**COMMONWEALTH’S DEVELOPMENT OPPORTUNITY FUND**

**PERFORMANCE AGREEMENT**

This **PERFORMANCE AGREEMENT** (the “Agreement”) made and entered this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, [2021/2022], by and among the [**CITY**/**COUNTY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, VIRGINIA]** (the “Locality”), a [municipal corporation/political subdivision] of the Commonwealth of Virginia (the “Commonwealth”), \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a [state of creation] [type of entity] [if a foreign entity: authorized to transact business in the Commonwealth] (the “Company”), the **VIRGINIA ECONOMIC DEVELOPMENT PARTNERSHIP AUTHORITY** (“VEDP”),a political subdivision of the Commonwealth, and the **[INDUSTRIAL**/**ECONOMIC DEVELOPMENT AUTHORITY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [, VIRGINIA]** (the “Authority”), a political subdivision of the Commonwealth. [THE “COMPANY” IS THE ENTITY OR ENTITIES THAT WILL BE MAKING THE CAPITAL INVESTMENT AND HIRING THE WORKERS.]

WITNESSETH:

WHEREAS, the Locality has been awarded a grant of and expects to receive $\_\_\_\_\_\_\_ (the “COF Grant”) from the Commonwealth’s Development Opportunity Fund (the “Fund”) through VEDP for the purpose of inducing the Company to [acquire land] [and an existing facility] and to [construct, expand, equip], improve, and operate a \_\_\_\_\_\_\_\_\_\_\_\_\_\_ 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 meets 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, and the obligations of the Company regarding Capital Investment and New Jobs;

WHEREAS, the [acquisition, 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 business personal property, approximately $\_\_\_\_\_\_\_\_\_\_ will be invested in the acquisition of land and an existing facility, and approximately $\_\_\_\_\_\_\_\_\_\_ will be invested in the construction, expansion and up-fit of the buildings for the Facility;

WHEREAS, the [acquisition, 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. The purchase or lease of machinery and tools or furniture, fixtures, and business personal property, including under an operating lease, and expected building [construction, expansion, improvement] and up-fit by or on behalf of the Company will qualify as Capital Investment. [MODIFY FOR CAPITAL LEASE 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 Capital Investment must be in addition to the capital improvements at the Facility as of \_\_\_\_\_\_\_\_\_\_, 2020. [GENERALLY, AROUND THE DATE OF THE ANNOUNCEMENT]

“Capital Investment Target” means that the Company has made or caused to be made and retained Capital Investments of at least $\_\_\_\_\_\_\_\_\_\_.

“Fund” means the Commonwealth’s Development Opportunity Fund.

“Maintain” means that the New Jobs will continue without interruption from the date of creation through the date that the level of achievement of the New Jobs Target is being tested, including the 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\_\_.] [GENERALLY, THE SAME DATE AS THE START DATE FOR COUNTING CAPITAL INVESTMENT -- AROUND THE DATE OF THE ANNOUNCEMENT]

“New Jobs Target” means that the Company has created and Maintained at least \_\_\_\_ New Jobs.

“Performance Date” means \_\_\_\_\_\_\_\_\_\_, 20\_\_. [GENERALLY, THE LAST DAY OF A CALENDAR QUARTER ABOUT 3 YEARS FROM THE DATE OF THE ANNOUNCEMENT] If the Locality, in consultation with VEDP, deems that good faith and reasonable efforts have been made and are being made by the Company to achieve the Targets, on or before the Performance Date the Locality may request an extension of the Performance Date by up to 15 months. Any extension of the Performance Date shall require the prior approval of the Company and the Board of Directors of VEDP (the “Board”). If the 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 Performance Date has been extended shall be the “Performance Date” for the purposes of this Agreement.

“Performance Report” means a report to be filed by the Company in accordance with Section 5. The “Final Performance Report” is to be filed within 90 days after the Performance Date. As noted in Section 5, the Locality, the Authority and VEDP may each request a Performance Report at other dates prior to the Performance Date.

“Targets” means the Capital Investment Target and the New Jobs Target, all to be achieved as of the Performance Date.

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

**Section 2. Targets; Statutory Criteria.**

(a) *Targets*: The Company will [acquire, construct, expand, equip,] improve, and operate the Facility, and achieve the Targets.

(b) *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) *Prevailing Wage; Unemployment and Poverty Rates:* The average annual wage of the New Jobs of at least $\_\_\_\_\_\_ is [more/less] than the prevailing average annual wage in the Locality of $\_\_\_\_\_\_\_ [, but is more than 85% of that prevailing average annual wage ($\_\_\_\_\_\_\_\_]. The Locality 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 [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) *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 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) *Support for Virginia’s and Locality’s Economic Development Efforts*: Recognizing that it is in the best interest of all parties for the Commonwealth and the Locality to achieve sustained economic growth, the parties will periodically engage with one another to advise on economic development strategies and initiatives for the Commonwealth and the Locality, such as promoting the attributes of the Commonwealth and the Locality as places to do business, or highlighting important industry trends and/or business development opportunities that the Commonwealth or the Locality may wish to pursue. Such engagement would include the Company’s participation in occasional business retention and expansion visits from VEDP personnel, as deemed appropriate based on the project parameters and nature of the incentives provided to the Company.

(f)*Compliance with Environmental Laws*: The Company covenants to (i) comply in all material respects with any and all applicable federal, state and local laws and regulations relating to the protection of human health and safety, the environment or hazardous or toxic substances or wastes, pollutants or contaminants ("Environmental Laws") with respect to its operations at the Facility, (ii) receive all material permits, licenses or other approvals required of the Company under applicable Environmental Laws to conduct its business at the Facility, and (iii) remain in compliance with all material terms and conditions of any such permit, license or approval. If the Company fails to comply with this covenant, and fails to rectify the noncompliance within 30 days of notice from VEDP, VEDP shall have the option to terminate this Agreement in accordance with Section 7.

[IF APPLICABLE. (g) *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.]

[IF APPLICABLE: (h)  *Relocation:* The Commonwealth’s Secretary of Commerce and Trade has delivered to the Co-Chairs of the Senate Finance and Appropriations 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.]

[IF APPLICABLE: (i) *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) *General Provisions:* 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 is to be allocated as \_\_% ($\_\_\_\_\_\_\_) for the Company’s Capital Investment Target, and \_\_% ($\_\_\_\_\_\_) for the Company’s New Jobs Target. [THE %% WILL DEPEND ON VEDP’S ROI ANALYSIS OF THE REVENUES TO BE DERIVED BY THE COMMONWEALTH FROM THE CAPITAL INVESTMENT AND NEW JOBS.]

The statutory minimum requirements for a COF Grant in the Locality require that the Company (1) make or case to be made and retained a Capital Investment of at least [$5,000,000/$2,500,000/$1,500,000] and (2) create and Maintain at least [50/25/15] New Jobs (the “Statutory Minimum Requirements”). [STATUTORY MINIMUM REQUIREMENTS WILL DEPEND ON THE FACTS PROVIDED IN SECTION 2(c)]

The COF Grant proceeds shall be retained in the Fund until needed for disbursement or the COF Grant is withdrawn in accordance with the terms of this Agreement.

[THIS FOLLOWING VERSION OF SUBSECTION (b) WILL BE USED IN THOSE INSTANCES IN WHICH THE COF GRANT WILL BE PAYABLE IN ONE INSTALLMENT FOLLOWING THE PERFORMANCE DATE. IT IS EXPECTED THAT THIS WILL BE THE MOST COMMON TIMELINE FOR DISTRIBUTION OF COF GRANTS:

(b) *Disbursement of the COF Grant:* Within 90 days after the Performance Date, the Company will deliver the Final Performance Report. Through this report, the Company will provide notice and evidence satisfactory to the Locality, the Authority and VEDP of the amount of Capital Investments made or caused to be made and retained, and the number of New Jobs created and Maintained, by the Company as of the Performance Date. The Final Performance Report will be subject to verification by the Locality and VEDP.

Upon such verification, the amount of the COF Grant proceeds to be disbursed to the Company, if any, shall be determined as follows:

(i) *If Statutory Minimum Requirements Not Met:* If, as of the Performance Date, the Company has not achieved both of the Statutory Minimum Requirements, the Company will not receive any of the proceeds of the COF Grant.

(ii) *If Targets Met:* If, as of the Performance Date, the Company has achieved the Capital Investment Target and the New Jobs Target, the Company will receive all $\_\_\_\_\_\_\_ of the proceeds of the COF Grant.

(iii) *If Statutory Minimum Requirements Met, but Targets Not Met:* If, as of the Performance Date, the Company has achieved both of the Statutory Minimum Requirements, but has not achieved the full Capital Investment Target and the full New Jobs Target, the Company will qualify for a reduced disbursement of the COF Grant, reflecting a proportional amount of the Target or Targets for which there is a shortfall. For example, if as of the Performance Date, only $\_\_\_\_\_\_\_\_\_\_ of the Capital Investment has been retained (reflecting achievement of [90]% of the Capital Investment Target), only \_\_\_ New Jobs have been created and Maintained (reflecting achievement of [75]% of the New Jobs Target), the Company will receive $\_\_\_\_\_\_\_\_ (reflecting [90]% of the $\_\_\_\_\_\_\_ of the COF Grant allocated to the Capital Investment Target), *plus* $\_\_\_\_\_\_\_ (reflecting [75]% of the $\_\_\_\_\_\_\_ of the COF Grant allocated to the New Jobs Target), for a total of $\_\_\_\_\_\_\_. These amounts reflect the percentages of the shortfall from the Capital Investment Target and the New Jobs Target, each such shortfall multiplied by the portion of the COF Grant proceeds available to the Company allocated to that Target.

Within 30 days after verification of the Final Performance Report, if any amount of COF Grant proceeds are available for disbursement to the Company, as determined in accordance with the foregoing calculations, VEDP will disburse that amount to the Locality. Within 30 days after receipt of such amount, the Locality will disburse such COF Grant proceeds to the Authority. Within 30 days after receipt of such amount, the Authority will disburse such COF Grant proceeds to the Company.

If any amount of COF Grant proceeds have not been earned by the Company, the amount not disbursed will be retained in the Fund and will be available for other economic development projects.

[THIS FOLLOWING VERSION OF SUBSECTION (b) WILL BE USED IN THOSE INSTANCES IN WHICH THE COF GRANT WILL BE PAYABLE IN MORE THAN ONE INSTALLMENT PRIOR TO THE PERFORMANCE DATE, WITH VARIATIONS TO REFLECT THE NUMBER, TIMING, AND VALUE OF THE PLANNED DISBURSEMENTS. IT IS NOT EXPECTED THAT THIS WILL BE THE MOST COMMON METHODOLOGY FOR DISTRIBUTION OF COF GRANTS:

(b) *First Disbursement*: If a Performance Report indicates that the Company has made or caused to be made and retained Capital Investments of at least $\_\_\_\_\_\_\_\_\_\_\_, and has created and Maintained at least \_\_\_ New Jobs [OR, INDICATE OTHER MILESTONES, SUCH AS A CERTIFICATE OF OCCUPANCY], the Company will qualify for a disbursement of $\_\_\_\_\_\_\_\_\_\_ of the COF Grant proceeds. Then, within 30 days of the verification of that Performance Report by the Locality and VEDP, VEDP will disburse $\_\_\_\_\_\_\_ of the COF Grant proceeds to the Locality (the “First Disbursement”). Within 30 days of its receipt of such COF Grant proceeds, the Locality will disburse such 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.

*Final* *Disbursement; Final Performance Report*: In the Final Performance Report, the Company will provide notice and evidence reasonably satisfactory to the Locality, the Authority and VEDP of the amount of Capital Investments made or caused to be made and retained and the number of New Jobs created and Maintained at the Facility as of the Performance Date. The Final Performance Report will be subject to verification by the Locality and VEDP.

The remaining amount of the COF Grant proceeds to be disbursed shall be calculated as follows:

If Targets Fully Achieved: If, as of the Performance Date, the Company has achieved the Capital Investment Target and the New Jobs Target, the Company will receive all of the remaining proceeds of the COF Grant: $\_\_\_\_\_\_\_ less the amount of the First Disbursement, if previously paid.

If Statutory Minimum Requirements have been Achieved, but full Targets have not been Achieved: If, as of the Performance Date, the Company has achieved both of the Statutory Minimum Requirements, but has not achieved the full Capital Investment Target and the full New Jobs Target, the Company will receive additional proceeds of the COF Grant, calculated as follows:

The Company shall be entitled to receive that part of the COF Grant that is proportional to the achievement of each Target. For example, if as of the Performance Date, the Company has made or caused to be made and retained Capital Investments of only $\_\_\_\_\_\_\_\_\_\_ (reflecting achievement of [75]% of the Capital Investment Target), and only \_\_\_ New Jobs have been created and Maintained (reflecting achievement of [80]% of the New Jobs Target), the Company shall have earned $\_\_\_\_\_\_\_\_ (reflecting [75]% of the $\_\_\_\_\_\_\_ of the COF Grant proceeds allocated to the Capital Investment Target, *plus* $\_\_\_\_\_\_\_ (reflecting [80]% of the $\_\_\_\_\_\_\_ of the COF Grant proceeds allocated to the New Jobs Target) for a total of $\_\_\_\_\_\_\_. 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 allocated to that Target. In this example, if the Company had not received any proceeds of the COF Grant from the First Disbursement, the Company would be entitled to receive all $\_\_\_\_\_\_\_. If, however, the Company had received $\_\_\_\_\_\_\_ of the proceeds of the COF Grant from the First Disbursement, the $\_\_\_\_\_\_\_ would be reduced to $\_\_\_\_\_\_\_. If the amount earned by the Company under this subparagraph is less than the amount previously paid to the Company from the First Disbursement, the Company shall owe a repayment to the Authority under Section 7 equal to the amount of overpayment.

Within 30 days after verification of the Final Performance Report, VEDP will disburse to the Locality any earned COF Grant proceeds yet to be paid. Within 30 days after receipt of such amount, the Locality will disburse such COF Grant proceeds to the Authority. Within 30 days after receipt of such amount, the Authority will disburse such COF Grant proceeds to the Company.

If any amount of COF Grant proceeds have not been earned by the Company, the amount not disbursed will be retained in the Fund and will be available for other economic development projects.

(c) *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 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 discretionary incentives, including but not limited to the COF Grant. With regard to the Facility, the Commonwealth expects to provide discretionary incentives in the following amounts:

|  |  |
| --- | --- |
| Category of Incentive: | Total Amount |
|  |  |
| 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”) |  |
| VEDP Talent Accelerator Program (“VTAP”) (Approximate Value) |  |
| Major Eligible Employers Grant (“MEE Grant”) |  |
| Virginia Economic Development Incentive Grant (“VEDIG”) |  |
| Major Business Facility Job Tax Credit (“MBFJTC”) (Estimated) |  |
| Port of Virginia Economic and Infrastructure Development Grant (“Port Grant”) |  |
| [Other] |  |

The proceeds of the COF Grant shall be used for the purposes described in Section 3(c). 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,] [the VEDIG,] [and the Port Grant] 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.] [The VTAP represents the value to the Company of workforce development services expected to be provided by VEDP to the Company for recruitment and training.]

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

|  |  |
| --- | --- |
| Category of Incentive: | Total Amount |
|  |  |
|  |  |
|  |  |
|  |  |
|  |  |

[IF THE LOCAL-LEVEL INCENTIVES ARE NOT BEING PROVIDED UP-FRONT:] If, by the Performance Date, the total value of all Local-Level Incentives disbursed or provided, or committed to be disbursed or provided, by the Locality to the Company is less than the $\_\_\_\_\_\_\_\_ COF Grant local match requirement, the Locality, subject to appropriation, will make an additional grant to the Company of the difference promptly after Performance Date, so long as the Company has met its Targets.

[The \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ will reflect cost savings to the Company.] [The proceeds of the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [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 Local-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) *Performance Reporting:* The Company shall provide, at the Company’s expense, in the form attached hereto as Exhibit A, detailed Performance Reports satisfactory to the Locality, the Authority and VEDP of the Company’s progress on the Targets. The Performance Reports are due by each \_\_\_\_\_\_\_\_\_\_ 1, commencing \_\_\_\_\_\_\_\_ 1, 20\_\_ [ABOUT 90 DAYS AFTER THE FIRST ANNIVERSARY OF THE MONTH/DATE OF THE PERFORMANCE DATE], reflecting the Company’s progress toward the Targets as of the prior \_\_\_\_\_\_\_\_\_\_ [SAME CALENDAR DATE AS THE MONTH/DATE OF THE PERFORMANCE DATE]. Further, the Company shall provide such Performance Reports at such other times as the Locality, the Authority or VEDP may require.

[IF APPLICABLE: 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 APPLICABLE: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.]

(b) *Final Performance Report:* The Company shall provide, at the Company’s expense, in the form attached hereto as Exhibit B, a detailed Final Performance Report satisfactory to the Locality, the Authority and VEDP of the Company’s achievement of the Targets as of the Performance Date. This Final Performance Report shall be filed within 90 days after the Performance Date.

Should the Company be unable to file the Final Performance Report within the 90-day timeframe, the Company may request a 60-day delay in filing the Final Performance Report. VEDP will require a $3,000 fee, payable to VEDP, to process the request for the filing delay. Should the Company not file the Final Performance Report within the 90-day window nor request a filing delay (including payment of the required fee), or if the Company requests a filing delay but does not file the Final Performance Report prior to the new filing deadline, VEDP will withhold any COF Grant payment that might otherwise be due and all rights of the Company under this Agreement will automatically terminate.

(c) *Virginia Corporate Income Tax Information:* With each such Performance Report or Final Performance Report, the Company shall report to VEDP the amount paid by the Company (or for a pass-through entity, by its shareholders, members or partners) in the prior calendar year in Virginia corporate (or for a pass-through entity, personal) income tax. 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.

**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 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. Attached hereto as Exhibit C is a form to be completed by the Company regarding access to the Company’s tax information.

(b) *Verification of New Jobs and Wages*: The Company must submit a copy of its four most recent Employer’s Quarterly Tax Reports (Form FC-20) with the Virginia Employment Commission with [each Performance Report] [the Final Performance 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.

(c) *Additional Documentation:* 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 Capital Investment or New Jobs.

[USE THIS FOLLOWING VERSION OF SECTION 7 IF THERE IS ONLY ONE DISBURSEMENT OF THE COF GRANT PROCEEDS FOLLOWING THE PERFORMANCE DATE]

**Section 7. Possible Termination of this Agreement and Redeployment of COF Grant Proceeds.** If the Locality, the Authority or VEDP shall determine at any time prior to the Performance Date that the Company is unable or unwilling to meet and Maintain its Targets by and through the Performance Date, and if the Locality, the Authority or VEDP shall have promptly notified the Company of such determination, this Agreement will be terminated, no further disbursements of the COF Grant proceeds will be made to the Company, and the amount not disbursed will be retained in the Fund and made available for other economic development projects. 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, a failure to comply with the covenant provided in Section 2(f), or other similar significant event that demonstrates that the Company will be unable or is unwilling to satisfy the Targets for the COF Grant.

[USE THIS FOLLOWING VERSION OF SECTION 7 IF ANY OF THE PROCEEDS OF THE COF GRANT MAY BE DISBURSED PRIOR TO THE PERFORMANCE DATE AND, THEREFORE, MAY BE SUBJECT TO REPAYMENT, WITH VARIATIONS TO TAKE INTO ACCOUNT THE NUMBER, NATURE AND AMOUNT OF DISBURSEMENTS MADE PRIOR TO THE PERFORMANCE DATE:

**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 achieve both of the Statutory Minimum Requirements in order to be eligible for the COF Grant. If the Company received the First Disbursement, but fails to meet both of the Statutory Minimum Requirements as of the Performance Date, the Company will be considered to have breached this Agreement and the Company must repay to VEDP all of the COF Grant proceeds previously disbursed to the Company.

(b) *If Statutory Minimum Eligibility Requirements are Met:* The provisions of this subsection (b) shall become applicable only if the Company has met the Statutory Minimum Requirements, and has received the First Disbursement of $\_\_\_\_\_\_\_ of the proceeds of the COF Grant prior to the Performance Date, in accordance with Section 3(a).

If the Company has not met either or both of its Targets as of the Performance Date, the Company shall repay to VEDP 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 made and retained (reflecting achievement of [60]% of the Capital Investment Target), and only \_\_\_ New Jobs have been created and Maintained (reflecting achievement of [50]% of the New Jobs Target), the Company shall repay to VEDP $\_\_\_\_\_\_\_, reflecting [40]% of the $\_\_\_\_\_\_\_ of the COF Grant proceeds that it received allocated to the Capital Investment Target, *plus* $\_\_\_\_\_\_\_, reflecting [50]% of the $\_\_\_\_\_\_\_ of the COF Grant proceeds that it received allocated to the New Jobs Target, for a total repayment amount of $\_\_\_\_\_\_. These amounts represent the percentages of the shortfall at the Performance Date 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.

(d) *Determination of Inability to Comply:* If the Locality, the Authority or VEDP shall determine at any time prior to the Performance Date (a “Determination Date”) that the Company is unable or unwilling to meet and Maintain its Targets by and through the Performance Date, and if the Locality, the Authority or VEDP shall have promptly notified the Company of such determination, the Company must repay to VEDP all of the COF Grant proceeds, if any, 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, a failure to comply with the covenant provided in Section 2(f), or other similar significant event that demonstrates that the Company will be unable or is unwilling to satisfy the Targets for the COF Grant. If the Determination Date is after the First Disbursement, the Company will repay to VEDP all of the COF Grant proceeds previously disbursed to the Company. If the Determination Date is prior to the First Disbursement, this Agreement will be terminated, and the amount not yet disbursed will be retained in the Fund and will become available for other economic development projects.

(e) *Repayment:* The Company shall be liable for any repayment of all or a portion of the COF Grant, to the extent described in this Section 7. ***Such repayment shall be due from the Company to VEDP within ninety days after the Performance Date or the Determination Date, as applicable.*** Any moneys repaid by the Company to VEDP shall be redeposited by VEDP into the Fund. The Locality and theAuthority shall use their best efforts to recover such funds, including legal action for breach of this Agreement. In any such matter, the Company shall be liable to pay interest, administrative charges, attorneys’ fees and other applicable fees. 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 Locality or the Authority from the Company.

(f) *Failure to Repay*: If any repayment due from the Company pursuant to this Section 7 is not made by the Company when due, 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, attorneys’ 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 Performance Date or the Determination Date, as applicable, until paid.

**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 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 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: with a copy to:

|  |  |
| --- | --- |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_  Email: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Attention: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_  Email: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Attention: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

if to the Locality, to: with a copy to:

|  |  |
| --- | --- |
| [City/County/Town] of \_\_\_\_\_\_\_, Virginia  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_  Email: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Attention: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_  Email: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Attention: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

if to the Authority, to: with a copy to:

|  |  |
| --- | --- |
| [Industrial/Economic Development Authority of \_\_\_\_\_\_\_\_\_\_, [Virginia]  c/o [City/County/Town] of \_\_\_\_\_\_\_, Virginia  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_  Email: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Attention: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | [City/County/Town] of \_\_\_\_\_\_\_, Virginia  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  \_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_  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  Email: moret@vedp.org  Attention: President and CEO | Virginia Economic Development Partnership  One James Center, Suite 900  901 East Cary Street  Richmond, Virginia 23219  Email: smcninch@vedp.org  Attention: General Counsel |

Each party may change the address for service of notice upon it by a notice in writing to the other parties hereto.

**Section 9. 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,] [a]ttorney’s fees shall be paid by the party incurring such fees.

(f) *Force Majeure:* Notwithstanding the foregoing provisions of this Agreement, if the Company does not achieve a Target or take any action required under this Agreement because of an “Event of Force Majeure” (as defined below), the time for achieving the applicable Target or taking such action will be extended day-for-day by the delay in meeting the applicable Target or taking such action caused by the Event of Force Majeure. “Event of Force Majeure” means without limitation, any of the following: acts of God; strikes, lockouts or other industrial disturbances; act of public enemies; orders of any kind of the government of the United States of America or of the Commonwealth or any of their respective departments, agencies, political subdivisions or officials, or any civil or military authority; insurrections; riots; epidemics; pandemics; landslides; lightning; earthquakes; fires; hurricanes; tornadoes; storms; floods; washouts; droughts; arrests; restraint of government and people; civil disturbances; explosions; breakage or accident to machinery, transmission pipes or canals not caused by the Company; partial or entire failure of utilities; or any other cause or event not reasonably within the control of the Company.

[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.

**[CITY/COUNTY/TOWN OF \_\_\_\_, VIRGINIA]**

By

Name:

Title:

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

**[INDUSTRIAL/ECONOMIC DEVELOPMENT AUTHORITY OF \_\_\_\_\_\_\_\_\_\_\_\_[, VIRGINIA]**

By

Name:

Title:

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

**[COMPANY]**

By

Name:

Title:

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

**VIRGINIA ECONOMIC DEVELOPMENT PARTNERSHIP AUTHORITY**

By

Name:

Title:

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

Exhibit A: Performance Report Form

Exhibit B: Final Performance Report Form

Exhibit A

**PERFORMANCE REPORT**

**COMMONWEALTH’S DEVELOPMENT OPPORTUNITY FUND**

**PROJECT SUMMARY:**

|  |  |
| --- | --- |
| Project |  |
| Location |  |
| Amount of Grant |  |
| Performance Reporting Period |  |
| Performance Date |  |

**PROJECT PERFORMANCE4:**

|  |  |  |  |
| --- | --- | --- | --- |
| **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 | Moderate | Low |
| **Capital Investment** (provide breakdown below)2 |  |  |  |
| Confidence level target will be reached by Performance Date shown above (check one) | High | Moderate | Low |
| **Average Annual Wage** |  |  | N/A |
| Confidence level target will be reached by Performance Date shown above (check one) | High | Moderate | Low |
| **Standard Fringe Benefits** (check one) | Yes | No | N/A |
| **Virginia Corporate Income Tax Paid in Prior Calendar Year**3 | $ | | |

1Data will be verified using Virginia Employment Commission records.Attach the company’s four most recent Quarterly Tax Reports (Form FC-20) filed with the Virginia Employment Commission.

2 Data will be verified with locality records.

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

4Final, actual performance will be reported on VEDP’s public reporting website.

|  |  |
| --- | --- |
| **Capital Investment Breakdown** | **Amount** |
|  |  |
| Land | $ |
| Land Improvements |  |
| New Construction or Expansion |  |
| Renovation or Building Up-fit |  |
| 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:

Kim Ellett, Incentives Compliance Manager, Virginia Economic Development Partnership, 804.545.5618, kellett@vedp.org

Exhibit B

**FINAL PERFORMANCE REPORT**

**COMMONWEALTH’S DEVELOPMENT OPPORTUNITY FUND**

**PROJECT SUMMARY:**

|  |  |
| --- | --- |
| Project |  |
| Location |  |
| Amount of Grant |  |
| Performance Date |  |

**PROJECT PERFORMANCE:1**

|  |  |  |  |
| --- | --- | --- | --- |
| **Performance Measurement** | **Target** | **As of \_\_\_\_\_\_\_\_, 20\_\_** | **% 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 Year**4 | $ | | |

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

2 Attach the company’s four most recent Quarterly Tax Reports (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

|  |  |
| --- | --- |
| **Capital Investment Breakdown** | **Amount** |
|  |  |
| Land | $ |
| Land Improvements |  |
| New Construction or Expansion |  |
| Renovation or Building Up-fit |  |
| Production Machinery and Tools |  |
| Furniture, Fixtures and Equipment |  |
| Other |  |
| **Total** | **$** |

**LOCAL MATCH:**

|  |  |
| --- | --- |
| Goal |  |
| Actual |  |

**COMMENTS:**

Discuss Project status or the importance 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 Compliance Manager, Virginia Economic Development Partnership, 804.545.5618, [kellett@vedp.org](mailto:kellett@vedp.org)