligations and liabilities, as well as all renewals and extensions thereof, now or hereafter owed to the Town by Borrower, whether arising under, by virtue of or pursuant to any of the Loan Documents or otherwise, together with all costs, expenses and reasonable attorney fees incurred by the Town in the enforcement or collection thereof, whether such indebtedness, obligations and liabilities are direct, indirect, fixed, contingent, liquidated, unliquidated, joint, several, joint and several, now existing or hereafter arising.

2. **Loan Documents Defined.** As used herein, the term "Loan Documents" shall mean collectively the Note, Loan Agreement, Security Agreement, the Leasehold Mortgage, Security Agreement and Fixture Filing, the Escrow Agreement and all other documents and instruments evidencing, guaranteeing or securing the Obligations as each from time to time may be further amended, renewed or restated.

3. **Agreement to Forbear/Extent of Forbearance.** Subject to the complete and timely satisfaction of the conditions of this Agreement by Borrower, Town agrees to forbear and refrain during the Forbearance Period (as hereinafter defined) from collecting the Obligations which are evidenced by the Loan Documents. As used in this Agreement, the term "Forbearance Period" means the period which commences on the effective date of this Agreement and ends on the date that is the earlier of: (a) May 15, 2019; and (b) the date on which any Termination Event (as hereinafter defined) occurs.

4. **Forbearance Conditions Applicable to Borrower.** To induce Town to enter into this Agreement, Borrower agrees to the following:

- a. At the time of execution of this Agreement, Borrower shall execute a joint letter in the form attached hereto as Exhibit "B" directing the Escrow Agent to transmit all funds currently on deposit pursuant to the Escrow Agreement to the Town. Upon receipt of such funds, the Town shall credit the principal due under the Note by the amount received. The estimated principal balance after the above credit (subject to any fees or adjustments by the Escrow Agent) is \$165,323.32.
- b. During the Forbearance Period, the obligation to pay interest previously accrued under the Note prior to the Effective Date ("Accrued Interest") shall be tolled. Upon the full payment of all sums required pursuant to this Agreement, the Accrued Interest shall be forgiven in its entirety.
- c. As of the Effective Date, and throughout the Forbearance Period, Borrower shall make monthly payments of principal, along with interest accruing thereon at the rate of one percent (1%) per annum until the balance due under the Note is paid in full. Payments due hereunder shall commence as of the Effective Date, and thereafter as of the fifteenth (15th)

of each calendar month, and shall be comprised of eighteen (18) monthly payments of \$500.00, sixty-six (66) monthly payments of \$2,038.64 with the balance of the remaining principal (scheduled to be \$30,210.33) and any accumulated interest thereon due and payable in full on May 15, 2019. An amortization schedule detailing the payments required hereunder is attached hereto as Exhibit "C."

- d. Borrower may prepay the entire principal balance then outstanding under the Note, along with any unpaid interest accrued from the Effective Date at the rate provided for in this Agreement, and Borrower's obligations under this Agreement, the Note and the Loan Documents shall be completed and fulfilled. Upon such payment, the Town shall execute any releases necessary to remove its secured interest from the Secured Collateral.
- e. Upon the occurrence of any Termination Event, Borrower shall immediately remit to the Town a lump sum payment in an amount equal to the entire outstanding principal and interest then due under the Note, the Accrued Interest, and all attorney fees and related costs incurred by the Town in connection with this Agreement.
- f. All payments required by this Agreement shall be in the form of checks made payable to "Town of Brownsburg". Unless otherwise notified in writing, all payments hereunder shall be mailed to the offices of Town as follows:
 - Office of Town Manager
Town of Brownsburg
61 N. Green Street
Brownsburg, IN 46112
c/o Grant Kleinhenz
- g. During the Forbearance Period, Borrower shall not, without first obtaining the prior written consent of Town:
 - (i) fail to promptly notify Town of the commencement of any litigation against Borrower or the commencement of an involuntary or voluntary case against or by Borrower under the United States Bankruptcy Code ("Bankruptcy Code");
 - (ii) fail to pay and discharge all taxes, assessments and charges of every nature assessed against Borrower; or
 - (iii) make any "transfer", as that term is defined in the Bankruptcy Code, which would constitute a voidable transfer under § 548 of the Bankruptcy Code if Borrower were to become a debtor, within

the meaning of the Bankruptcy Code, within ninety (90) days of the date of such transfer;

- (iv) sell or transfer any assets of Borrower outside of the normal course of business; or
- (v) fail to comply with any provision of this Agreement.

- i. Notwithstanding any other provision of this Agreement or the Loan Documents, all of the Borrower's obligations as contained in the Loan Agreement and Loan Documents, including but not limited to the obligation to complete and use the Project as required by Section 7.9 of the Loan Agreement and the Borrower's obligation to submit annual evidence of substantial compliance with the Objectives (as defined therein), are hereby suspended during the Forbearance Period.

5. **Representations, Warranties and Acknowledgments.** To induce Town to enter into this Agreement, Borrower hereby acknowledges, agrees, represents and warrants to Town that:

- a. Each of the Recitals set forth in this Agreement is accurate and correct in all respects.
- b. The Loan Documents are each valid, binding and enforceable against Borrower in accordance with their respective terms.
- c. Borrower has no defenses, set-offs, claims, counterclaims or causes of action of any kind or nature whatsoever with respect to the Loan Documents or any of the Obligations, and Borrower hereby expressly waives, releases and relinquishes any and all defenses, set-offs, claims, counterclaims or causes of action, whether known or unknown.

6. **Termination Events.** As used in this Agreement, the term "Termination Event" shall mean the occurrence of any one of the following:

- a. Borrower shall breach or fail to perform any of the covenants, obligations or agreements contained in this Agreement or the Loan Documents (except as modified herein), other than the Existing Defaults and except as otherwise provided herein and such failure or breach continues for ten (10) business days after Borrower receives written notice from Town of such failure or breach.
- b. Borrower shall become the subject of a voluntary or involuntary case under the Bankruptcy Code, or shall become the subject of an order for relief under the Bankruptcy Code and such case or order is not dismissed within sixty (60) days of its filing.

- c. Any representation or warranty of Borrower contained in this Agreement or any of the Loan Documents (except as modified herein), or in any financial statement, report, notice or other writing furnished by Borrower to Town shall be or become untrue or inaccurate in any material respect.
- d. Any creditor of Borrower shall take any action to enforce by replevin or other legal proceeding any lien or security interest against the Collateral.

Upon the occurrence of any Termination Event, the Town shall be entitled to initiate or prosecute a legal action in any court of competent jurisdiction to collect the Obligations.

7. **No Course of Dealing.** Borrower hereby acknowledges and agrees that:

- a. Neither this Agreement nor any action taken or forbearance by the Town pursuant to this Agreement shall establish or be deemed to establish any precedent or course of dealing with respect to any of the obligations owed to the Town by Borrower.
- b. Neither this Agreement nor any action taken or forbearance by Town pursuant to this Agreement shall constitute or be deemed to be a waiver by Town of any rights or remedies under the Loan Documents, it being understood that the obligations of Borrower to the Town remain due and payable in full.
- c. Notwithstanding the fact that the Town has agreed to enter into this Agreement, the Town has made no commitment, express or implied, and has no obligation to enter into any further agreements to extend the Forbearance Period. Borrower acknowledges that it has been told that the Town may not agree to any extension of the Forbearance Period or to further forbear with respect to any event of default, now existing or hereafter arising, under this Agreement or the Loan Documents.

8. **Conditions Precedent to Forbearance.** This Agreement shall become effective upon Town's receipt of the following, each of which shall be in form and substance satisfactory to the Town:

- a. This Agreement duly executed by all parties hereto;
- b. The first monthly installment payment provided for in this Agreement; and
- c. Such other documents as the Town may reasonably request.

9. **Release.** IN CONSIDERATION FOR TOWN'S FORBEARANCE, BORROWER HEREBY RELEASES AND FOREVER DISCHARGES THE TOWN, ITS OFFICERS, AGENTS, REPRESENTATIVES, SUCCESSORS, HEIRS, ASSIGNS,

SUBSIDIARIES AND ATTORNEYS, FROM AND AGAINST ANY AND ALL CLAIMS, COUNTERCLAIMS, DEMANDS, DAMAGES, DEBTS, LIABILITIES, OBLIGATIONS, COSTS, EXPENSES, LIENS, ACTIONS AND CAUSES OF ACTION OF EVERY KIND AND NATURE WHETHER NOW KNOWN OR UNKNOWN, SUSPECTED OR UNSUSPECTED, FIXED OR CONTINGENT, WHETHER EXPRESS, IMPLIED IN FACT OR IMPLIED IN LAW, WHICH THEY NOW HAVE, OWN OR HOLD OR AT ANY TIME EVER HAD, OWNED OR HELD, OR COULD, SHALL OR MAY OWN FROM THE BEGINNING OF TIME TO THE PRESENT ARISING AS A RESULT OF THE INTERACTIONS AND TRANSACTIONS BETWEEN THE TOWN AND BORROWER, AND WITH RESPECT TO THE LOAN DOCUMENTS AND OBLIGATIONS, INCLUDING, BUT NOT LIMITED TO, THE VARIOUS COLLECTION ACTIVITIES OF THE TOWN WITH RESPECT TO SUCH DOCUMENTS AND THE UNDERLYING OBLIGATIONS.

10. **Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall constitute an original, but all of which when taken together shall constitute but one agreement.

11. **Miscellaneous.**

- a. Time is of the essence to this Agreement.
- b. Borrower covenants and agrees to execute and deliver, or cause to be executed and delivered, upon request by the Town, such further instruments and documents, and to perform or cause to be performed such further acts, as may be necessary to carry out the terms, provisions and purposes of this Agreement.
- c. Any modification, amendment or waiver of any provision of this Agreement, or a consent to any departure by Borrower therefrom, shall be effective when the same shall be in writing and signed by the Town, and then such waiver or consent shall be effective only in the specific instance and for the purpose given.
- d. This Agreement and the performance by the parties under this Agreement shall be construed in accordance with the laws of the State of Indiana.

12. **Survival / No Third Party Beneficiaries.** All of the acknowledgments, representations, warranties, covenants and agreements of Borrower shall survive and continue in full force and effect notwithstanding the expiration of the Forbearance Period or the occurrence of a Termination Event. There are no third party beneficiaries to this Agreement.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

BORROWER

Vortek Surgical, LLC

By: _____
Thomas E. Szymczak, President

STATE OF INDIANA)
) SS:
COUNTY OF HENDRICKS)

Before me, a Notary Public, in and for said County and State this ____ day of _____, 2012, personally appeared, Thomas E. Szymczak, known to me, and known to me to be the President of Vortek Surgical, LLC who, having been duly sworn, acknowledged he executed the foregoing document for and on behalf of such corporation, and that they are authorized to do so.

Witness my hand and Notarial Seal this _____ day of _____, 2012.

_____, Notary Public

My Commission Expires: _____

County of Residence: _____

TOWN

Town of Brownsburg, Indiana

By: _____
Dwayne Sawyer, President
Brownsburg Town Council

ATTEST:

Jeanette M. Brickler, Clerk-Treasurer

STATE OF INDIANA)
) SS:
COUNTY OF HENDRICKS)

Before me, a Notary Public, in and for said County and State this _____ day of _____, 2012, personally appeared Dwayne Sawyer and Jeanette M. Brickler, known to me, who having been duly sworn, acknowledge they have executed the foregoing document for and on behalf of the Town, and that they are authorized to do so.

Witness my hand and Notarial Seal this _____ day of _____, 2012.

_____, Notary Public

My Commission Expires: _____
County of Residence: _____