

## SECOND AMENDMENT TO AGENT AGREEMENT

THIS SECOND AMENDMENT TO AGENT AGREEMENT, dated as of 7/19, 2017, is by and between the **ERIE COUNTY INDUSTRIAL DEVELOPMENT AGENCY**, a public benefit corporation duly existing under the laws of the State of New York with offices at 95 Perry Street, Suite 403, Buffalo, New York 14203 (the "Agency") and **555 RIVERWALK PARKWAY, LLC**, a limited liability company duly organized, validly existing and in good standing under the laws of the State of New York, with offices at 2760 Kenmore Avenue-Suite 100, Tonawanda, New York 14150 (the "Company").

### WITNESSETH:

WHEREAS, the Agency was created by Chapter 293 of the Laws of 1970 of the State of New York pursuant to Title 1 of Article 18-A of the General Municipal Law of the State of New York (collectively, the "Act") as a body corporate and politic and as a public benefit corporation of the State of New York; and

WHEREAS, the Company has requested the Agency's assistance with a certain project (the "Project") consisting of: (i) a 12+/- acre parcel of land located on River Road, Town of Tonawanda, Erie County, New York (the "Land"); (ii) the construction of an 88,000+/- SF building to be comprised of 55,000+/- SF of warehouse/distribution space and 33,000+/- SF of office space (the "Improvements"); and (iii) the acquisition and installation by the Company of certain items of machinery, equipment and other tangible personal property (the "Equipment", and collectively with the Land and the Improvements, the "Facility"); and

WHEREAS, by Resolution dated April 22, 2013 (the "Resolution"), the Agency authorized the Company to act as its Agent for the purposes of acquiring, constructing and/or equipping the Facility subject to the Company entering into an Agent Agreement; and

WHEREAS, the Agency and the Company entered into that certain Agent Agreement, dated as of April 22, 2013, as amended by First Amendment to Agent Agreement, dated as of April 30, 2014, (as so amended, the "Original Agent Agreement"), whereby the Agency authorized the Company to act as its Agent for the purposes of acquiring, constructing and/or equipping the Facility; and

WHEREAS, the Original Agent Agreement conditioned the provision of Agency financial assistance (including, the provision of an exemption from all New York State and local sales and use taxes with respect to the qualifying personal property included in or incorporated into the Facility or used in the acquisition, construction, or equipping of the Facility, a partial real property tax abatement through the PILOT Agreement for the benefit of each municipality and school district having taxing jurisdiction over the Project, and a mortgage recording tax exemption for the financing related to the Project (collectively, the sales and use tax exemptions, the PILOT Agreement and the mortgage recording tax exemption are hereinafter collectively referred to as the "Financial Assistance")), on the Company's covenant and agreement to, amongst other items, maintain and create certain FTE job numbers at the Facility; and

WHEREAS, the Company has informed the Agency that the Project has allowed the Company to adapt to market changes that occurred during the construction of the Project that required the Company to shift and/or maintain certain department and personnel from the Facility to its other Town of Tonawanda facility located at 170 Cooper Avenue (the “170 Cooper Facility”); and

WHEREAS, by shifting certain departments and personnel from the Facility to the 170 Cooper Facility, the Company has been able to maintain and create FTE positions at both the Facility and the 170 Cooper Facility that meet the job requirements as required by the Agency and contained within the Agent Agreement; and

WHEREAS, the Company has requested that the Agency amend the job retention and creation material terms and conditions as contained within the Resolution and the Original Agent Agreement to allow for it to account for the jobs it is retaining at, and creating at, the 170 Cooper Facility; and

WHEREAS, on January 25, 2017, the Agency resolved to amend the job retention and job creation material terms and conditions as expressed in the Resolution and the Original Agent Agreement to allow for the Company to account for job retention and job creation at both the Facility and the 170 Cooper Facility and to also require, as a condition related thereto, that the Company adhere to the Agency’s Pay Equity Policy and Unpaid Tax Policy; and

WHEREAS, the Company and the Agency desire to amend the Original Agent Agreement.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

The Original Agent Agreement is amended as follows:

1. Section 2(g) of the Original Agent Agreement is hereby amended to read in its entirety as follows:

(g) In accordance with Section 874 and 875 of the General Municipal Law, the policies of the Agency, and the Resolution, the Company covenants and agrees that it may be subject to a Recapture/Termination/Modification Event (a “Recapture Event Determination”) as hereinafter defined, resulting in the potential recapture and/or termination and/or modification of any or all Financial Assistance, as described below, if the Company receives, or any duly appointed subagents receives, any Financial Assistance from the Agency, and it is determined by the Agency that:

(1) the Company or its Subagents, if any, authorized to make purchases for the benefit of the Project is not entitled to the sales and use tax exemption benefits; or

(2) the sales and use tax exemption benefits are in excess of the amounts authorized by the Agency to be taken by the Company or its Subagents, if any; or

(3) the sales and use tax exemption benefits are for property or services not authorized by the Agency as part of the Project; or

(4) the Company has made a material false or misleading statement, or omitted any information which, if included, would have rendered any information in the application or supporting documentation false or misleading in any material respect, on its application for Financial Assistance; or

(5) the Company fails to meet and maintain the thresholds and requirements representing certain material terms and conditions, including an Investment Commitment, an Employment Commitment, an Equal Pay Commitment, and an Unpaid Real Property Tax Policy Commitment, all as further defined below, representing certain purposes to be achieved by the Agency with respect to its determination to provide Financial Assistance to the Company and required by the Agency to be complied with and adhered to, as evidenced by submission, as so required by the Agency, of written confirmation certifying and confirming on an annual basis, or as otherwise required, beginning in the first year in which Financial Assistance is so claimed, through the conclusion of the termination of PILOT Agreement (said date hereinafter referred to as the “Project Completion Date” and the time period so referenced being hereinafter defined as the “Material Terms and Conditions Monitoring Period”) confirming:

(a) Investment Commitment - that the total investment actually made with respect to the Project at the Project’s construction completion date equals or exceeds \$10,628,000.00, as stated in the Company’s application for Financial Assistance); and

(b) Employment Commitment – that there are at least 168 existing full time equivalent (“FTE”) jobs located at, or to be located at, the Facility and 603 existing jobs located at the 170 Cooper Facility (collectively, the 771 jobs to be referred to as the “Baseline FTE” which jobs may be relocated among the Facility and the 170 Cooper Facility); and

- that within two years after Project construction completion, and for the term of the PILOT Agreement, the Company has maintained and created FTE employment at the Facility and the 170 Cooper Facility equal to the sum of (a) 100% of the Baseline FTE plus (b) 70 new FTE employee positions as proposed to be created by the Company at either the Facility and/or the 170 Cooper Facility. In order to certify and verify the foregoing the Company shall provide to the Agency, a certified statement and documentation enumerating the full time equivalent jobs retained and the full time equivalent jobs created as a result of the financial assistance. Failure by the Company to provide such confirmation to the Agency by February 15 of each year during the Material Terms and Conditions Monitoring Period shall constitute an Event of Default hereunder, whereby the Agency, in its sole and absolute discretion, may terminate this agreement and/or the PILOT Agreement and undertake a Recapture Event Determination.

(c) Equal Pay Commitment - that the Company adheres to and undertakes or has undertaken activities in compliance with the Agency's Pay Equity Policy.

(d) Unpaid Real Property Tax Policy Commitment – that the Company adheres to and is in compliance with the Agency's Unpaid Real Property Tax Policy.

The findings made by the Agency, or Agency staff, as appropriate, with respect to Section 2(g)(1), (2), (3) and/or (4) and/or failure to provide the written confirmation as required by Section 2(g)(5) with respect to the thresholds and requirements as identified in Section 2(g)(5), above, and/or failure to meet the thresholds and requirements as identified in Section 2(g)(5) above, may potentially be determined by the Agency, in accordance with the Agency's "Policy for Termination and/or Modification of Agency Financial Assistance and Recapture of Agency Financial Assistance Previously Granted", or by Agency Staff, as appropriate, to constitute a failure to comply with Section 875(3) of the New York General Municipal Law, and/or a failure to comply with a material term or condition to use property or services or Agency Financial Assistance in the manner approved by the Agency in connection with the Project, and/or a failure to comply with the Agency's policies and Resolution, as amended from time to time, (collectively, findings and determinations made as described herein with respect to Section 2(g)(1), (2), (3) and/or (4) and/or the failure under Section 2(g)(5) to submit the required certification and/or the failure to meet the required thresholds and requirements as specified in Section 2(g)(5) are hereby defined as a "Recapture Event Determination"). If the Agency makes a Recapture Event Determination, or notwithstanding anything contained herein to the contrary, Agency staff makes a finding with respect to Section 2(g)(1), (2), or (3) above, and/or Agency staff determines that the Company has closed the Project or has failed to operate the Project as contemplated by the Application and the Resolution, then the Company agrees and covenants that it will (i) cooperate with the Agency in its efforts to recover or recapture any and all Financial Assistance obtained by the Company to the extent Agency policy and/or statutory authority then permits such recapture and (ii) promptly pay over any such amounts to the Agency that the Agency demands in connection therewith. The Company further understands and agrees that in the event that the Company fails to pay over such amounts to the Agency, the New York State Tax Commissioner and/or Erie County Comptroller may assess and determine the Financial Assistance due from the Company, together with any relevant penalties and interest due on such amounts.

2. Unless otherwise amended by the terms hereof, the Original Agent Agreement shall remain unchanged.

3. The Company hereby ratifies all covenants, representations and warranties made in the Original Agent Agreement as if made the date hereof. All such covenants, representations and warranties are incorporated herein by reference.

[Remainder of Page Intentionally Blank]

[Signature Page to Second Amendment to Agent Agreement]

IN WITNESS WHEREOF, the Company and the Agency have caused this First Amendment to Agent Agreement to be executed in their respective names, all as of the date first above written.

**555 RIVERWALK PARKWAY, LLC**

By: Matthew T. Montante  
Name: Matthew T. Montante  
Title: Manager

**ERIE COUNTY INDUSTRIAL  
DEVELOPMENT AGENCY**

By: Karen M. Fiala  
Name: Karen M. Fiala  
Title: Assistant Treasurer