**VIRGINIA ECONOMIC DEVELOPMENT INCENTIVE GRANT**

**PERFORMANCE AGREEMENT**

This **PERFORMANCE AGREEMENT** made and entered this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, [2022][2023], by and among the **COMMONWEALTH OF VIRGINIA** (the “Commonwealth”), \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the “Company”), a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [corporation] [limited liability partnership] [limited liability company] [authorized to transact business in the Commonwealth], and the **VIRGINIA ECONOMIC DEVELOPMENT PARTNERSHIP AUTHORITY** (“VEDP”), a political subdivision of the Commonwealth. [THE COMPANY IS THE ENTITY OR ENTITIES THAT WILL BE INVESTING CAPITAL AND HIRING WORKERS AT THE FACILITY]

WITNESSETH:

 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 $ expected average annual wage of the expected New Jobs is [at least 50% greater (400+ jobs)] [at least 100% greater (300+ jobs)] 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 in the Locality;

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 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 5:

 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 , [2022][2023], in taxable real property, taxable tangible personal property, or both, at the Facility that is capitalizable 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, nor shall capital expenditures for land or existing real property improvements; 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.

“Company Notification” has the meaning set forth in Section 3(b).

“Maintain” means that the New Jobs created pursuant to the VEDIG will continue without interruption from the date of creation through the date that achievement of the New Jobs Target is being tested, including throughout the Payment Period. 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 to the Facility, 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 positions at the Facility as of \_\_\_\_\_\_\_\_\_\_ 1, [2022][2023].] [GENERALLY, A DATE NEAR THE PROJECT’S ANNOUNCEMENT DATE, AND GENERALLY THE SAME AS THE START DATE FOR COUNTING CAPITAL INVESTMENT]

“Payment Period” means the period commencing with the Company Notification and ending with the payment of the last installment of the VEDIG to the Company as provided in Section 5 hereof.

“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. [GENERALLY, THE LAST DAY OF CALENDAR QUARTER APPROXIMATELY 3 YEARS AFTER THE PROJECT’S ANNOUNCEMENT DATE]

“Targets” means the Company’s obligations to make Capital Investments at the Facility of at least $\_\_\_\_\_\_\_\_\_\_ (the “Capital Investment Target”) and to create and Maintain at least \_\_\_ New Jobs at the Facility (the “New Jobs Target”).

**Section 2. Performance Targets; Performance Period.**

(a) *Performance Targets*: The Company shall [acquire,] [construct,] [renovate,] [expand,] [equip,] improve and operate the Facility and achieve the Targets by the Projected Completion Date.

(b) *Deadlines*: The Company must commence making the proposed Capital Investment and creating the New Jobs, if either of the foregoing has not already commenced, no later than one year of the date of execution of this Agreement.

**Section 3. Reporting; Company Notification.**

(a) *Progress Reporting*: The Company shall provide, at the Company’s expense, in the form attached hereto as Exhibit A, detailed verification reasonably satisfactory to VEDP of the Company’s progress on the Targets. Such progress reports shall be filed annually on or before \_\_\_\_\_\_\_\_\_\_ 1, starting at \_\_\_\_\_\_\_\_\_\_ 1, 20\_\_, [ONE FULL QUARTER AFTER THE CALENDAR DATE OF THE PROJECTED COMPLETION DATE – SO, FOR A JUNE 30 PROJECTED COMPLETION DATE, THE REPORT WILL BE DUE ON THE FOLLOWING OCTOBER 1], and covering the period through the prior \_\_\_\_\_\_\_\_\_\_ [SAME CALENDAR DATE AS THE PROJECTED COMPLETION DATE]. Further, the Company shall provide such progress reports at such other times as VEDP may reasonably require.

 (b) *Company Notification:* The Company will provide a written certification to VEDP within 90 days after completion of the Capital Investment and the New Job creation and Maintenance, 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) an indication whether a package of standard fringe benefits was provided for those employees (a “Company Notification”). The Company Notification must be submitted no later than \_\_\_\_\_\_\_\_\_\_ 1, 20\_\_. [GENERALLY, ONE YEAR PLUS 90 DAYS PAST THE PROJECTED COMPLETION DATE]

(c) *Special Notifications:* In the event 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 Capital Investment Target and the New Jobs Target.

As noted in Section 5 below, if (i) the Capital Investment does not substantially remain in place during the Payment Period, (ii) the New Jobs are not substantially Maintained during the Payment Period, or (iii) the Facility is no longer operated at substantially the same level as existed at the time of the Company Notification, the Company shall provide immediate notice to VEDP.

**Section 4. 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. [MODIFY FOR THOSE LOCALITIES THAT DO NOT HAVE COMMISSIONERS / TREASURERS]

[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.]

(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 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.

[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.]

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

**Section 5. VEDIG Payouts.**

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 to the Company in the amount of $ per year, for a total of $ , subject to appropriations.

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

The installment payments shall be made subject to the conditions that: (i) the Capital Investment remains substantially in place during the Payment Period, (ii) the New Jobs are substantially 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 so 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 paid to the Company may be used, at the sole discretion of the Company, for any lawful purpose.

**Section 6. 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 substantially 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 both of the following targets by , 20 : [THE ONE YEAR ANNIVERSARY OF THE PROJECTED COMPLETION DATE]

(i) $ in Capital Investment (which is the greater of (a) the statutory minimum capital investment requirement of $ and (b) 50% of the Company’s $ Capital Investment Target); and

(ii) New Jobs (which is the greater of (a) the required statutory minimum number of [400] [300] new jobs at [50%] [100%] over the Locality’s prevailing average wage rate as of the date of this Agreement of $\_\_\_ and (b) 50% of the Company’s New Jobs Target).

(b) *Reduced Payment Due:* To the extent that the Company achieves more in Capital Investment and New Jobs by , 20 than described in clauses (a)(i) and (ii) above, but does not completely attain its Targets, the total VEDIG to be paid shall be diminished proportionately but only if (i) the Capital Investment remains substantially in place during the Payment Period, (ii) the New Jobs are substantially 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. For this purpose, the VEDIG shall be allocated \_\_\_% ($\_\_\_\_\_\_\_\_\_) to the Capital Investment Target and \_\_\_\_% ($\_\_\_\_\_\_\_\_\_) to the New Jobs Target. If the Company achieves, for example, 75% of its Capital Investment Target and 60% of its New Jobs Target, portions of the VEDIG will be diminished proportionately to $\_\_\_\_\_\_\_\_\_ (reflecting 75% of $\_\_\_\_\_\_\_\_ allocated to the Capital Investment Target), *plus* $\_\_\_\_\_\_\_\_\_ (reflecting 60% of $\_\_\_\_\_\_\_\_ allocated to the New Jobs Target), for a total of $\_\_\_\_\_\_\_\_\_, to be paid out in five annual installments on the schedule set forth in Section 5. [THE %% WILL BE BASED ON THE RELATIVE VALUE TO THE COMMONWEALTH, BASED UPON VEDP’S RETURN-ON-INVESTMENT ANALYSIS]

(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 7. 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: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Attention: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Email: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | with a copy to:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Attention: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Email: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| if to the Commonwealth, to:Commonwealth of VirginiaPatrick Henry Building1111 East Broad StreetRichmond, Virginia 23219Email: caren.merrick@governor.virginia.govAttention: Secretary of Commerce and Trade | with a copy to:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Email: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Attention: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| if to VEDP:Virginia Economic Development PartnershipOne James Center, Suite 900901 East Cary Street Richmond, Virginia 23219Email: ceo@vedp.orgAttention: President and CEO | With a copy to:Virginia Economic Development PartnershipOne James Center, Suite 900901 East Cary Street Richmond, Virginia 23219Email: generalcounsel@vedp.orgAttention: 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 8. Miscellaneous.**

 (a) *Entire Agreement; Amendments:* This Agreement constitutes the entire agreement among 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.

(e) *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.

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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: Caren Merrick

 Title: Secretary of Commerce and Trade

 Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_\_

**[COMPANY]**

By

 Name:

 Title:

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_\_

 **VIRGINIA ECONOMIC DEVELOPMENT PARTNERSHIP AUTHORITY**

By

 Name:

 Title:

 Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_\_

Exhibit A: Form of Annual Progress Report

Exhibit A

**ANNUAL PROGRESS REPORT**

**VIRGINIA ECONOMIC DEVELOPMENT INCENTIVE GRANT**

**PROJECT SUMMARY:**

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

**PROJECT PERFORMANCE:**

|  |  |  |  |
| --- | --- | --- | --- |
| **Performance Measurement** | **Target** | **As of \_\_\_\_\_\_\_** | **% Complete** |
|  |  |  |  |
| **New Jobs** [(over \_\_\_ baseline)]1 |  |  |  |
| Confidence level target will be reached by Projected Completion Date shown above (check one) | High[ ]  | Moderate[ ]  | Low[ ]  |
| **Capital Investment** (provide breakdown below)2 |  |  |  |
| Confidence level target will be reached by Projected Completion Date shown above (check one) | High[ ]  | Moderate[ ]  | Low[ ]  |
| **Average Annual Wage Per Job** |  |  | N/A |
| Confidence level target will be reached by Projected Completion Date shown above (check one) | High[ ]  | Moderate[ ]  | Low[ ]  |
| **Standard Fringe Benefits** (check one) | Yes[ ]  | No[ ]  | N/A |

1Data will be verified using Virginia Employment Commission records.

2Data will be verified with locality records.

|  |  |
| --- | --- |
| **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:

Please return to:

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