CITY OF PLANO
COUNCIL AGENDA ITEM

CITY SECRETARY'S USE ONLY
☐ Consent ☐ Regular ☐ Statutory

Council Meeting Date:	7/26/10
Department:	Finance
Department Head	Denise Tacke
Agenda Coordinator (include phone #):	**Katherine Crumbley - 7479**

CAPTION

A Resolution of the City Council of the City of Plano, Texas, approving the terms and conditions of an Economic Development Incentive Agreement by and between the City of Plano, Texas, and Advocare International, LP., a Delaware Limited Partnership; authorizing its execution by the City Manager or his designee; and providing an effective date.

FINANCIAL SUMMARY

☒ NOT APPLICABLE ☐ OPERATING EXPENSE ☐ REVENUE ☐ CIP

FISCAL YEAR: **2010**	**Prior Year (CIP Only)**	**Current Year**	**Future Years**	**TOTALS**
Budget	0	12,578,710	0	**12,578,710**
Encumbered/Expended Amount	0	-4,217,175	-4,593,500	**-8,810,675**
This Item	0	-75,000		**-75,000**
BALANCE	0	8,286,535	-4,593,500	**3,693,035**

FUND(S): ECONOMIC DEVELOPMENT FUND

COMMENTS: Strategic Plan Goal: Providing economic development incentives relates to the City's goal of strong local economy

SUMMARY OF ITEM

A request from Advocare International, LP for an Economic Development Incentive to relocate its business and commercial activities to the City, thereby generating additional local sales tax revenues and increasing ad valorem tax values to the City. Advocare International agrees to occupy not less than 97,000 sq. ft of commercial space by 6/30/11 and create or transfer 103 jobs by 6/30/11.

List of Supporting Documents:	Other Departments, Boards, Commissions or Agencies
Economic Development Incentive Agreement	

A Resolution of the City Council of the City of Plano, Texas, approving the terms and conditions of an Economic Development Incentive Agreement by and between the City of Plano, Texas, and Advocare International, LP., a Delaware Limited Partnership; authorizing its execution by the City Manager or his designee; and providing an effective date.

WHEREAS, the City Council has been presented a proposed Economic Development Incentive Agreement by and between the City of Plano, Texas and Advocare International, LP., a Delaware Limited Partnership, a substantial copy of which is attached hereto as Exhibit "A" and incorporated herein by reference (hereinafter called "Agreement"); and,

WHEREAS, upon full review and consideration of the Agreement, and all matters attendant and related thereto, the City Council is of the opinion that the terms and conditions thereof should be approved, and that the City Manager or his designee shall be authorized to execute it on behalf of the City of Plano.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF PLANO, TEXAS, THAT:

Section I. The terms and conditions of the Agreement, having been reviewed by the City Council of the City of Plano and found to be acceptable and in the best interests of the City of Plano and its citizens, are hereby in all things approved.

Section II. The City Manager or his designee is hereby authorized to execute the Agreement and all other documents in connection therewith on behalf of the City of Plano, substantially according to the terms and conditions set forth in the Agreement.

Section III. This Resolution shall become effective immediately upon its passage.

DULY PASSED AND APPROVED this the 26th day of July, 2010.

_____
Phil Dyer, MAYOR

ATTEST:

_____
Diane Zucco, CITY SECRETARY

APPROVED AS TO FORM:

_____
Diane C. Wetherbee, CITY ATTORNEY

ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT

This Economic Development Incentive Agreement ("Agreement") is made by and between the City of Plano, Texas (the "City") and Advocare International, LP., a Delaware Limited Partnership ("Company"), acting by and through its respective authorized officers and representatives.

WITNESSETH:

WHEREAS, Company is a health and wellness company offering energy, weight-loss, nutrition and sports performance products; and

WHEREAS, the Company has advised the City that a contributing factor that would induce the Company to relocate and maintain certain of its business and commercial activities in and to the City, thereby generating additional local sales tax revenues and increasing ad valorem tax values for the City, would be an agreement by the City to provide an economic development grant to the Company; and

WHEREAS, the Company has plans to add up to One Million Two Hundred Thousand Dollars ($1,200,000.00) of taxable Real Property improvements to its new location in Plano and to add up to One Million Dollars ($1,000,000.00) of taxable Business Personal Property in Plano; and

WHEREAS, the Company, as consideration for a grant, will occupy not less than a total of 97,000 square feet of commercial space located at 2801 Summit Drive, Plano, Texas 75074 (the "Property"); and create 103 Job Equivalents on the Property and maintain those positions for the remainder of the term of this Agreement; and

WHEREAS, occupancy of 97,000 square feet of commercial space on the Property and the creation of 103 Job Equivalents at the Property within the City will promote economic development, stimulate commercial activity and enhance the tax base and economic vitality of the City; and

WHEREAS, the City has adopted programs for promoting economic development; and

WHEREAS, the City is authorized by TEX. LOC. GOV'T CODE §380.001 *et seq*. to provide economic development grants to promote local economic development and to stimulate business and commercial activity in the City; and

WHEREAS, the City has determined that making an economic development grant to the Company in accordance with the terms and conditions set forth in this Agreement will further the objectives of the City, will benefit the City and the City's inhabitants and will promote local economic development and stimulate business and commercial activity in the City;

NOW THEREFORE, in consideration of the foregoing and the premises, mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties, intending to be legally bound, hereby covenant and agree as follows:

Article 1
Definitions

For purposes of this Agreement, each of the following terms shall have the meaning set forth herein unless the context clearly indicates otherwise:

"Commencement Date" shall mean the earlier of the date of occupancy of the Property by the Company or June 30, 2011, whichever occurs first.

"Effective Date" shall mean the last date on which all of the parties hereto have executed this Agreement.

"Event of Force Majeure" shall mean any contingency or cause beyond the reasonable control of a party including, without limitation, acts of God or the public enemy, war, riot, civil commotion, insurrection, government or de facto governmental action (unless caused by the intentionally wrongful acts or omissions of the party), fires, explosions or floods, strikes, slowdowns or work stoppages any of which event(s) directly impact the Company's operations in the City.

"Job Equivalent" shall mean one or more Company job positions, excluding third party contractors, located at the Property, individually or when combined, total 2080 hours (inclusive of holidays, vacation and sick leave) annually.

Article 2
Term

The term of this Agreement shall begin on the Commencement Date and continue until June 29, 2021, unless sooner terminated as provided herein.

Article 3
Obligations of Company

In consideration for the grant of public funds as set forth in Section 4.01 below, the Company agrees to the following:

(a) Occupy not less than 97,000 square feet of commercial/industrial space on the Property on or before June 30, 2011;

(b) Create or transfer 103 Job Equivalents to the Property on or before June 30, 2011;

(c) Continue to occupy the 97,000 square feet of commercial/industrial space on the Property for the full term of this agreement; and

(d) Use reasonable efforts to place all Company-managed hotel room nights, related to the Company's business activities related to or being conducted within the Property, at facilities located in the City of Plano.

Article 4
Economic Development Grant

4.01 **Grant**. The City agrees to provide the Company a cash grant of Seventy Five Thousand Dollars ($75,000.00) for the Company's relocation expenses and for the occupancy of 97,000 square feet of commercial space on the Property and the creation of 103 Job Equivalent positions on the Property in accordance with Article 3 above. The Company agrees to maintain the transferred or created Job Equivalents throughout the term of this Agreement as provided in Section 4.03 below.

4.02 **Grant Payments**. Except as otherwise indicated, the Company shall be entitled to a payment of Seventy Five Thousand Dollars ($75,000.00) from the City under this Agreement within thirty (30) days after the Company verifies to the City, using the Initial Certification form attached hereto as Exhibit "A", that the Company has met its obligations as set forth in Article 3 (a) and (b) above (such payment referred to as the "Initial Grant Payment"). **IN ORDER TO RECEIVE PAYMENT UNDER THIS AGREEMENT, COMPANY'S INITIAL CERTIFICATION VERIFYING COMPLIANCE WITH ARTICLE 3 (A) AND (B) ABOVE MUST BE FILED WITH THE CITY ON OR BEFORE AUGUST 1, 2011.**

4.03 **Refunds**.

(a) In the event the Company allows Job Equivalents at the Property to fall below 103 Job Equivalents for more than one hundred eighty (180) consecutive days during the term of this Agreement, not the result of an Event of Force Majeure, the Company shall refund to the City an amount equal to Seven Hundred and Twenty Eight Dollars ($728.00) for each lost Job Equivalent. For purposes of determining whether the City is due a refund under this section, the Company's Chief Financial Officer shall certify to the City by January 31, 2011, and by January 31st of each year thereafter during the term of this Agreement the actual number of Job Equivalents at the Property for the preceding calendar year, using the Certification form attached as Exhibit "B". All refunds under this Agreement shall be due within thirty (30) days of written demand for payment. Notwithstanding the foregoing, the Company shall never be required to refund to the City, in the aggregate, any amount in excess of the total grant amount set forth in Section 4.01.

(b) In the event the Company, at any time during the term of this Agreement, is convicted of a violation under 8 U.S.C. Section 1324a(f) regarding the unlawful employment of undocumented workers it shall reimburse the City all grant funds paid pursuant to this Agreement together with interest charged from the date of payment of the funds at the statutory rate for delinquent taxes as determined by V.T.C.A., Tax Code § 33.01 but without the addition

of penalty. Repayment of grant funds and interest shall be due not later than one hundred twenty (120) days after the date the City notifies the Company of the conviction.

Article 5
Termination

5.01 This Agreement terminates upon any one or more of the following:

(a) By mutual written agreement of the parties;

(b) Upon expiration of the term of this Agreement;

(c) By either party upon written notice to the other, if the other party defaults or breaches any of the terms or conditions of this Agreement and such default or breach is not cured within thirty (30) days after written notice thereof (provided that such 30-day period shall be extended if the default is of a nature that cannot reasonably be cured within such 30-day period and further provided that the remedy is being diligently pursued); and

(d) By either party upon written notice to the other if any subsequent federal or state legislation or any decision of a court of competent jurisdiction declares or renders this Agreement invalid, illegal or unenforceable, provided that such termination notice shall set forth an explanation of the terminating party's basis for termination under this subsection (d).

5.02 **Effect of Termination**. The rights, responsibilities and liabilities of the parties under this Agreement shall be extinguished upon the applicable effective date of termination of this Agreement, except for any obligations that accrue prior to such termination or as otherwise provided herein. All rights and obligations set forth above in this Section 5.02 shall survive the termination of this Agreement.

Article 6
Miscellaneous

6.01 **Binding Agreement**. The terms and conditions of this Agreement are binding upon the successors and permitted assigns of the parties. This Agreement may not be assigned without the express written consent of the non-assigning party, except that the Company may assign this Agreement without obtaining the City's consent (a) to one of its affiliates, (b) to its parent or (c) to any person or entity that directly or indirectly acquires, through merger, sale of stock, purchase or otherwise, all or substantially all of the assets of the Company.

6.02 **No Joint Venture**. It is acknowledged and agreed by the parties that the terms of this Agreement are not intended to and shall not be deemed to create a partnership or joint venture among the parties. Neither party shall have any authority to act on behalf of the other party under any circumstances by virtue of this Agreement.

6.03 **Authorization**. Each party represents that it has full capacity and authority to grant all rights and assume all obligations that are granted and assumed under this Agreement.

6.04 **Notice**. Any notice required or permitted to be delivered hereunder shall be deemed received three (3) days thereafter sent by United States Mail, postage prepaid, certified mail, return receipt requested, addressed to the party at the address set forth below (or such other address as such party may subsequently designate in writing) or on the day actually received if sent by courier or otherwise hand delivered.

If intended for the City:	City of Plano, Texas Attn: Thomas H. Muehlenbeck, City Manager 1520 Avenue K P.O. Box 860358 Plano, Texas 75086-0358
With a copy to:	City of Plano, Texas Attn: Diane Wetherbee, City Attorney 1520 Avenue K P. O. Box 860358 Plano, Texas 75086-0358
If intended for the Company:	Advocare International, LP Attn: Reid Ward 2801 Summit Avenue Plano, Texas 75074

6.05 **Entire Agreement**. This Agreement is the entire Agreement between the parties with respect to the subject matter covered in this Agreement. There is no other collateral oral or written agreement between the parties that in any manner relates to the subject matter of this Agreement.

6.06 **Governing Law**. This Agreement shall be governed and construed in accordance with the laws of the State of Texas, without giving effect to any conflicts of law rule or principle that might result in the application of the laws of another jurisdiction. Venue for any action concerning this Agreement, the transactions contemplated hereby or the liabilities or obligations imposed hereunder shall be in the State District Court of Collin County, Texas.

6.07 **Amendment**. This Agreement may only be amended by the mutual written agreement of the parties.

6.08 **Legal Construction**. In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect other provisions, and it is the intention of the parties to this Agreement that in lieu of each provision that is found to be illegal, invalid, or unenforceable, a provision shall be added to this Agreement which is legal, valid and enforceable and is as similar in terms as possible to the provision found to be illegal, invalid or unenforceable.

6.09 **Recitals**. The recitals to this Agreement are incorporated herein.

6.10 **Counterparts**. This Agreement may be executed in counterparts. Each of the counterparts shall be deemed an original instrument, but all of the counterparts shall constitute one and the same instrument.

6.11 **Survival of Covenants**. Any of the representations, warranties, covenants, and obligations of the parties, as well as any rights and benefits of the parties, pertaining to a period of time following the termination of this Agreement shall survive termination.

6.12 **Time is of the Essence**. Time is of the essence in this Agreement.

EXECUTED on this 26th day of July, 2010.

ATTEST:

CITY OF PLANO, TEXAS, a home rule municipal corporation

_____
Diane Zucco, CITY SECRETARY

By: _____
Thomas H. Muehlenbeck, CITY MANAGER

APPROVED AS TO FORM:

_____
Diane C. Wetherbee, CITY ATTORNEY

ADVOCARE INTERNATIONAL, LP.,
a Delaware Limited Partnership

By:_____
Richard H. Wright, Manager
AdvoCare GP, LLC
General Partner

EXHIBIT "A"

INITIAL CERTIFICATE OF COMPLIANCE

[DATE]

City of Plano
Finance Department
P.O. Box 860358
Plano, Texas 75086-0358

RE: Initial Certificate of Compliance by Advocare International, LP., ("Company")
Economic Development Incentive Agreement between Company and the City of Plano dated as of 7/26/10(the "Agreement")

I hereby certify that Company has occupied not less than 97,000 square feet of commercial/industrial space located at 2801 Summit Drive, Plano, Texas (the "Property") and has created 103 new Job Equivalent (as defined in the Agreement) positions to the Property. Company is in compliance with subsections (a) and (b) of Article 3 of the Agreement and is entitled to receive payment under the terms of the Agreement.

Advocare International, LP.,
a Delaware limited partnership

By: _____
Name:
Title:

EXHIBIT "B"

ANNUAL CERTIFICATE OF COMPLIANCE

[DATE]

City of Plano
Finance Department
P.O. Box 860358
Plano, Texas 75086-0358

RE: Annual Certificate of Compliance by Advocare International, LP ("Company")
Economic Development Incentive Agreement between Company and the City of Plano dated as of 7/26/10(the "Agreement")

I hereby certify that Company is in compliance with each applicable term as set forth in Article 3 of the Agreement. The term of the Agreement is June 30, 2011 through June 29, 2021. The number of new Job Equivalents, calculated as set forth in the Agreement and maintained pursuant to the Agreement since its inception, has not fallen below ____ for more than one hundred eighty (180) consecutive days and is _____ as of the date of this Certificate of Compliance. If the number herein reported is below the number required to be maintained pursuant to the Agreement, I certify that the City of Plano has been refunded the appropriate amount as required by Section 4.03 of the Agreement. This form is due on April 1st of each year the Agreement is in force.

Advocare International, LP.,
a Delaware limited partnership

By:_____
Name:_____
Title:_____