

COMMONWEALTH'S DEVELOPMENT OPPORTUNITY FUND

PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** made and entered this ____ day of _____, 20__, by and among the _____ of _____, **VIRGINIA** (the "Locality"), a political subdivision of the Commonwealth of Virginia (the "Commonwealth"), _____ (the "Company"), a _____ [corporation/limited liability company/etc.] [authorized to transact business in the Commonwealth], the **[INDUSTRIAL / ECONOMIC] DEVELOPMENT AUTHORITY OF _____** (the "Authority"), a political subdivision of the Commonwealth, and the **VIRGINIA ECONOMIC DEVELOPMENT PARTNERSHIP AUTHORITY ("VEDP")**, a political subdivision of the Commonwealth. [CAN DELETE THE LOCALITY'S AUTHORITY AS A PARTY, IF SO DESIRED BY THE LOCALITY, THEN MAKE APPROPRIATE CHANGES THROUGHOUT]

WITNESSETH:

WHEREAS, the Locality has been awarded a grant of and expects to receive \$_____ from the Commonwealth's Development Opportunity Fund (a "COF Grant") through VEDP for the purpose of inducing the Company to [purchase / construct / expand / equip / improve] and operate a [manufacturing] [warehouse and distribution] [office and headquarters] facility in the Locality (the "Facility"), thereby making a significant Capital Investment, and creating and Maintaining a significant number of New Jobs, as such capitalized terms are hereinafter defined;

WHEREAS, the Locality is willing to provide the funds to the Authority with the expectation that the Authority will provide the funds to or for the use of the Company, provided that the Company promises to meet certain criteria relating to Capital Investment and New Jobs;

WHEREAS, the Locality, the Authority, the Company, and VEDP desire to set forth their understanding and agreement as to the payout of the COF Grant, the use of the COF Grant proceeds, the obligations of the Company regarding Capital Investment and New Jobs, and the repayment by the Company of all or part of the COF Grant under certain circumstances;

WHEREAS, the [purchase / construction / expansion / equipping / improvement] and operation of the Facility will entail a capital expenditure by or on behalf of the Company of approximately \$_____, of which approximately \$_____ will be invested in machinery and tools, approximately \$_____ will be invested in furniture, fixtures and equipment, approximately \$_____ will be invested in the purchase of land, approximately \$_____ will be invested in the [purchase of an existing] [construction of a new] building and approximately \$_____ will be invested in the up-fit of the building;

WHEREAS, the [purchase / construction / expansion / equipping / improvement] and operation of the Facility will further entail the creation and Maintenance of ____ New Jobs at the Facility; and

WHEREAS, the stimulation of the additional tax revenue and economic activity to be generated by the Capital Investment and New Jobs constitutes a valid public purpose for the expenditure of public funds and is the animating purpose for the COF Grant:

NOW, THEREFORE, in consideration of the foregoing, the mutual benefits, promises and undertakings of the parties to this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties covenant and agree as follows.

Section 1. Definitions.

For the purposes of this Agreement, the following terms shall have the following definitions:

“Capital Investment” means a capital expenditure by or on behalf of the Company in taxable real property, taxable tangible personal property, or both, at the Facility. [MODIFY FOR CAPITAL LEASE OF REAL ESTATE OR OPERATING LEASE OF EQUIPMENT BY INSERTING, AS APPROPRIATE: A capital expenditure related to a leasehold interest in real property will be considered to be made “on behalf of the Company” if a lease between a developer and the Company is a capital lease, or is an operating lease having a term of at least ten years, and the real property would not have been constructed or improved but for the Company’s interest in leasing some or all of the real property. Only the capital expenditures allocated to the portion of the real property to be leased by the Company will count as “Capital Investment.”] The purchase or lease of machinery and tools or furniture, fixtures, and equipment, including under an operating lease, [and expected building up-fit and tenant improvements] by or on behalf of the Company will qualify as Capital Investment. [The Capital Investment must be in addition to the capital improvements at the Facility as of _____, 20__].

“Maintain” means that the New Jobs will continue without interruption from the date of creation through the [Subsequent] Performance Date. Positions for the New Jobs will be treated as Maintained during periods in which such positions are not filled due to (i) temporary reductions in the Company’s employment levels (so long as there is active recruitment for open positions), (ii) strikes, and (iii) other temporary work stoppages.

“New Job” means new permanent full-time employment of an indefinite duration at the Facility for which the standard fringe benefits are provided by the Company for the employee, and for which the Company pays an average annual wage of at least \$_____. Average annual wage means the average annual salary of full-time positions at the Facility determined by dividing total payroll (of a type included in W-2 compensation) provided to full-time positions at the Facility by the number of full-time positions at the Facility. Each New Job must require a minimum of either (i) 35 hours of an employee’s time per week for the entire normal year of the Company’s operations, which “normal year” must consist of at least 48 weeks, or (ii) 1,680 hours per year. Seasonal or temporary positions, positions created when a job function is shifted from an existing location in the Commonwealth, and positions with construction

contractors, vendors, suppliers and similar multiplier or spin-off jobs shall not qualify as New Jobs. [IF APPLICABLE: Net new jobs in the Commonwealth for contractors or employees of contractors who provide dedicated full-time service to the Company may count as New Jobs, even though the Company is not directly paying the wages or providing the fringe benefits, if the other conditions set forth in this paragraph have been satisfied.] [The New Jobs must be in addition to the ___ full-time jobs at the Facility as of _____, 20__.]

“[Initial] Performance Date” means _____, 20___. If the Locality, in consultation with the Authority and VEDP, deems that good faith and reasonable efforts have been made and are being made by the Company to achieve the Targets, the Locality may request an extension of the [Initial] Performance Date by up to 15 months. Any extension of the [Initial] Performance Date shall require the prior approval of the Board of Directors of VEDP (the “Board”). If the [Initial] Performance Date is extended, the Locality shall send written notice of the extension to the Authority, the Company and VEDP and the date to which the [Initial] Performance Date has been extended shall be the “[Initial] Performance Date” for the purposes of this Agreement. OR [The Performance Date is not subject to extension.] [GENERALLY, THE PERFORMANCE DATE WILL BE THE END OF A CALENDAR QUARTER ABOUT 3 YEARS AFTER THE PUBLIC ANNOUNCEMENT OF THE PROJECT]

“Targets” means the Company’s obligations to make Capital Investments at the Facility of at least \$_____ and to create and Maintain at least ___ New Jobs at the Facility, all as of the [Initial] Performance Date. [Further, “Targets” includes the Company’s obligation to Maintain at least ___ New Jobs at the Facility as of the Subsequent Performance Date.]

“Virginia Code” means the Code of Virginia of 1950, as amended.

[SEE SECTIONS 4 AND 7, IF THE BREAK-EVEN POINT IS BEYOND THE PERFORMANCE DATE, THE COMPANY WILL BE REQUIRED TO ACHIEVE ITS TARGETS BY THE PERFORMANCE DATE, AND WILL ALSO BE REQUIRED TO MAINTAIN ITS NEW JOBS THROUGH THE BREAK-EVEN POINT. IN THIS EVENT, THE “PERFORMANCE DATE” WILL BECOME THE “INITIAL PERFORMANCE DATE” AND A DATE AROUND THE BREAK-EVEN POINT WILL BECOME THE “SUBSEQUENT PERFORMANCE DATE.” THIS WILL BE THE DEFINITION OF “SUBSEQUENT PERFORMANCE DATE:

“Subsequent Performance Date” means _____, 20__, unless the Initial Performance Date has been extended. If the Initial Performance Date has been extended, the Subsequent Performance shall be ___ year(s) after the new Initial Performance Date. Except as so noted, the Subsequent Performance Date is not subject to extension.]

Section 2. Targets; Statutory Criteria.

(a) *Targets:* The Company will [purchase / construct / expand / equip / improve] and operate the Facility in the Locality, make a Capital Investment of at least \$_____, and create and Maintain at least ___ New Jobs at the Facility, all as of the [Initial] Performance Date.

[Further, the Company will Maintain at least ____ New Jobs at the Facility as of the Subsequent Performance Date.]

[THE FOLLOWING (b) OR (c) IF APPLICABLE. (b) *MEI Project Approval Commission*: Pursuant to Virginia Code Sections 2.2-115 and 30-310, the MEI Project Approval Commission (“MEI Commission”) must review economic development incentive packages in which [a business relocates or expands its operations in one or more Virginia localities and simultaneously closes its operations or substantially reduces the number of its employees in another Virginia locality] [the aggregate amount of incentives to be provided by the Commonwealth in the incentive package is in excess of \$10 million in value]. The MEI Commission has reviewed and approved the state-level incentives offered in conjunction with the Company’s Capital Investment and creation and Maintenance of ____ New Jobs at the Facility.

(c) *Relocation*: The Commonwealth’s Secretary of Commerce and Trade has delivered to the Co-Chairs of the Senate Finance Committee and the Chair of the House Appropriations Committee a letter indicating that, although the Company is relocating a portion of its operations from _____ to the Locality, the reasons for the move and the desire to retain the Company’s operations in Virginia justify the use of incentives to move such facility from one Virginia locality to another. The Locality and VEDP have informed _____ of the move and of the use of incentives. _____ has indicated to VEDP that it is supportive of these efforts.]

(b)[(d)]*Encouragement to Offer New Jobs to Residents of the Commonwealth*: The Locality, the Authority, and VEDP hereby strongly encourage the Company to ensure that at least 30% of the New Jobs are offered to “Residents” of the Commonwealth, as defined in Virginia Code Section 58.1-302. In pertinent part, that definition includes natural persons domiciled in Virginia or natural persons who, for an aggregate of more than 183 days of the year, maintained a place of abode within the Commonwealth, whether domiciled in the Commonwealth or not.

(c)[(e)]*Prevailing Wage; Unemployment and Poverty Rates*: The average annual wage of the New Jobs of at least \$_____ is [less than the prevailing average annual wage in the Locality of \$_____, but is more than 85% of that prevailing average annual wage (\$_____)] [more than the prevailing average annual wage in the Locality of \$_____]. The Locality is [is not] a high-unemployment locality, with an unemployment rate for 20____, which is the last year for which such data is available, of ____% as compared to the 20____ statewide unemployment rate of ____%. The Locality is [is not] a high-poverty locality, with a poverty rate for 20____, which is the last year for which such data is available, of ____% as compared to the 20____ statewide poverty rate of ____%.

(d)[(f)] *Disclosure of Political Contributions*: The Company acknowledges that the name of the Company will be shared by VEDP with the Governor of Virginia, and any campaign committee or political action committee associated with the Governor. The Company acknowledges that within 18 months of the date of this Performance Agreement, the Governor, his campaign committee, and his political action committee will submit to the Virginia Conflict of Interest and Ethics Advisory Council a report listing any contribution, gift, or other item with a value greater than \$100 provided by the Company to the Governor, his campaign committee, or

his political action committee, respectively, during the period from the date of the Company's application for the COF Grant through the one-year period immediately after the date of this Agreement.

(e)[(g)][*Other Performance Criteria:* IF THE COF GRANT IS ALSO PREDICATED ON OTHER FACTORS, SUCH AS ESTABLISHING AND MAINTAINING THE COMPANY'S CORPORATE HEADQUARTERS IN VIRGINIA, ADD HERE LANGUAGE REQUIRING THE COMPANY TO DO THOSE OTHER THINGS.]

Section 3. Disbursement of COF Grant.

(a) *Disbursement of the COF Grant:* [IF THERE ARE NO CONDITIONS TO DISBURSEMENT:] By execution and delivery of this Agreement, the Locality requests that the COF Grant be disbursed to it. VEDP will promptly arrange for the payment of the \$_____ COF Grant to the Locality. Within 30 days of its receipt of the COF Grant proceeds, the Locality will disburse the COF Grant proceeds to the Authority. Within 30 days of its receipt of the COF Grant proceeds, the Authority will disburse the COF Grant proceeds to the Company. [OR INDICATE THAT THE LOCALITY OR THE AUTHORITY WILL SPEND \$ ON BEHALF OF THE COMPANY]

The disbursement of the COF Grant proceeds to the Company will serve as an inducement to the Company to achieve the Targets.

(a) *Disbursement of the COF Grant:* [IF THERE ARE PERFORMANCE METRICS TIED TO THE DISBURSEMENT:] By execution and delivery of this Agreement, the Locality requests that the COF Grant be disbursed to it. VEDP will promptly arrange for the payment of the \$_____ COF Grant to the Locality.

The disbursement of the COF Grant proceeds to the Company will serve as an inducement to the Company to achieve the Targets.

The COF Grant proceeds shall be retained by the Locality and shall be disbursed in _____ payments as follows: [OR, FUNDS COULD BE SENT FROM LOCALITY TO AUTHORITY, WITH THE AUTHORITY HOLDING, THEN DISBURSING, FUNDS]

First Payment: The Company will provide notice and evidence reasonably satisfactory to the Locality, the Authority, and VEDP that it has [received a Certificate of Occupancy for the Facility][made Capital Investments of at least \$_____][created and Maintained at least ___ New Jobs] [and, _____]. Such evidence will be subject to verification by the Locality and VEDP. Within 30 days of the verification, the Locality will disburse \$_____ of the COF Grant proceeds to the Authority. Within 30 days of its receipt of such COF Grant proceeds, the Authority will disburse such COF Grant proceeds to the Company.

Second Payment: The Company will provide notice and evidence reasonably satisfactory to the Locality, the Authority, and VEDP that it has [received a Certificate of Occupancy for the Facility][made additional Capital Investments of at least \$_____ (for an aggregate of \$_____ of Capital Investments)] [created and Maintained at least an additional ___ New Jobs (for an aggregate of ___ New Jobs)] [and, _____]. Such evidence will be subject to verification by the Locality and VEDP. Within 30 days of the verification, the Locality will disburse \$_____ of the COF Grant proceeds to the Authority. Within 30 days of its receipt of such COF Grant proceeds, the Authority will disburse such COF Grant proceeds to the Company.

Third Payment: The Company will provide notice and evidence reasonably satisfactory to the Locality, the Authority, and VEDP that it has [received a Certificate of Occupancy for the Facility][made additional Capital Investments of at least \$_____ (for an aggregate of \$_____ of Capital Investments)] [created and Maintained at least an additional ___ New Jobs (for an aggregate of ___ New Jobs)] [and, _____]. Such evidence will be subject to verification by the Locality and VEDP. Within 30 days of the verification, the Locality will disburse the remaining \$_____ of the COF Grant proceeds to the Authority. Within 30 days of its receipt of such COF Grant proceeds, the Authority will disburse such COF Grant proceeds to the Company.

If any COF Grant proceeds have not been disbursed to the Company within 90 days after the [Initial] Performance Date, the Locality shall return such proceeds to VEDP for redeposit to the Commonwealth’s Development Opportunity Fund.

(b) *Use of the COF Grant Proceeds:* The [Company / Locality / Authority] will use the COF Grant proceeds to pay or reimburse the cost of [public and private utility extension or capacity development for the Facility, whether on or off site,] [public and private installation, extension, or capacity development of high-speed or broadband Internet access for the Facility, whether on or off site,] [road, rail, or other transportation access costs supporting the Facility beyond the funding capability of existing programs,] [site acquisition,] [grading, drainage, paving, and any other activity required to prepare the Facility site for construction,] [construction or build-out of publicly or privately owned buildings for the Facility, and] [recruitment and training], [all] as permitted by Section 2.2-115(D) of the Virginia Code.

Section 4. Break-Even Point; State and Local Incentives.

(a) *State-Level Incentives:* VEDP has estimated that the Commonwealth will reach its “break-even point” by the [Subsequent] Performance Date. The break-even point compares new revenues realized as a result of the Capital Investment and New Jobs at the Facility with the Commonwealth’s expenditures on incentives, including but not limited to the COF Grant. With regard to the Facility, the Commonwealth expects to provide incentives in the following amounts:

<u>Category of Incentive:</u>	<u>Total Amount</u>
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COF Grant \$ _____
 Virginia Jobs Investment Program (“VJIP”) (Estimated)
 Tobacco Region Opportunity Fund Grant (“TROF”)
 Enterprise Zone Real Property Investment Grant (“EZRPIG”)
 (Estimated)
 Enterprise Zone Job Creation Grant (“EZJCG”) (Estimated)
 Virginia Investment Performance Grant (“VIP Grant”)
 Major Eligible Employers Grant (“MEE Grant”)
 Virginia Economic Development Incentive Grant (“VEDIG”)
 Major Business Facility Job Tax Credit (“MBFJTC”) (Estimated)

The proceeds of the COF Grant shall be used for the purposes described in Section 3(b). The VJIP grant proceeds shall be used by the Company to pay or reimburse itself for recruitment and training costs. [The proceeds of the TROF Grant [shall][may] be used for _____ [any lawful purpose].] [The proceeds of [the EZRPIG,] [the EZJCG,] [the VIP Grant,] [the MEE Grant] [and the VEDIG] may be used by the Company for any lawful purpose.] [The MBFJTC will serve as an offset to Virginia corporate income taxes that may be owed by the Company.]

(b) *Locality-Level Incentives:* The Locality expects to provide the following incentives, as matching grants or otherwise, for the Facility by the Performance Date:

<u>Category of Incentive:</u>	<u>Total Amount</u>
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[THE FOLLOWING MAY BE APPLICABLE: In addition to providing the [_____] _____], the Locality has elected to allocate \$ _____ from the TROF Grant toward the COF Grant local match requirement.]

[IF THE LOCALITY’S FUNDS ARE BEING PROVIDED OVER TIME: If, by the [Initial] Performance Date, the [proceeds / funds] disbursed or committed to be disbursed by the Locality to the Company total less than the \$ _____ COF Grant local match requirement, the Locality, subject to appropriation, will make an additional grant to the Company of the difference at the [Initial] Performance Date, so long as the Company has met its Targets.]

The proceeds of the Locality’s _____ [may / shall] be used by the Company for [any lawful purpose / _____].

(c) *Other Incentives:* This Agreement relates solely to the COF Grant. The qualification for, and payment of all State-Level Incentives and Locality-Level Incentives, except for the COF Grant, will be governed by separate arrangements between the Company and the entities offering the other incentives.

Section 5. Company Reporting.

(a) *Progress Reporting:* The Company shall provide, at the Company's expense, in the form attached hereto as Exhibit A, detailed verification reasonably satisfactory to the Locality, the Authority, and VEDP of the Company's progress on the Targets. Such progress reports will be provided annually, starting at _____, 20__, [ABOUT 90 DAYS AFTER THE FIRST ANNIVERSARY OF THE MONTH/DATE OF THE PERFORMANCE DATE] and covering the period through the prior _____] [SAME CALENDAR DATE AS THE MONTH/DATE OF THE PERFORMANCE DATE]. Further, the Company shall provide such progress reports at such other times as the Locality, the Authority, or VEDP may reasonably require.

[If the Company wishes to count as Capital Investments the capital expenditures made on its behalf by a lessor or a developer of the Facility, the Company is responsible for assembling and distributing the documentation necessary to verify the capital expenditures made on behalf of the Company.]

[If the Company wishes to count as New Jobs employees of contractors, to the extent permitted in the definition of "New Jobs" in Section 1, the Company is responsible for assembling and distributing the documentation necessary to verify such New Jobs, including whether such jobs are net New Jobs in the Commonwealth.]

With each such progress report, the Company shall report to VEDP the amount paid by the Company in the prior calendar year in Virginia corporate income tax [or, as applicable, shall provide to VEDP a copy of its Virginia income tax form filed with respect to its status as a pass-through entity.] VEDP hereby represents to the Company that it considers such information to be confidential proprietary information that is exempt from public disclosure under the Virginia Freedom of Information Act and that such information will be used by VEDP solely in calculating aggregate return on invested capital analyses for purposes of gauging the overall effectiveness of economic development incentives.

(b) *Final Report:* The Company shall provide, at the Company's expense, in the form attached hereto as Exhibit B, detailed verification reasonably satisfactory to the Locality, the Authority, and VEDP of the Company's achievement of the Targets. The final report shall be filed at _____, 20__. [ABOUT 90 DAYS AFTER THE PERFORMANCE DATE]

Section 6. Verification of Targets.

(a) *Verification of Capital Investment:* The Company hereby authorizes the Locality, including the Locality's [Commissioner of the Revenue and Treasurer], to release to

VEDP the Company's real estate tax, business personal property tax and machinery and tools tax information. Such information shall be marked and considered confidential and proprietary and shall be used by VEDP solely for verifying satisfaction of the Capital Investment Target. If the Locality, the [Office of the Commissioner of the Revenue or the Office of the Treasurer] should require additional documentation or consents from the Company to access such information, the Company shall promptly provide, at the Company's expense, such additional documentation or consents as the Locality, the Authority, or VEDP may request. In accordance with Virginia Code Section 58.1-3122.3, VEDP is entitled to receive the Company's real estate tax, business personal property tax and machinery and tools tax information from the Locality's Commissioner of the Revenue.

In addition to the verification data described above, in the sole discretion of the Locality, the Authority, or VEDP, the Locality, the Authority, or VEDP, may each require such other documentation, including invoices, or audits as may be required to properly verify the Capital Investment.

(b) *Verification of New Jobs and Wages:* The Company must submit a copy of its four most recent Employer's Quarterly Tax Report (Form FC-20) with the Virginia Employment Commission with the final report. The forms shall be marked and considered confidential and proprietary and shall be used by VEDP solely for verifying satisfaction of the New Jobs Target. In accordance with Virginia Code Section 60.2-114, VEDP is entitled to receive the Company's employment level and wage information from the Virginia Employment Commission.

The Company agrees that it will report to the Virginia Employment Commission with respect to its employees at a facility-level, rather than at the company-level.

In addition to the verification data described above, in the sole discretion of the Locality, the Authority, or VEDP, the Locality, the Authority or VEDP, may each require such other documentation or audits as may be required to properly verify the New Jobs.

Section 7. Repayment Obligation.

(a) *If Statutory Minimum Eligibility Requirements are Not Met:* Section 2.2-115 of the Virginia Code requires that the Company make a Capital Investment of at least [\$100,000,000][\$5,000,000][\$2,500,000][\$1,500,000] and create and Maintain at least [50][25][15] New Jobs in order to be eligible for the COF Grant. Failure by the Company to meet either of these statutory minimum eligibility requirements by the [Initial] Performance Date shall constitute a breach of this Agreement [and the entire COF Grant must be repaid by the Company to the Authority][and the Company must repay to the Authority all of the COF Grant proceeds previously disbursed to the Company. In such event, the Locality will repay to VEDP all of the COF Grant proceeds not previously disbursed to the Company].

(b) *Allocation of COF Proceeds:* For purposes of repayment under subsection (c), the COF Grant is to be allocated as 50% (\$ _____) for the Company's Capital Investment

Target, and 50% (\$ _____) for the Company's New Jobs Target. [ADJUST IF THERE IS A THIRD TARGET]

(c) *If Statutory Minimum Eligibility Requirements are Met:* [IF THE COF IS PAID IN FULL UP-FRONT] The provisions of this subsection (c) shall become applicable only if the Company has met the statutory minimum eligibility requirements set forth in subsection (a).

[Except as noted in subsection (d) below,] [i]f the Company has met at least 90% of both of the Targets at the [Initial] Performance Date, then and thereafter the Company is no longer obligated to repay any portion the COF Grant.

If the Company has not met at least 90% of either or both of its Targets at the [Initial] Performance Date, the Company shall repay to the Authority that part of the COF Grant that is proportional to the Target or Targets for which there is a shortfall. For example, if as of the Performance Date, the Company has received all \$ _____ of the COF Grant proceeds, but only \$ _____ of the Capital Investment has been retained (reflecting achievement of ____% of the Capital Investment Target) and only ___ New Jobs have been created and Maintained (reflecting achievement of ____% of the New Jobs Target), the Company shall repay to the Authority \$ _____, reflecting ____% of the COF Grant proceeds that it received allocated to the Capital Investment Target, *plus* \$ _____, reflecting ____% of the COF Grant proceeds that it received allocated to the New Jobs Target. These amounts represent the percentages of the shortfall from the expected amount of Capital Investment and expected number of New Jobs, each multiplied by the portion of the COF Grant proceeds that the Company received allocated to that Target.

[IF THE COF IS PAID IN INSTALLMENTS UPON THE ACHIEVEMENT OF PERFORMANCE METRICS] The provisions of this subsection (c) shall become applicable only if the Company has met the statutory minimum eligibility requirements set forth in subsection (a).

[Except as noted in subsection (d) below,] [i]f the Company has met at least 90% of both of the Targets at the [Initial] Performance Date, then and thereafter the Company is no longer obligated to repay any portion the COF Grant.

If the Company has not met at least 90% of either or both of its Targets as of the [Initial] Performance Date, the Company shall repay to the Authority that part of the COF Grant previously disbursed to the Company that is proportional to the Target or Targets for which there is a shortfall. For example, if as of the Performance Date, the Company has received \$ _____ of the COF Grant proceeds, but only \$ _____ of the Capital Investment has been retained (reflecting achievement of ____% of the Capital Investment Target), and only ___ New Jobs have been created and Maintained (reflecting achievement of ____% of the New Jobs Target), the Company shall repay to the Authority \$ _____, reflecting ____% of the COF Grant proceeds that it received allocated to the Capital Investment Target, *plus* \$ _____, reflecting ____% of the COF Grant proceeds that it received allocated to the New Jobs Target. These amounts represent the percentages of the shortfall from the expected amount of Capital Investment and expected number of New Jobs, each multiplied by the portion of the COF Grant

proceeds that the Company received allocated to that Target. In such event, the Locality will repay to VEDP all of the COF Grant proceeds not previously disbursed to the Company.

[(d)(e)] *Determination of Inability to Comply*: If the Locality or VEDP shall determine at any time prior to the [Initial] Performance Date (a “Determination Date”) that the Company is unable or unwilling to meet and Maintain its Targets by and through the [Initial] Performance Date, and if the Locality, the Authority or VEDP shall have promptly notified the Company of such determination, the Company must repay to the Authority all of the COF Grant proceeds previously disbursed to the Company. In such event, the Locality will repay to VEDP all of the COF Grant proceeds not previously disbursed to the Company. Such a determination will be based on such circumstances as a filing by or on behalf of the Company under Chapter 7 of the U.S. Bankruptcy Code, the liquidation of the Company, an abandonment of the Facility by the Company or other similar significant event that demonstrates that the Company will be unable or is unwilling to satisfy the Targets for the COF Grant.

[(e)(f)] *Repayment*: The Company shall be liable for any repayment of all or a portion of the COF Grant, as described in this Section 7. ***Such repayment shall be due from the Company to the Authority within ninety days of the [Initial] Performance Date [, the Subsequent Performance Date] or the Determination Date, as applicable.*** Any moneys repaid by the Company to the Authority hereunder shall be repaid by the Authority to the Locality and shall be repaid by the Locality promptly to VEDP for redeposit into the Commonwealth’s Development Opportunity Fund. The Locality and the Authority shall use their best efforts to recover such funds, including legal action for breach of this Agreement. Neither the Locality nor the Authority shall have any responsibility for the repayment of any sums payable by the Company hereunder unless said sums have been received by the Authority from the Company.

[(f)(g)] *Failure to Repay*: If any repayment due pursuant to this Section 7 is not made by the Company when due, the Board of Directors of VEDP (the “Board”) may determine that further collection action is required, and the Board may refer the matter to the Office of the Attorney General (the “OAG”) for collection pursuant to Section 2.2-518 of the Virginia Code. In such event, by their signatures below, the Locality and the Authority will be deemed to have assigned to the Commonwealth all of their rights, title and interest in and to this Section 7. In any matter referred to the OAG for collection, the Company shall be liable to pay interest, administrative charges, attorney fees and other applicable fees. Interest on any outstanding repayment referred to the OAG shall accrue at the rate set forth in Section 6.2-301 A. of the Virginia Code (currently 6.0% per year) for the period from the [Initial] Performance Date [, the Subsequent Performance Date] or the Determination Date, as applicable, until paid.

[SEE SECTIONS 1 AND 4. IF THE BREAK-EVEN POINT IS BEYOND THE INITIAL PERFORMANCE DATE, A NEW SUBSECTION (d) WILL BE ADDED TO SECTION 7, SUBSTANTIALLY AS FOLLOWS:

[(d) *Further Performance Target for the Maintenance of the New Jobs*: If the Company had no repayment obligation under subsection (a) above or under subsection (c) above as to the New Jobs Target, the Company may still have a repayment obligation if it has not

Maintained the New Jobs from the Initial Performance Date through the Subsequent Performance Date. If the Company has received all of the proceeds of the COF Grant, but has not Maintained at least ___ New Jobs (90% of ___ the New Jobs Target) through the Subsequent Performance Date, the Company shall repay to the Authority that part of COF Grant that is proportional to the shortfall from the ___ New Jobs Target. For example, if at the Subsequent Performance Date, only ___ New Jobs have been Maintained (reflecting achievement of ___% of the New Jobs Target), the Company shall repay to the Authority \$_____, reflecting ___% of the COF Grant proceeds that it received allocated to the New Jobs Target.]

Section 8. Notices.

Formal notices and communications between the Parties shall be given either by (i) personal service, (ii) delivery by a reputable document delivery service that provides a receipt showing date and time of delivery, (iii) mailing utilizing a certified or first class mail postage prepaid service of the United States Postal Service that provides a receipt showing date and time of delivery, or (iv) delivery by facsimile or electronic mail (email) with transmittal confirmation and confirmation of delivery, addressed as noted below. Notices and communications personally delivered or delivered by document delivery service shall be deemed effective upon receipt. Notices and communications mailed shall be deemed effective on the second business day following deposit in the United States mail. Notices and communications delivered by facsimile or email shall be deemed effective the next business day, not less than 24 hours, following the date of transmittal and confirmation of delivery to the intended recipient. Such written notices and communications shall be addressed to:

if to the Company, to:

Facsimile: _____
Email: _____
Attention: _____

with a copy to:

Facsimile: _____
Email: _____
Attention: _____

if to the Locality, to:

Facsimile: _____
Email: _____
Attention: _____

with a copy to:

Facsimile: _____
Email: _____
Attention: _____

if to the Authority, to:

with a copy to:

Facsimile: _____
Email: _____
Attention: _____

Facsimile: _____
Email: _____
Attention: _____

if to VEDP, to:

with a copy to:

Virginia Economic Development Partnership
One James Center, Suite 900
901 East Cary Street
Richmond, Virginia 23219
Facsimile: 804.545.5611
Email: moret@vedp.org
Attention: President and CEO

Virginia Economic Development Partnership
One James Center, Suite 900
901 East Cary Street
Richmond, Virginia 23219
Facsimile: 804.545.5611
Email: smcninch@vedp.org
Attention: General Counsel

Section 8. Miscellaneous.

(a) *Entire Agreement; Amendments:* This Agreement constitutes the entire agreement among the parties hereto as to the COF Grant and may not be amended or modified, except in writing, signed by each of the parties hereto. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. The Company may not assign its rights and obligations under this Agreement without the prior written consent of the Locality, the Authority and VEDP.

(b) *Governing Law; Venue:* This Agreement is made, and is intended to be performed, in the Commonwealth and shall be construed and enforced by the laws of the Commonwealth. Jurisdiction and venue for any litigation arising out of or involving this Agreement shall lie in the Circuit Court of the City of Richmond, and such litigation shall be brought only in such court.

(c) *Counterparts:* This Agreement may be executed in one or more counterparts, each of which shall be an original, and all of which together shall be one and the same instrument.

(d) *Severability:* If any provision of this Agreement is determined to be unenforceable, invalid or illegal, then the enforceability, validity and legality of the remaining provisions will not in any way be affected or impaired, and such provision will be deemed to be restated to reflect the original intentions of the parties as nearly as possible in accordance with applicable law.

(e) *Attorney's Fees:* Except as provided in Section 7 [(f)(g)] , attorney's fees shall be paid by the party incurring such fees.

[THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties hereto have executed this Performance Agreement as of the date first written above.

_____ **OF** _____, **VIRGINIA**

By _____
Name: _____
Title: _____
Date: _____

**INDUSTRIAL/ECONOMIC
DEVELOPMENT AUTHORITY OF
THE _____ OF _____,
VIRGINIA**

By _____
Name: _____
Title: _____
Date: _____

[COMPANY]

By _____
Name: _____
Title: _____
Date: _____

**VIRGINIA ECONOMIC
DEVELOPMENT PARTNERSHIP
AUTHORITY**

By _____
Name: _____
Title: _____
Date: _____

Exhibit A: Annual Progress Report Form

Exhibit B: Final Report Form

**ANNUAL PROGRESS REPORT
COMMONWEALTH'S DEVELOPMENT OPPORTUNITY FUND**

PROJECT SUMMARY:

Project	
Location	
Amount of Grant	
Performance Reporting Period	
Performance Date	

PROJECT PERFORMANCE:

Performance Measurement	Target	As of _____	% Complete
New Jobs (over ___ baseline) ¹			
Confidence level target will be reached by Performance Date shown above (check one)	High <input type="checkbox"/>	Moderate <input type="checkbox"/>	Low <input type="checkbox"/>
Capital Investment (provide breakdown below) ²			
Confidence level target will be reached by Performance Date shown above (check one)	High <input type="checkbox"/>	Moderate <input type="checkbox"/>	Low <input type="checkbox"/>
Average Annual Wage			N/A
Confidence level target will be reached by Performance Date shown above (check one)	High <input type="checkbox"/>	Moderate <input type="checkbox"/>	Low <input type="checkbox"/>
Standard Fringe Benefits (check one)	Yes <input type="checkbox"/>	No <input type="checkbox"/>	N/A
Virginia Corporate Income Tax Paid in Prior Calendar Year ³	\$		

¹Data will be verified using Virginia Employment Commission records.

²Data will be verified with locality records.

³This confidential information is protected from disclosure pursuant to § 2.2-3705.6 of FOIA.

Capital Investment Breakdown	Amount
Land	\$
Land Improvements	\$
New Construction or Expansion	\$
Renovation or Building Upfit	\$
Production Machinery and Tools	\$
Furniture, Fixtures and Equipment	\$
Other	
Total	\$

COMMENTS:

Discuss project status, including the current level of new jobs and capital investment, progress on targets, changes or likely changes in project's nature that may impact achievement of targets, and other information relevant to project performance. If the project is not on track to meet targets, please provide an explanation.

TO BE CERTIFIED BY AN OFFICER OF THE COMPANY:

I certify that I have examined this report and to the best of my knowledge and belief, it is true, correct, and complete.

Company: _____

Submitted By: _____
Signature of Official

Name: _____
Print Name

Title: _____

Date: _____

Please return to:

**FINAL REPORT
COMMONWEALTH'S DEVELOPMENT OPPORTUNITY FUND**

PROJECT SUMMARY:

Project	
Location	
Amount of Grant	
Performance Date	

PROJECT PERFORMANCE:¹

Performance Measurement	Target	As of March 1, 2021	% Complete
New Jobs (over __ baseline) ²			
Capital Investment (provide breakdown below) ³			
Average Annual Wage			N/A
Standard Fringe Benefits			
Virginia Corporate Income Tax Paid in Prior Calendar Year⁴	\$		

Capital Investment Breakdown	Amount
Land	\$
Land Improvements	\$
New Construction or Expansion	\$
Renovation or Building Upfit	\$
Production Machinery and Tools	\$
Furniture, Fixtures and Equipment	\$
Other	
Total	\$

¹Final, actual performance will be reported on VEDP's public reporting website.

² Attach the company's four most recent Quarterly Tax Report (Form FC-20) filed with the Virginia Employment Commission.

³ Data will be verified using records from the Commissioner of the Revenue and invoices.

⁴This confidential information is protected from disclosure pursuant to § 2.2-3705.6 of FOIA

LOCAL MATCH:

Goal	
Actual	

COMMENTS:

Discuss Project status or the important of the Project to the locality and region.

TO BE CERTIFIED BY AN OFFICER OF THE COMPANY:

I certify that I have examined this report and to the best of my knowledge and belief, it is true, correct, and complete.

Company: _____

Submitted By: _____
Signature of Official

Name: _____
Print Name

Title: _____

Date: _____

Please return to:

Kim Ellett, Incentives Coordinator, Virginia Economic Development Partnership, 804-545-5618, kellett@vedp.org