

## VIRGINIA INVESTMENT PERFORMANCE GRANT

### PERFORMANCE AGREEMENT

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

#### WITNESSETH:

WHEREAS, the Virginia General Assembly created the Virginia Investment Partnership Act, Chapter 51, Title 2.2, Code of Virginia of 1950, as amended ( the “VIP Act”) to encourage and assist existing Virginia manufacturers in the modernization and improvement of their processes through capital investment;

WHEREAS, the Company is a manufacturer that has had a legal presence in the Commonwealth for at least three years;

WHEREAS, the Company intends [purchase / construct / expand / equip / improve] and operate its [warehouse/distribution/office/headquarters/\_\_\_\_\_] facility (the “Facility”) located in the \_\_\_\_\_ of \_\_\_\_\_, Virginia (the “Locality”), by making a Capital Investment of at least \$\_\_\_\_\_ by the Projected Completion Date, as such capitalized terms are defined below;

WHEREAS, the Company expects that it will have no net reduction in employment in the one year period starting at the date the Capital Investment has been completed;

WHEREAS, the Company intends to [create and] Maintain at least \_\_\_\_\_ [New Jobs/Jobs,] as such capitalized terms are defined below, at the Facility by the Projected Completion Date, for which the average annual wage is at least [\_\_\_\_\_], which is [more/less] than the prevailing average wage in the Locality of \$\_\_\_\_\_, and [more/less] than the prevailing average annual manufacturing wage in the Locality of \$\_\_\_\_\_, as determined by the Virginia Employment Commission;

WHEREAS, the Locality [is/is not] a fiscally stressed locality, with an unemployment rate for 20\_\_ (the last full year for which final numbers are available) of \_\_\_\_\_% as compared to the 20\_\_\_ statewide unemployment rate of \_\_\_%, and a poverty rate for 20\_\_ (the last full year for which final numbers are available) of \_\_\_\_\_% as compared to the 20\_\_\_ statewide poverty rate of \_\_\_\_\_%;

WHEREAS, under Section 2.2-5101 of the VIP Act and through the Virginia Economic Development Partnership Authority (“VEDP”), the Commonwealth has approved a Virginia Investment Performance Grant in the amount of \$\_\_\_\_\_ (the “VIP Grant”) for the

purpose of inducing the Company to make such Capital Investment and to [create and] Maintain the [New Jobs/Jobs];

WHEREAS, VEDP has determined that there are direct public purpose benefits to the Commonwealth from new tax revenues and increased economic activity created by the Capital Investment and the [New Jobs/Jobs], and has determined that the amount of the VIP Grant is appropriate, based on the relative value of such benefits; and

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

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.**

The following terms shall have the following meanings in this Agreement, unless the context otherwise requires:

“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, that is or may be capitalized by the Company and that increases the productivity of the Facility, results in the creation, development or utilization of a more advanced technology than is in use immediately prior to such investment, or both. Any Capital Investment in technology shall result in a measurable increase in capacity or productivity, a measurable decrease in the production of flawed product, or both. Capital expenditures for maintenance, replacement or repair of existing machinery, tools and real property shall not constitute a Capital Investment; however, expenditures for the replacement of property shall not be ineligible for designation as a Capital Investment if such replacement results in a measurable increase in productivity. [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.] [The purchase or lease of furniture, fixtures, machinery and equipment, including under an operating lease, and expected building expansion and up-fit by or on behalf of the Company will qualify as Capital Investment.] [The Capital Investment must be in addition to the capital improvements at the Facility as of \_\_\_\_\_, 20\_\_].

“Maintain” means that the [New Jobs/Jobs] will continue without interruption from the date of creation throughout the payment period of the VIP Grant. Positions for the [New Jobs/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/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/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/Jobs]. [The New Jobs must be in addition to the \_\_\_\_\_ full-time positions in place at the Facility as of \_\_\_\_\_, 20\_\_\_\_.]

“Projected Completion Date” means \_\_\_\_\_, 20\_\_\_\_. This is the date by which the Company expects to complete the Capital Investment and to [create and] Maintain the [New Jobs/Jobs].

“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. Company Performance; Reporting; Notifications.**

(a) *Performance:* The Company will undertake the [construction/expansion/improvement/ equipping and operation] of the Facility and complete at least \$\_\_\_\_\_ in Capital Investments and [create and] Maintain \_\_\_ [New Jobs/Jobs] at the Facility.

(b) *Progress Reporting:* The Company shall provide, at the Company’s expense, in the form attached hereto as Exhibit A, detailed verification reasonably satisfactory to VEDP of the Company’s progress on the Targets. Such progress reports shall be filed annually on or before \_\_\_\_\_, starting at \_\_\_\_\_, 20\_\_\_\_, and covering the period through the prior \_\_\_\_\_. Further, the Company shall provide such progress reports at such other times as VEDP may reasonably require.

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

(c) *Initial Company Notification:* The Company will provide a written certification to VEDP within 90 days of completion of the Capital Investment and the [New Job/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/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 (an “Initial Company Notification”). The Initial Company Notification must be submitted no later than \_\_\_\_\_, 20\_\_\_, and may be the same as an progress report as described in subsection (b) above.

(d) *Subsequent Company Notification:* One year after the Initial Company Notification, the Company will provide a written certification to VEDP indicating whether there has been a net reduction in employment at the Facility in the year since the completion of the Capital Investment (the “Subsequent Company Notification”).

(e) *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/Jobs Target (together, the “Targets”).

As noted in Section 4 below, if (i) the Capital Investment does not substantially remain in place during the payment period, (ii) the [New Jobs/Jobs] are not 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 Initial Company Notification, the Company shall provide immediate notice to VEDP.

### **Section 3. Verification of Targets.**

(a) *Verification of Capital Investment:* The Company hereby authorizes the Locality, including the Locality’s [Commissioner of the Revenue and Treasurer], to release to VEDP the Company’s real estate tax, business personal property tax and machinery and tools tax information. 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.

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

(b) *Verification of New Jobs and Wages:* The Company must submit a copy of its four most recent Quarterly Tax Reports (Form FC-20) filed with the Virginia Employment Commission

with the Initial Company Notification and the Subsequent 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.

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

#### **Section 4. VIP Grant Payout.**

Beginning with the fiscal year in which the Initial Company Notification has been on file at VEDP for [24/36] months, and pursuant to the provisions of the VIP Act, the Commonwealth shall make five equal annual payments of the VIP Grant to the Company in the amount of \$ \_\_\_\_\_ per year, for a total of \$ \_\_\_\_\_, subject to appropriations.

The VIP Grant payments shall be made subject to the conditions that (i) the Subsequent Company Notification reveals no net reduction in employment in the year following completion of the Capital Investment, (ii) the Capital Investment remains substantially in place during the payment period, (iii) the [New Jobs/Jobs] are Maintained during the payment period, and (iv) the Facility continues to operate during the payment period at substantially the same level as existed at the time of the Initial Company Notification. If there has been a net reduction in employment in the year following completion of the Capital Investment, if the Capital Investment does not so remain, if the [New Jobs/Jobs] are not Maintained, or if the Facility is no longer so operated, the Company shall provide immediate notice to VEDP.

It is expected that the Company will complete the Capital Investment and the [creation and] Maintenance of the [New Jobs/Jobs] by the Projected Completion Date. If the Initial Company Notification is provided in \_\_\_\_\_, 20\_\_\_\_, and the other conditions are met, the first payment would be due to the Company in the Commonwealth's fiscal year 20\_\_\_\_, which begins on July 1, 20\_\_.

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

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

(a) *Net Reduction in Employment in Year Following Completion of Capital Investment.* As noted in Section 4 above, no VIP Grant payment in any amount shall be paid if the Subsequent

Company Notification has revealed a net reduction in employment in the year following the completion of the Capital Investment.

(b) *Failure of Full Performance.* No VIP Grant installment payment shall be paid if (i) the Capital Investment does not substantially remain in place during the payment period, (ii) the [New Jobs/Jobs] are not Maintained during the payment period, or (iii) the Facility does not continue to operate during the payment period at substantially the same level as existed at the time of the Initial 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 VIP Grant installment payments previously made.

Further, no VIP Grant payment in any amount shall be paid if the Company fails to achieve by \_\_\_\_\_, 20\_\_\_\_:

- (i) \$\_\_\_\_\_ in Capital Investment (the greater of the \$25,000,000 statutory minimum Capital Investment requirement and 50% of the Company's \$\_\_\_\_\_ Capital Investment Target); [and
- (ii) \_\_\_\_\_ [New Jobs/Jobs created and] Maintained (\_\_\_\_\_ % of the Company's \_\_\_\_\_ [New Jobs/Jobs] Target).]

To the extent that the Company achieves more in Capital Investment [and New Jobs] than described in clause[s] (i) [and (ii)] above, but does not completely attain the Targets, the total VIP Grant to be paid shall be diminished proportionately, but only if (i) the Subsequent Company Notification does not reveal a net reduction in employment in the year following the completion of the Capital Investment, (ii) the Capital Investment remains in place during the payment period, (iii) the [New Jobs/Jobs] have been Maintained during the payment period, and (iv) the Facility continues to operate during the payment period at substantially the same level as existed at the time of the Initial Company Notification.

For this purpose, the VIP Grant shall be allocated [three-quarters (\$\_\_\_\_\_) to the Capital Investment Target [and one-quarter (\$\_\_\_\_\_) to the New Jobs Target.] If the Company achieves, for example, \$\_\_\_\_\_ in Capital Investment, which is 75% of its Capital Investment Target, [and creates and Maintains, for example, \_\_\_\_\_ New Jobs, which is 60% of its New Jobs Target,] portions of the VIP Grant will be diminished proportionately to 75% of \$\_\_\_\_\_ (\$\_\_\_\_\_) for the Capital Investment [and 60% of \$\_\_\_\_\_ (\$\_\_\_\_\_) for the New Jobs,] to be paid out in five annual installments, on the schedule set forth in Section 4 above.

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

**Section 6. Notices.**

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

if to the Company, to:

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

Facsimile: \_\_\_\_\_

Email: \_\_\_\_\_

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

with a copy to:

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

Facsimile: \_\_\_\_\_

Email: \_\_\_\_\_

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

if to the Commonwealth, to:

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

with a copy to:

Virginia Economic Development Partnership  
One James Center, Suite 900  
901 East Cary Street  
Richmond, Virginia 23219  
Facsimile: (804) 545-5611  
Email: moret@vedp.org  
Attention: President and CEO

**Section 7. Miscellaneous.**

(a) *Entire Agreement; Amendments.* This Agreement constitutes the entire agreement between the parties hereto as to the VIP 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 Commonwealth.

(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) *Attorney's Fees:* Attorney's fees shall be paid by the party incurring such fees.

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Witness the following signatures as of the day and year first above written.

**COMMONWEALTH OF VIRGINIA**

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

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

Exhibit A: Annual Progress Report Form

## ANNUAL PROGRESS REPORT VIRGINIA INVESTMENT PERFORMANCE GRANT

**PROJECT SUMMARY:**

Project	
Location	
Amount of Grant	
Performance Reporting Period	
Performance Date	

**PROJECT PERFORMANCE:**

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

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

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

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

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

**COMMENTS:**

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

**TO BE CERTIFIED BY AN OFFICER OF THE COMPANY:**

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

Company: \_\_\_\_\_

Submitted By: \_\_\_\_\_  
Signature of Official

Name: \_\_\_\_\_  
Print Name

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