

## PERFORMANCE AGREEMENT (Loan)

This Performance Agreement (this "Agreement") is made and entered into this \_\_\_\_\_, by and among the TOBACCO REGION REVITALIZATION COMMISSION, a body corporate and political subdivision of the Commonwealth of Virginia (the "Commission"), \_\_\_\_\_ (the "Debtor"), a political subdivision of the Commonwealth, and \_\_\_\_\_, a \_\_\_\_\_ Corporation (the "Company") whose Federal Employer Identification Number is \_\_\_\_\_.

### WITNESSETH:

**WHEREAS**, the Debtor has been selected to receive a loan in the amount of \_\_\_\_\_ (the "Loan") from the Commission for the Debtor's use in inducing the Company to construct or locate taxable assets and employ persons in \_\_\_\_\_ (the "Locality"); and

**WHEREAS**, the Debtor has indicated its desire to tender the Loan to the Company for its use and benefit, provided that the Company commits to the achievement of certain goals relating to employment and the construction or location of taxable assets in compliance with the terms hereof; and

**WHEREAS**, the Commission, the Debtor and the Company desire to set forth their understanding and agreement as to the use of the Loan, the obligations of each party hereto, the conditions under which the Loan must be repaid, and the obligations of each party hereto in the Event of Default (as defined herein); and

**WHEREAS**, the Commission has determined that the approval and funding of the Loan constitutes a valid public purpose for the expenditure of public funds and is consistent with and in furtherance of the Commission's public purposes as outlined in Section 3.2-3100, *et. seq.* of the *Code of Virginia* of 1950, as amended;

**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 hereto hereby represent, warrant, covenant, and agree as follows:

### **Section 1. Disbursement of the Loan**

After receipt by the Commission of this Agreement fully executed by all parties hereto, and provided that the Debtor is not in default on its obligations to the Commission as of the date first written above, the Commission shall disburse the Loan to the Debtor as follows:

*In Advance.* One (1) disbursement as requested by the Debtor in writing at such time as the Debtor may elect, subject to the reasonable approval of the Commission. The amount of the disbursement shall **not** be limited to that portion of the Loan which has been earned by the Company; however, the disbursement shall only be made after the Debtor Certification attached hereto as **Exhibit B** has been completed by the Debtor and delivered to and approved by the Commission in its sole discretion.

Fifty percent (50%) of the Loan is allocated for the Company's taxable asset obligation set forth in Section 4 of this Agreement and fifty percent (50%) of the Loan is allocated for the Company's employment obligation set forth in Section 3 of this Agreement. Unless otherwise agreed to in writing by all parties to this Agreement, Debtor shall disburse all Loan proceeds to the Company or for the Company's benefit within 30 days of receipt of Loan proceeds from the Commission or return the undisbursed proceeds to the Commission.

## **Section 2. Loan Restrictions and Conditions**

Under this Agreement, the Commission places no restriction on the use of the Loan proceeds by the Company, and imposes no conditions beyond those described herein. Should any such restrictions or conditions be imposed by the Debtor, the same shall be described in **Exhibit A**, which shall be attached hereto and made a part hereof, but which shall be binding upon the Company only if signed thereon by an authorized representative of the Company. The Debtor shall be responsible for enforcement of any restrictions or conditions described in said **Exhibit A**.

## **Section 3. Employment Obligation**

The Company shall employ\* at least \_\_\_ persons in the Locality with a quarterly aggregate payroll of at least \$\_\_\_\_\_. Said employment and payroll will be in addition to those already employed in the Locality by the Company and paid during the calendar quarter ending on \_\_\_\_\_, hereinafter called the "Base Quarter." Persons employed by the Company in the Locality shall be counted as employed hereunder only to the extent that they (a) exceed the aggregate number of employees at all Company locations within the Commonwealth of Virginia during the Base Quarter, and (b) are not counted as fulfillment of any other employment obligation made to the Commission by the Company under any other agreement.

## **Section 4. Obligations Regarding Taxable Assets**

The Company shall locate or construct taxable assets in the Locality having an assessed value of at least \$\_\_\_\_\_, as determined by the Locality's Commissioner of Revenue ("COR"). If the Locality elects to arrange for reimbursement to the Company of all, or any portion of, the tax paid by the Company on said taxable assets, or elects to waive all or any portion of such tax liability, the Company's aforementioned obligation to locate or construct taxable assets in the Locality shall not be waived or reduced. The Company shall receive credit for the value of all taxable assets so determined by the COR, notwithstanding the local taxing authority's election to waive or refund the taxes so levied. Said taxable assets will be in addition to those counted in fulfillment of any other taxable asset or capital investment obligation made to the Commission by the Company under any other agreement. If the Company is exempt from the payment of property taxes on certain assets by state law, the Company shall not be entitled to receive or keep any portion of the Loan allocated to its investment in those certain assets.

## **Section 5. Determination of Performance - Employment**

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*\*For purposes of this Agreement the number of persons "employed" means the number of persons who received pay in any given quarter and is calculated by adding together the number of persons who received pay in each month of the quarter and dividing that sum by three (3).*

In order to earn the Loan, the Company must meet its employment obligations hereunder not later than thirty-six (36) months after the end of the Base Quarter. The Company's employment obligations will be deemed to have been fully met when it can document any three (3) consecutive calendar quarters after the Base Quarter in which:

- (i) the average number of employees who received pay from the Company during each of those three (3) consecutive quarters\* exceeds the average number of employees who received pay in the Base Quarter by at least the number promised in Section 3 above, AND
- (ii) the total wages paid by the Company to employees in each of those three quarters exceed the wages paid by the Company to employees in the Base Quarter by at least the amount promised in Section 3 above, AND
- (iii) all such employees worked in the Locality, AND
- (iv) all Company employees in Virginia have been reported to the Virginia Employment Commission ("VEC") in accordance with VEC regulations. The Company's failure to satisfy such requirements shall be a breach hereof, and shall constitute an Event of Default hereunder by the Company. Employment gains by the Company in the Locality that are offset by employment losses elsewhere in Virginia shall not be counted as employment hereunder.

All determinations of performance made under this Section 5 shall be based upon reports made by, or on behalf of, the Company to the VEC including but not limited to *VEC Form FC-20 Employer's Quarterly Tax Report* and *O.M.B. Form No 1220-0134 Multiple Worksite Report – BLS 3020* (or any successor forms designated by VEC, or accepted by VEC in lieu thereof). If such tax filings include Company employees who did not work in the Locality, it shall be the duty of the Company to provide additional information sufficient to identify those employees who did work in the Locality. Employees of control affiliates (*e.g.*, subsidiary companies, parent companies, entities under common ownership or control) or employees of independent contractors hired by the Company shall not be counted as employees of the Company in fulfillment of its promise hereunder UNLESS such entities and their relationship to the Company are disclosed to and approved by the Commission in writing, AND such entities supply the Commission with the same employment documentation as described herein. Employees of temporary employment agencies ("temps") who are assigned to work for the Company in the Locality shall not be counted UNLESS evidenced by letter from the temporary employment agency setting forth the number of man-hours so assigned during the Base Quarter and the 36 months immediately following the Base Quarter. Such man hours shall be credited to the Company's job-creation obligation at the rate of one job for one quarter for every 520 man hours evidenced by such letter.

**Section 6. Determination of Performance – Taxable Assets**

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\*The number of persons who received pay in any given quarter is calculated by adding together the number of persons who received pay in each month of the quarter and dividing that sum by three (3).

In order to earn the Loan, the Company must meet its taxable asset obligations hereunder not later than thirty-six (36) months after the Base Quarter. Company assets located, constructed, or leased in the Locality prior to and within the Base Year will not be counted in fulfillment of the Company's taxable asset obligation. For purposes of this Agreement, the calendar year that includes the Base Quarter shall be called the "Base Year."

Leased assets not on record with the COR in the name of the Company will be counted in fulfillment of the Company's taxable asset obligation only if a copy of the lease is submitted to the Commission indicating that the asset(s) under lease meet the other requirements listed above and were not leased from the Locality or its control affiliates at a substantial discount from market rates.

The Company's achievement toward meeting its taxable asset obligation shall be based on asset values assessed by the COR for the Locality and shall be the sum of the following:

- a. the highest real property assessed value of record for any one of the three calendar years following the Base Year, less the assessed value of the Base Year, PLUS
- b. the first personal property assessed value for each asset first appearing of record during the three calendar years following the Base Year.

The Commission shall rely upon the information described above as the same is reported to the Commission by the COR in writing, without exception.

Taxable assets owned by subsidiary companies, related entities, or entities under common ownership or control shall not be counted as taxable assets of the Company in fulfillment of its taxable asset obligation hereunder UNLESS such entities and their relationships to the Company are disclosed to and approved by the Commission in writing, AND such entities supply the Commission with the same taxable assets documentation as described herein.

## **Section 7. Verification of Performance**

The Company hereby expressly grants its consent for (a) the COR for the Locality to release to the Tobacco Commission or the Debtor records necessary to disclose the information required in this Section, and (b) the Virginia Employment Commission to release to the Tobacco Commission all Company employment records of any kind held by the Virginia Employment Commission.

If any of the taxable assets described in Section 4 have been acquired or improved on behalf of the Company by a lessor, the Company shall be responsible for gathering and reporting to the Commission information regarding the taxable assets acquired or improved by the lessor on behalf of the Company.

## **Section 8. Events of Default**

If any of the following should occur within the thirty-six (36) month period after the end of the Base Quarter, it shall constitute an "Event of Default" and the Commission may, at its election,

accelerate the Company's obligation to repay the portion of the Loan that has not been earned as of the date of the Event of Default:

- a. The Company applies for or consents to the appointment of a receiver, trustee or liquidator of all or a substantial part of its assets, files a voluntary petition of bankruptcy, makes a general assignment for the benefit of creditors, files a petition or an answer seeking reorganization or arrangement with creditors, or if an order, judgment or decree shall be entered by any court of competent jurisdiction, on the application of a creditor, adjudicating the Company as bankrupt or insolvent or approving a petition seeking reorganization of the Company or appointing a receiver, trustee or liquidator of the Company or of all or a substantial part of its assets which remains undismissed, undischarged or unstayed for a period of forty-five (45) days;
- b. The Company ceases to be of record and in good standing with the Virginia State Corporation Commission, and such failure is not cured within sixty (60) days from notice thereof, unless Company obligations hereunder have been assumed by another entity and that assumption was approved by the Commission and the Debtor;
- c. The Company fails, for reasons other than an Event of Force Majeure to fulfill at least twenty-five percent (25%) of either its employment obligation described in Section 3 above or its taxable asset obligation described in Section 4 above within eighteen (18) months after the end of the Base Quarter. "Event of Force Majeure" means any of the following: acts of God, strikes, lockouts, crime, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, hurricanes, tornadoes, storms, floods, washouts, draughts, or explosions;
- d. The Company's employment level is less than 75% of that found in the Base Quarter in more than 2 calendar quarters following the Base Quarter;
- e. The Company fails to provide verification to the Commission as described in Section 7, within sixty (60) days from a written request from the Commission; or
- f. The Company closes its business in the Locality for a period of more than thirty (30) days during the thirty-six (36) months following the Base Quarter.
- g. The Company fails to make its payments, as required by this Agreement, within 30 days of said payment being required.

**Section 9. Repayment Obligation in the Event of Default**

In the event that the Company does not meet its obligations hereunder within thirty-six (36) months after the end of the Base Quarter, or an Event of Default occurs, the Company shall repay to the Debtor the remaining amount owed by the Company within thirty (30) days of notice from the Commission along with an additional 5% of the amount owed.

- a. Interest shall accrue on unpaid balances (and the 5% penalty owed) at the rate of three percent (3%) per annum beginning on the 31<sup>st</sup> day after the Company is notified of the amount due.
- b. Monies due to the Locality pursuant to this Agreement, if any, shall be considered to be owed to the Treasurer for the Locality and subject to the Treasurer's statutory powers provided for in the Code of Virginia.
- c. In the event the Commission is required to take legal action under this Agreement, the Debtor and the Company, jointly and severally, shall be liable for all of the Commission's costs expended for the administration and enforcement of this Agreement, including but not limited to reasonable attorney's fees and court costs.

**Section 10. Terms of Repayment**

The Company hereby promises to pay to the order of the Commission, the principal sum of \$ \_\_\_\_\_ pursuant to the terms and conditions set forth herein.

- a. The principal amount of this Loan shall be due and payable in \_\_\_\_\_ equal semi-annual payments due on the first of February and the first of August, respectively. The first payment is due on the first semi-annual due date to arrive six months after the Loan is disbursed in the amount of \$\_\_\_\_\_.
- b. This Loan shall bear no interest except as required in the Event of Default as stated in Section 9.
- c. The Company shall have the right at any time and from time to time to prepay this Loan in whole or in part without penalty.

**Section 11. Acknowledgment and Notice**

The Company and the Debtor each acknowledge and agree to its respective repayment obligation in accordance with this Agreement. Any notices required or permitted under this Agreement shall be given in writing, and shall be deemed to be received upon receipt or refusal after mailing of the same in the United States Mail by certified mail, postage fully pre-paid or by overnight courier (refusal shall mean return of certified mail, undelivered) and addressed as follows:

if to the Company, to:

NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

Attention: \_\_\_\_\_

if to the Debtor, to:

NAME: \_\_\_\_\_  
ADDRESS: \_\_\_\_\_  
Attention: \_\_\_\_\_

if to the Commission, to:

NAME: Tobacco Region Revitalization Commission  
ADDRESS: 701 East Franklin Street, Suite 501  
Richmond, VA 23219  
Attention: Evan Feinman, Executive Director

This Agreement constitutes the entire agreement between the parties hereto and 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 or obligations under this Agreement without the prior written consent of the Debtor and the Commission; provided that the Company shall have the right, without the consent of the Debtor or the Commission, to assign its rights (not its obligations) under this Agreement to any entity that controls, is controlled by, or is under common control with, the Company.

This Agreement is made, and intended to be performed, in the Commonwealth and shall be construed and enforced by the laws of that state. 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.

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. If any provision of this Agreement is determined to be unenforceable, then the remaining provisions of this Agreement shall, in the sole discretion of the Commission, be voidable by the Commission or interpreted as in effect as if such unenforceable provisions were not included therein.

The Company hereby warrants that from the date of this Agreement until all obligations hereunder have been satisfied that it is, and will remain, registered and in good standing with the Virginia State Corporation Commission and that the Company is, and will remain, legally authorized to conduct business in the Commonwealth of Virginia.

The provisions of this Agreement are intended to and shall survive closing, the delivery of any deed or other instrument, and any other event. If this Agreement has not been executed by all parties hereto and returned to the Commission within 90 days from the date hereof, the Debtor's and the Company's rights to the Loan Proceeds shall automatically terminate.

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

TOBACCO REGION REVITALIZATION  
COMMISSION

By: \_\_\_\_\_  
Evan Feinman, Executive Director

Date: \_\_\_\_\_

DEBTOR

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

COMPANY

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_



**Loan Restrictions**

**Exhibit B**

**Debtor Certification**

\_\_\_\_\_ (the “Debtor”), a political subdivision of the Commonwealth, hereby certifies that (a) it unconditionally guarantees the Company’s performance under and pursuant to the Performance Agreement (this “Agreement”) dated as of dated as of \_\_\_\_\_, 20\_\_, by and among the TOBACCO REGION REVITALIZATION COMMISSION, a body corporate and political subdivision of the Commonwealth of Virginia (the “Commission”), the Debtor, and \_\_\_\_\_, a \_\_\_\_\_ Corporation (the “Company”), and (b) it holds collateral security from the Company sufficient to provide a secondary source of repayment in the event that the Company cannot or will not repay the unearned portion of the Loan (as defined in the Agreement) to the Commission. Such collateral security is described as follows:

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The Debtor hereby acknowledges that the sufficiency of the collateral security for the Loan is the sole responsibility of the Debtor.

The Debtor further certifies that the repayment obligations it has undertaken pursuant to this Agreement constitute valid, authorized, and legal obligations of the Debtor, and create a legally enforceable debt of the Debtor.

DEBTOR

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_