

STATE OF TEXAS           §  
  §  
COUNTY OF LUBBOCK   §

**PERFORMANCE AGREEMENT**

This Performance Agreement (the "Agreement") is made effective on July 1, 2013 by and between LUBBOCK ECONOMIC DEVELOPMENT ALLIANCE, INC., a Texas nonprofit corporation (hereinafter referred to as "LEDA") and RNDC TEXAS, LLC a Texas limited liability company or its permitted assigns (hereinafter referred to as "Recipient"), by and through their duly authorized officers and affiliate organizations under the terms and conditions that follow.

1. **Applicable Law:** It is understood by and between the parties that the term "Act" as used herein, is intended to mean the Development Corporation Act of 1979, as amended (Section 501.001 et seq. Texas Local Government Code, formerly Section 5190.6, VACS). The parties hereto covenant and agree to comply with the terms of the Act applicable to this Agreement. Capital terms not otherwise defined herein shall have the meaning ascribed thereto in the Act.

2. **Parties:**

- A. LEDA, a Texas non-profit corporation as well as a tax exempt 501(c)4 entity, was created by the City of Lubbock, Texas, as an Industrial Development Corporation under the Act for the purpose of creating and retaining positions and encouraging new businesses to be established in Lubbock, Texas, to stimulate business and commercial activities, as well as all other purposes allowed by the Act.
- B. Recipient is preparing a new "Project" which shall include a distribution facility located in Lubbock Business Park in Lubbock, Texas (NAICS 420000) anticipated to result in 51 Primary Jobs in the City of Lubbock servicing the Project, with a Target Annual Compensation of \$1,749,489 in the aggregate, or a total of \$8,747,444 over five years. Total capital investment cost by Recipient is estimated to be \$5,600,000.00 for building and equipment.
- C. Recipient is a Texas Limited Liability Company.

3. **Purpose:** The purpose for this Agreement is to formalize the agreements between LEDA and Recipient for the payment of certain costs associated with Recipient's Project and specifically state the covenants, representations of the parties, and the incentives associated with Recipient's commitment to abide by the terms of this Agreement which has been approved by the Board of Directors of LEDA. It is expressly agreed that this Agreement constitutes a single transaction. A failure to perform any obligation by Recipient may constitute a breach of the entire Agreement and terminate any further commitments by LEDA.

4. **Definitions:**

- A. "**LEDA**" shall refer to Lubbock Economic Development Alliance, Inc., a Texas non-profit corporation.
- B. "**Recipient**" shall refer to RNDC TEXAS, LLC, a Texas Limited Liability Company, or its permitted assigns, and the recipient party to this Agreement.
- C. "**Project**" shall mean the project identified in Paragraph 2B, above.
- D. "**Payback Provisions**" shall be as set forth in Paragraph 10 below.
- E. "**Full Time Equivalent Employee**" shall include individuals employed in "Primary Jobs" as defined by the Act, as well as contract or leased employees performing "Primary Jobs" in the City of Lubbock on behalf of Recipient.
- F. "**Annual Compensation**" shall mean the higher of actual compensation or annualized base pay or actual annualized payment as determined within the sole discretion of LEDA's accountants/representative.
- G. "**Term**", as used herein, shall begin when the certificate of occupancy on the building to be constructed on the Property is issued (the "Start Date") and shall continue for a period of five (5) years thereafter (the "Termination Date") unless earlier terminated as set forth herein.
- H. "**Baseline Measurement Date**" shall mean the day preceding the Start Date of this Agreement.
- I. "**Census**" is defined as a compilation listing of the employee name, address, date of hire, date of termination, position, base pay, and indication of full-time or part-time status. (Such information is preferred to be presented in Excel format) which shall be made available to LEDA's accountant in performing the review.
- J. "**Measurement Date**" shall mean the date upon which the determination is made as to whether Recipient is in compliance with creating and/or maintaining the Primary Job positions represented by Recipient. Measurement Dates shall be:
- |                |                       |                     |
|----------------|-----------------------|---------------------|
| (1) Year One:  | <u>Aug 18 2014</u> to | <u>Aug 18, 2015</u> |
| (2) Year Two   | <u>Aug 18 2015</u> to | <u>Aug 18, 2016</u> |
| (3) Year Three | <u>Aug 18 2016</u> to | <u>Aug 18, 2017</u> |
| (4) Year Four  | <u>Aug 18 2017</u> to | <u>Aug 18, 2018</u> |
| (5) Year Five  | <u>Aug 18 2018</u> to | <u>Aug 18, 2019</u> |
- K. "**Primary Jobs**" shall mean new and/or retained jobs in the City of Lubbock, TX.



**5. Representations of Recipient:**

- A. Recipient represents that it will utilize the Property (defined below) provided for the Project.
- B. Recipient represents that it is authorized to do business in Texas and has authorization to enter into this Agreement on its behalf.
- C. Recipient represents that it has sought from LEDA economic assistance pursuing Recipient's Project.
- D. Recipient represents that it has conferred with attorneys of its own choosing and is fully knowledgeable of all conditions precedent and subsequent as required to be eligible for the incentives offered by LEDA, including the Payback Provisions.
- E. Recipient understands and agrees that any variations as to any term of this Agreement or any terms or conditions of the incentives as stated must be mutually agreed to in written supplements or addenda since no oral agreements, amendments, or representations will be binding on either party.
- F. Recipient understands and acknowledges that Recipient's failure to comply with its obligations in accordance with the terms set forth herein could result in Recipient being subject to the provisions of Paragraph 10 below.

**6. Representations by LEDA:**

- A. LEDA represents that it is established as a Texas nonprofit corporation and further represents that the costs applied toward Recipient's Project as stated in this Agreement have been found by the Board of Directors of LEDA sitting as fact finders to be in compliance with the requirements and purposes of the Act, LEDA charter, as well as for the benefit of the City of Lubbock, Lubbock County, Texas, and trade area.
- B. LEDA represents that it has authority to enter into this Agreement. LEDA understands and agrees that any variation in terms of this Agreement or the incentives offered to Recipient or commitment by Recipient will only be binding if mutually agreed to in writing.

- 7. Conveyance of Property: LEDA shall convey the surface estate to Recipient of 17.072 acres, more or less, being Lot 12, Lubbock Business Park (the "Property"). The Property will be in "building condition" (i.e., raw land without the existence of structures or underground pipes or other impediments to building). LEDA will provide a plat and ALTA surveys and cause utilities (water, gas, electric, sewer, fiber optics, telephone, etc.) to be provided adjacent to the property line of the Property. The conveyance shall be by**

special warranty deed, "as is", and shall occur on the date set forth in that certain Real Estate Sales Contract dated as of the date hereof, between LEDA, as seller, and Recipient, as purchaser. LEDA shall be furnished with a signed copy of the construction contract before commencement of construction of the Project facility. Should the Property be conveyed and construction not commenced within 180 days from conveyance, the Property shall be re-conveyed to LEDA for no consideration. The term "commence" shall mean mobilization by Recipient's contractor to bring equipment onto the Property for grading purposes. The Property will be conveyed subject to the covenants, restrictions and rules of the Lubbock Business Park. Recipient and its successors in interest, if any, in their respective capacities, shall comply with such covenants, restrictions and rules.

**8. Omitted.**

**9. Conditions for Conveyance of Property:** It is specifically agreed and understood by and between the parties that LEDA has agreed to grant the Property to Recipient strictly upon the following terms and conditions:

- A. Any use of LEDA's name for publicity in connection with Recipient's business or activities must be approved in advance by LEDA. It is understood that LEDA may make known its contributions to Recipient in whatever public manner LEDA deems appropriate.
- B. Recipient shall have delivered to LEDA a certified copy of the authorization by an authorized manager or officer of Recipient, authorizing the execution and performance of this Agreement, as well as timely delivery of all other information expressly called for in this Agreement.
- C. Recipient must maintain a business location in the City of Lubbock or Lubbock County and its legal status under federal and state law duly and remain qualified to do business in the State of Texas.
- D. The operations or activities of Recipient and its employees shall be performed and conducted in a professional and businesslike manner and shall be in keeping with federal and state laws and regulations, and any ordinances of the City of Lubbock and/or governmental entities which may have jurisdiction over operations and activities.
- E. Recipient agrees to, in good faith, engage in a confidential review of all material records by LEDA's accountants, and the parties mutually agree that such review is necessary to insure compliance with the conditions of the grant of Property. Within ten (10) days after written request from LEDA to Recipient, Recipient agrees to provide to LEDA's accountants the Census and information reasonably requested by LEDA's accountants which is needed to evidence same.

- F. Recipient certifies that the Recipient does not and will not knowingly employ an undocumented worker in accordance with Chapter 2264 of the Texas Government Code, as amended. If during the Term of this Agreement, Recipient is convicted of a violation under 8 U.S.C. § 1324a(f), Recipient shall pay to LEDA the value of the land conveyed which is stipulated to be \$1,115,484.48 with interest at the legal pre-judgment interest rate, with reasonable attorney's fees, not later than the 120th day after the date LEDA notifies Recipient of the conviction.
- G. Any information obtained by LEDA or its agents or assigns during negotiations leading up to the execution of this Agreement or otherwise about Recipient's business, have or will be returned upon the execution of this Agreement, subject to a right to a continuing examination by LEDA (pursuant to the terms of section 9, E. above) in order to comply with LEDA's reporting obligations, if any. Such information shall be considered confidential and beyond the scope of any Open Records request as proprietary information.

**10. Payback Provisions and Events of Default:**

The Recipient has provided to LEDA a schedule by which Recipient projects to create 51 Primary Jobs, with a Target Annual Compensation of \$1,749,489 in the aggregate, or a total of \$8,747,444 over five years. Notwithstanding anything stated herein to the contrary, the parties acknowledge and agree that none of the employees holding a Primary Job needs to be a resident of the City or County of Lubbock, Texas, but the employees must perform a substantial portion of their work in the Lubbock facility. The job creation over the five year period is projected as follows: Year 1 – 40 jobs; Year 2 – 3 jobs; Year 3 – 2 jobs; Year 4 – 3 jobs; and Year 5 – 3 jobs for a total of 51 Primary Jobs ("Target Job Positions"). LEDA based its decision to grant the Property to Recipient partly upon such job creation. Should Recipient fail to attain the Target Job Positions on any Measurement Date, LEDA shall give written notice of such default to Recipient, and if Recipient fails to cure such default within sixty (60) days after such notice, Recipient shall pay to LEDA, upon demand, the sum of \$21,872.25 for each job not timely created. Job creation shall be measured in Full Time Equivalent Employees.

If, within 10 years from the date hereof, Recipient attempts to assign this Agreement to a party who is not an affiliate of Recipient or a Qualified Third Party Assignee (defined below), or abandons or vacates the Property, LEDA shall have the following options: Option (1): LEDA or its designee may exercise an exclusive ninety (90) day option to purchase the Property from the Recipient. The purchase price of the Property will be the sum equivalent to the market value of the Property's facility, including paving, curbs, and outdoor lighting and landscaping, exclusive of land value; or Option (2): require that Recipient pay to LEDA the value of the land underlying the Property at the time of conveyance to Recipient. Should LEDA choose Option (2) and the Recipient fails or refuses to pay to LEDA the value of the land underlying the Property at the time of conveyance to Recipient within 180 days from LEDA exercising Option (2), the ownership of the Property, including the facility located on the Property, shall revert back to LEDA. It is stipulated that the value of the land underlying the Property upon the date of conveyance by LEDA to Recipient is \$1,115,484.48. On the date hereof, the parties shall execute a Memorandum of Purchase Option, in the form attached hereto as Exhibit A, to

evidence LEDA's rights under this Section.

11. **Assignment, Merger, and Termination Due to Merger, Etc.:** This Agreement shall not be assignable, either in whole or in part, without the prior consent of LEDA; provided, however, Recipient may assign this Agreement to an affiliated entity upon notice to LEDA ("Qualified Third Party Assignee"). Termination as the result of assignment or merger or change in business form shall not disqualify the remaining or new entity from applying to LEDA for new incentive consideration.

12. **Insurance/Hold Harmless:** Where real property has been conveyed, Recipient covenants and agrees to provide, assign, and include LEDA as additional named insured to all policies of liability insurance coverage and insurance policies regarding Recipient's ownership and operations whereby LEDA is provided insurance coverage against all liability for injury or damages caused by Recipient's employees, customers, clients, patrons, visitors, or guests. Additionally, Recipient agrees to indemnify and hold LEDA harmless from all loss, cost, or expenses (including reasonable attorney's fees) arising out of the existence of this Performance Agreement or any interpretation, application, or performance thereunder, except to the extent caused by the gross negligence or willful misconduct of LEDA, its employees or agents.

13. **No Privity of Endeavor Nor Joint Venture:** It is specifically agreed that there shall be no privity of endeavor nor joint venture whatsoever between LEDA and Recipient, and the sole connection between the parties is the contribution of the economic assistance by LEDA under the restricted conditions as set forth herein and that such contributions as stated herein are for the sole purposes as set forth herein and it shall in no way be construed as a continuing basis of financial support by LEDA to Recipient. The parties hereto have entered into this Agreement in an arms-length transaction. No agency relationship or fiduciary relationship is intended to be created by this Agreement, and no such relationship shall be determined to exist.

14. **Good Faith - Normal Business Operations:** The parties agree that this Agreement has been entered into in good faith and that each party shall act in good faith in complying with its provisions. The parties further agree to transact all their business under and that which relates to this Agreement, in accordance with their normal business operations.

15. **Miscellaneous Provisions:**

A. **Notices:**

For the purposes of any notices to be given, pursuant to the terms of this Agreement, the parties shall use the following addresses or any other address as may be changed by the parties, upon written notice to the other party, as follows:

- (1) John Osborne  
CEO and President  
LUBBOCK ECONOMIC DEVELOPMENT ALLIANCE, INC.  
1500 Broadway, 6<sup>th</sup> Floor  
Lubbock, TX 79401

- (2) With a copy to:  
William F. "Pete" Baker  
MCCLESKEY, HARRIGER, BRAZILL & GRAF, L.L.P.  
5010 University Avenue, 5th Floor  
P.O. Box 6170  
Lubbock, TX 79493
- (3) Mr. Steve Rhoden  
Director of Operations, Texas  
RNDC TEXAS, LLC  
8045 Northcourt Rd.  
Houston, TX 77040
- (4) With a copy to:  
  
Holly H. Fuller  
Cox Smith Matthews Incorporated  
112 E. Pecan Street, Suite 1800  
San Antonio, TX 78205

Notices shall be in writing and shall be deemed to be given upon the placing in the United States Mail, Certified Mail, Return Receipt Requested, to the above-described addresses or as may be changed, pursuant to the terms and conditions hereof.

- B. **Entire Agreement:** This instrument constitutes the entire agreement between the parties hereto and neither this Agreement nor any of the exhibits attached hereto, if any, can be altered, changed, or amended in any respect except by an instrument in writing duly executed by both parties.
- C. **Governing Law and Performance:** This Agreement shall be governed by the laws of the State of Texas and shall be deemed to be executed in and performance called for in Lubbock, Lubbock County, Texas.
- D. **Partial Invalidity:** In the event that any portion of this Agreement should be found or declared to be invalid for any reason, the remaining provisions of this Agreement shall remain in full force and effect and shall be binding upon the parties. The parties agree that it is their intent for this Agreement to be determined as being an indivisible obligation of the parties.
- E. **Binding Effect:** This Agreement shall be binding upon the undersigned, their successors and permitted assigns, subject to the express terms of this Agreement concerning assignment.
- F. **Force Majeure:** If any default or performance of any other covenant or term of

this Agreement is delayed by reason of strike, riots, shortages of labor, materials, supplies, or transportation, war, civil commotion, act of God, governmental restrictions, regulations, or interference, fire, or other casualty, or any other circumstances beyond a signatory party's control, then the duty to do or perform the term or covenant, regardless of whether the circumstance is similar to any of those enumerated above or not, is excused during the delay period.


- G. Time is of the Essence: The parties agree that time is of the essence in the execution of this Agreement.
- H. Counterparts: This Agreement may be executed in multiple counterparts, and all such executed counterparts shall constitute the same agreement. It shall be necessary to account for only one (1) fully-executed counterpart in proving the existence, validity or content of this Agreement. Execution copies of this Agreement may be delivered by facsimile and/or e-mail, and the parties hereto agree to accept and be bound by facsimile and e-mail signatures hereto.
- I. Attorneys' Fees: In case any litigation is commenced by one of the parties hereto against the other, involving this Agreement, the party not prevailing shall pay to the prevailing party all costs and attorney's fees and other expenses incurred in enforcing agreements and provisions of this Agreement.

[Signature Page follows]

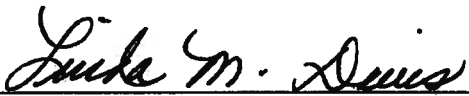


EXECUTED in multiple counterparts, each of which is an original, on this 1st day of July, 2013.

LUBBOCK ECONOMIC DEVELOPMENT ALLIANCE, INC.


By:   
John Osborne, CEO and President

ATTEST:



RECIPIENT:

RNDC TEXAS, LLC

By:   
Vice President, Treasurer

ATTEST:

