

**VIRGINIA ECONOMIC DEVELOPMENT INCENTIVE GRANT**  
**PERFORMANCE AGREEMENT**

This **PERFORMANCE AGREEMENT** made and entered this \_\_\_\_ day of \_\_\_\_\_, 20[\_\_\_], by and between the **COMMONWEALTH OF VIRGINIA** (the “Commonwealth”) and the \_\_\_\_\_ (the “Company”), a \_\_\_\_\_ [corporation/limited liability company/etc.] [authorized to transact business in the Commonwealth].

WHEREAS, the Virginia General Assembly enacted the Virginia Investment Partnership Act, Chapter 51, Title 2.2, Code of Virginia of 1950, as amended (the “VIP Act”), to encourage capital investment and job creation in the Commonwealth;

WHEREAS, the Company intends to locate \_\_\_\_\_ (the “Facility”) in the \_\_\_\_\_ of \_\_\_\_\_, Virginia (the “Locality”), which will entail a Capital Investment of at least \$ \_\_\_\_\_ and the creation and Maintenance of at least \_\_\_\_\_ New Jobs, as such capitalized terms are hereinafter defined;

WHEREAS, the expected Capital Investment of \$ \_\_\_\_\_ is in excess of the greater of \$5,000,000 or \$6,500 per New Job expected to be created and Maintained, which is the minimum eligibility criteria set forth in the VIP Act for a Virginia Economic Development Incentive Grant;

WHEREAS, the Locality is located in a Metropolitan Statistical Area with a Virginia population of [more/less] than 300,000;

WHEREAS, the \$ \_\_\_\_\_ expected average annual wage of the \_\_\_\_\_ expected New Jobs is [at least 50% greater/at least 100% greater] than the prevailing average annual wage in the Locality as of the date of this Agreement of \$ \_\_\_\_\_ which is the minimum eligibility criteria set forth in the VIP Act for a Virginia Economic Development Incentive Grant [if in an MSA with more than 300,000];

WHEREAS, for the location of the Facility, the Company has not been awarded a Virginia Investment Performance Grant or a performance grant for Major Eligible Employers under the provisions of Sections 2.2-5101 or 2.2-5102 of the VIP Act;

WHEREAS, under Section 2.2-5102.1 of the VIP Act and through the Virginia Economic Development Partnership Authority (“VEDP”), the Commonwealth has approved a Virginia Economic Development Incentive Grant in the amount of \$ \_\_\_\_\_ (the “VEDIG”) from the Economic Development Incentive Grant Subfund of the Virginia Investment Partnership Grant Fund created under the VIP Act for the purpose of inducing the Company to make the Capital Investment and to create and Maintain the New Jobs;

WHEREAS, the Commonwealth has determined that 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 that the amount of this VEDIG is appropriate, based on the relative value of such public purpose benefits;

WHEREAS, the Commonwealth is willing to provide the VEDIG to the Company, subject to appropriations, in installments, as described in Section 4:

Now the parties hereto, in consideration of the foregoing, and the disbursement of funds, hereafter provided, agree as follows:

**Section 1. Definitions.**

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

“Capital Investment” means a capital expenditure by or on behalf of the Company on or after \_\_\_\_\_, 20\_\_\_\_, in taxable real property, taxable tangible personal property, or both, at the Facility that is capitalized or is capitalizable by the Company and that increases the productivity of the Facility, results in the creation, development or utilization of a more advanced technology than is in use immediately prior to such investment, or both. Any Capital Investment in technology shall result in a measurable increase in capacity or productivity, a measurable decrease in the production of flawed product, or both. Capital expenditures for maintenance, replacement or repair of existing machinery, tools and real property shall not constitute a Capital Investment; however, expenditures for the replacement of property shall be eligible for designation as a Capital Investment if such replacement results in a measurable increase in productivity. [A capital expenditure related to the Company’s leasehold interest in certain real property will be considered to be made “on behalf of the Company” if the lease between a developer or lessor and the Company is a capital lease or 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 furniture, fixtures, machinery and equipment, including under an operating lease, and expected building up-fit and tenant improvements 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 payment period of the VEDIG. 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 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, suppliers, and similar multiplier or spin-off jobs shall not qualify as New Jobs. [The New Jobs must be in addition to the \_\_\_\_\_ full-time positions in place at the Facility as of \_\_\_\_\_, 20\_\_\_\_.]

"Projected Completion Date" means \_\_\_\_\_, 20\_\_\_\_. This is the date by which the Company expects to complete the Capital Investment and to create and Maintain the New Jobs. [If the "Performance Date" for the \$\_\_\_\_\_ Commonwealth's \_\_\_\_\_ Development Opportunity Fund Grant awarded for the benefit of the Company is extended beyond \_\_\_\_\_, 20\_\_\_\_, the Projected Completion Date will be extended to the same date.]

**Section 2. Performance Goals; Reporting; Company Notification.**

(a) *Performance Goals:* The Company shall make or cause to be made a Capital Investment at the Facility of at least \$\_\_\_\_\_ (the "Capital Investment Goal") and create and Maintain at least \_\_\_\_\_ New Jobs at the Facility (the "New Jobs Goal") (together, the "Performance Goals").

(b) *Progress Reporting:* The Company shall provide, at the Company's expense, in the form attached hereto as Exhibit A, detailed verification reasonably satisfactory to VEDP of the Company's progress on the Performance Goals. Such progress reports shall be filed annually on or before\_\_\_\_\_, starting at \_\_\_\_\_, 20\_\_\_\_, and covering the period through the prior \_\_\_\_\_. [If the Company wishes to count as Capital Investments the capital expenditures made on its behalf by a developer or lessor 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.]

The Company shall provide such progress reports at such other times as VEDP may reasonably require.

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.

(c) *Company Notification:* The Company will provide a written certification to VEDP within 90 days of completion of the Performance Goals, with a letter executed by a senior executive of the Company, certifying (i) the amount of Capital Investment at the Facility, (ii) the number of New Jobs created and Maintained at the Facility, (iii) the average annual wage paid to

those employees, and (iv) a summary of the standard fringe benefit package provided for those employees (the “Company Notification”).

In the event that the Projected Completion Date may be significantly earlier or later than \_\_\_\_\_, 20\_\_\_\_, the Company agrees to furnish a letter to VEDP containing details of its progress toward completing the Performance Goals.

The Company Notification must be no submitted later than 90 days after the projected Completion Date, and may be the same as a progress report described in subsection (b) above.

### **Section 3. 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. All such tax information shall be confidential and exempt from public disclosure under the Virginia Freedom of Information Act. VEDP shall use such tax information 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 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 VEDP, VEDP may each require such other documentation, including invoices, or audits as may be reasonably 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 Quarterly Tax Reports (Form FC-20) filed with the Virginia Employment Commission with the Company Notification. The forms shall be marked and considered confidential and proprietary and shall be used by VEDP solely for verifying satisfaction of the New Jobs. 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 VEDP, VEDP may require such other documentation or audits as may be reasonably required to properly verify the New Jobs.

### **Section 4. VEDIG Payout.**

Beginning with the fiscal year in which the Company Notification has been on file at VEDP for 36 months and pursuant to the provisions of the VIP Act, the Commonwealth shall make five equal annual payments of the VEDIG to the Company in the amount of \$\_\_\_\_\_ per year, for a total of \$\_\_\_\_\_, subject to appropriations.

The VEDIG payments shall be made subject also to the conditions that (i) the Capital Investment remains substantially in place during the payment period, (ii) the New Jobs are Maintained during the payment period, and (iii) the Facility continues to operate throughout the payment period at substantially the same level as existed at the time of the Company Notification. If the Capital Investment does not substantially remain in place, if the New Jobs are not so Maintained, or if the Facility is no longer so operated, the Company shall provide immediate notice to VEDP.

The VEDIG proceeds may be used by the Company for any lawful purpose.

It is expected that the Company will achieve the Performance Goals by the Projected Completion Date. If the Company Notification is provided in \_\_\_\_\_, 20\_\_\_\_, and the other conditions are met, the first payment would be due to the Company in the Commonwealth's fiscal year 20\_\_\_\_, which begins on July 1, 20\_\_.

Although payments to the Company under this Agreement are subject to appropriations by the Virginia General Assembly, the Commonwealth agrees to exercise diligence in seeking the necessary funding for this Agreement from the Virginia General Assembly and to include such funding in the appropriate budget requests for the appropriate fiscal years.

**Section 5. Consequences of Failure of Full Compliance; Reductions.**

(a) *Failure of Full Performance:* No VEDIG installment payment shall be paid if (i) the Capital Investment does not substantially remain in place during the payment period, (ii) the New Jobs are not Maintained during the payment period, or (iii) the Facility does not continue to operate during the payment period at substantially the same level as existed at the time of the Company Notification. If, for example, the Capital Investment has not substantially remained in place during the third year of the payment period, no further installment payments shall be made, but the Company shall not be required to repay any VEDIG installment payments previously made.

Further, no VEDIG payment in any amount shall be paid if the Company fails to achieve by the Projected Completion date:

- (i) \$\_\_\_\_\_ in Capital Investment (which is the greater of (a) the statutory minimum capital investment requirement of the greater of \$5,000,000 or \$6,500 per New Job and (b) 50% of the Company's \$\_\_\_\_\_ Capital Investment Goal); and
- (ii) \_\_\_\_\_ New Jobs (which is the greater of (a) the required statutory minimum number of new jobs at [50%/100%] of the Locality's prevailing average wage rate as of the Projected Completion Date and (b) 50% of the Company's \_\_\_\_ New Jobs Goal).

(b) *Reduced Payment Due:* To the extent that the Company achieves more in Capital Investment and New Jobs by \_\_\_\_\_, 20\_\_\_\_, than described in clause (i) above, but does not completely attain its Performance Goals, the total VEDIG to be paid shall be diminished proportionately.

For this purpose, the VEDIG shall be allocated as \$\_\_\_\_\_ (25%) to the Capital Investment Goal and \$\_\_\_\_\_ (75%) to the New Jobs Goal. If, for example, the Company has (i) made Capital Investments of \$\_\_\_\_\_ (\_\_\_\_\_% of the Capital Investment Goal) and (ii) has created and Maintained \_\_\_\_\_ New Jobs (\_\_\_\_\_% of the New Jobs Goal), the amount of the VEDIG will be diminished proportionately by \$\_\_\_\_\_ (\_\_\_\_\_% of the \$\_\_\_\_\_ allocated to the Capital Investment) and \$\_\_\_\_\_ (\_\_\_\_\_% of the \$\_\_\_\_\_ allocated to the New Jobs) to \$\_\_\_\_\_. The amount will be paid out on the schedule set forth in Section 4 above.

(c) *Failure of Full Appropriation:* If there are insufficient funds in the Economic Development Incentive Grant Subfund in the Virginia Investment Partnership Grant Fund created under the VIP Act to pay all VEDIG payments due to intended recipients, the provisions of Section 2.2-5104 of the VIP Act shall govern the distribution of the available funds.

**Section 6. 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: \_\_\_\_\_

if to the Commonwealth, to:

Commonwealth of Virginia

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Facsimile: \_\_\_\_\_  
Email: \_\_\_\_\_  
Attention: \_\_\_\_\_

with a copy to:

Virginia Economic Development Partnership

Patrick Henry Building  
1111 East Broad Street  
Richmond, Virginia 23219  
Facsimile: (804) 371-0250  
Email: brian.ball@governor.va.gov  
Attention: Secretary of Commerce and Trade

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

**Section 7. Miscellaneous.**

(a) *Entire Agreement; Amendments:* This Agreement constitutes the entire agreement between the parties hereto as to the VEDIG 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 Commonwealth, which consent shall not be unreasonably withheld.

(b) *Governing Law; Venue:* This Agreement is made, and 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.

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

**COMMONWEALTH OF VIRGINIA**

By \_\_\_\_\_  
Name: Brian Ball  
Title: Secretary of Commerce and Trade  
Date: \_\_\_\_\_, 20[\_\_]

\_\_\_\_\_

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_, 20[\_\_]



**ANNUAL PROGRESS REPORT  
VIRGINIA ECONOMIC DEVELOPMENT INCENTIVE GRANT**

**PROJECT SUMMARY:**

Project	
Location	
Amount of Grant	
Performance Reporting Period	
Projected Completion Date	

**PROJECT PERFORMANCE:**

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

<sup>1</sup>Data will be verified using Virginia Employment Commission records.

<sup>2</sup>Data will be verified with locality records.

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

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

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