

COMMONWEALTH'S DEVELOPMENT OPPORTUNITY FUND

PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** (the "Agreement") made and entered into this ____ day of _____, 2024, by and among the **CITY OF NEWPORT NEWS, VIRGINIA** ("Newport News") and the **CITY OF HAMPTON, VIRGINIA** ("Hampton"), each a political subdivision of the Commonwealth (the "Commonwealth") ("Newport News" and "Hampton", collectively the "Localities"), **LIEBHERR-AMERICA INC.**, a Virginia corporation authorized to transact business in the Commonwealth (the "Company"), the **VIRGINIA ECONOMIC DEVELOPMENT PARTNERSHIP AUTHORITY** ("VEDP"), a political subdivision of the Commonwealth, and the **ECONOMIC AUTHORITY OF THE CITY OF NEWPORT NEWS, VIRGINIA** (the "Authority") and the **ECONOMIC DEVELOPMENT AUTHORITY OF THE CITY OF HAMPTON, VIRGINIA** ("Hampton EDA"), each a political subdivision of the Commonwealth (the "Authority" and "Hampton EDA" collectively as the "EDAs").

WITNESSETH:

WHEREAS, Newport News has been awarded a grant of and expects to receive \$1,500,000 (the "COF Grant") from the Commonwealth's Development Opportunity Fund (the "Fund") through VEDP for the purpose of inducing the Company to construct, expand, equip, improve, and operate an existing mining equipment facility spanning the border of the Localities (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, Newport News 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, and regardless of whether those criteria are met in Newport News or Hampton;

WHEREAS, the Localities, the EDAs, 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 construction, expansion, equipping, improvement, and operation of the existing Facility will entail a capital expenditure by or on behalf of the Company of approximately \$72,329,755, of which approximately \$17,183,201 will be invested in machinery and tools and approximately \$55,146,554 will be invested in the construction, expansion and up-fit of the buildings for the Facility;

WHEREAS, the Company anticipates that two phases of the construction, expansion, equipping, improvement, and operation for the expansion will take place entirely at the portion

of the Facility located in Newport News, and that another phase involves an expansion of the Facility in Hampton;

WHEREAS, the construction, expansion, equipping, improvement, and operation of the existing Facility will further entail the creation and Maintenance of 175 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. The Capital Investment must be in addition to the capital improvements at the Facility as of January 1, 2023.

“Capital Investment Target” means that the Company has made or caused to be made and retained Capital Investments of at least \$72,329,755.

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

“High-Paying New Jobs” means those New Jobs, exclusive of the Standard New Jobs, created and Maintained by the Company paying an Average Annual Wage of at least \$55,891, excluding fringe benefits.

“High-Paying New Jobs Target” means the Company’s obligation, in addition to the Standard New Jobs Target, to create and Maintain at least 20 High-Paying New Jobs as of the Performance Date.

“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. 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. No full-time position may count as both a High-Paying New Job and a Standard New Job. The New Jobs must be in addition to the 792 full-time jobs at the Facility as of September 30, 2023.

“New Jobs Target” means, together, the High-Paying New Jobs Target and the Standard New Jobs Target.

“Performance Date” means September 30, 2027. If the Authority, 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 Authority 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 Authority or the Hampton EDA shall send written notice of the extension to 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 Localities, the Authority and VEDP may each request a Performance Report at other dates prior to the Performance Date.

“Standard New Jobs” means those New Jobs, exclusive of the High-Paying New Jobs, created and Maintained by the Company and paying an Average Annual Wage of at least \$47,075, excluding fringe benefits.

“Standard New Jobs Target” means the Company’s obligation, in addition to the High-Paying New Jobs Target, to create and Maintain at least 155 Standard New Jobs as of the Performance Date.

“Targets” means, collectively, the Capital Investment Target and the New Jobs Target, including the High-Paying New Jobs Target and the Standard 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 construct, expand, equip, improve and operate the Facility, and achieve the Targets.

(b) *Encouragement to Offer New Jobs to Residents of the Commonwealth:* The Localities, the EDAs, 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 High-Paying New Jobs of at least \$55,891 is less than the prevailing average annual wage in place for Newport News on September 30, 2023 of \$65,488, but is more than 85% of that prevailing average annual wage which is \$55,665. Newport News is a high-unemployment locality, with an unemployment rate for 2023, which is the last year for which such data is available, of 3.4% as compared to the 2023 statewide unemployment rate of 2.9%. Newport News is a high-poverty locality, with a poverty rate for 2022, which is the last year for which such data is available, of 17.2% as compared to the 2022 statewide poverty rate of 10.6%.

(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 Localities’ Economic Development Efforts:* Recognizing that it is in the best interest of all parties for the Commonwealth and the Localities 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 Localities, such as promoting the attributes of the Commonwealth and the Localities as places to do business, or highlighting important industry trends and/or business development opportunities that the Commonwealth or the Localities 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 Laws:*

(i) 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.

- (ii) The Company covenants to comply with all federal, state, and local statutes, ordinances, and regulations now in effect or hereafter adopted, in the performance of its obligation under this Agreement and in the operation of its business, including, but not limited to, the timely payment of any and all taxes and fees due for any purpose. In addition, the Company, whether organized as a stock or non-stock corporation, limited liability company, business trust, or limited partnership or registered as a registered limited liability partnership, shall be at all times authorized to transact business in the Commonwealth of Virginia as a domestic or foreign business entity. The Company shall not allow its existence to lapse or its certificate of authority or registration to transact business in the Commonwealth of Virginia to be revoked or cancelled at any time during the term of the Agreement.

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 50% (\$750,000) for the Company's Capital Investment Target, 40% (\$600,000) for the Company's High-Paying New Jobs Target and 10% (\$150,000) for the Company's Standard New Jobs Target.

The statutory minimum requirements for a COF Grant in the Localities require that the Company (1) make or cause to be made and retained a Capital Investment of at least 1,500,000 and (2) create and Maintain at least 15 High-Paying New Jobs (the "Statutory Minimum Requirements").

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.

If the Company has more than 20 High-Paying New Jobs as of the Performance Date, those New Jobs over 20 may be counted as Standard New Jobs. Further, the wages of those High-Paying New Jobs over 20 may be used in calculating the Average Annual Wage for the Standard New Jobs.

(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 Localities, the EDAs 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 Localities 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 \$1,500,000 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, the full High-Paying New Jobs Target, and the full Standard 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 \$65,096,780 of the Capital Investment has been retained (reflecting achievement of 90% of the Capital Investment Target), only 15 High-Paying New Jobs have been created and Maintained (reflecting achievement of 75% of the High-Paying New Jobs Target), and only 93 Standard New Jobs have been created and Maintained (reflecting achievement of 60% of the Standard New Jobs Target), the Company will receive \$675,000 (reflecting 90% of the \$750,000 of the COF Grant allocated to the Capital Investment Target), *plus* \$450,000 (reflecting 75% of the \$600,000 of the COF Grant allocated to the High-Paying New Jobs Target), *plus* \$90,000 (reflecting 60% of the \$150,000 of the COF Grant allocated to the Standard New Jobs Target) for a total of \$1,215,000. These amounts reflect the percentages of the shortfall from the Capital Investment Target, the High-Paying New Jobs Target, and the Standard 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 is available for disbursement to the Company, as determined in accordance with the foregoing calculations, VEDP will disburse that amount to Newport News. Within 30 days after receipt of such amount, Newport News 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 has 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 will use the COF Grant proceeds to pay or reimburse the cost of building demolition, site preparation, and new construction activities, 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:

<u>Category of Incentive:</u>	<u>Total Amount</u>
COF Grant	\$1,500,000
Enterprise Zone Job Creation Grant (“EZJCG”) (Estimated)	478,000
Virginia Jobs Investment Program (“VJIP”) (Estimated)	76,500
Port of Virginia Economic and Infrastructure Development Grant (“Port Grant”)	109,500

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 EZJCG and the Port Grant may be used by the Company for any lawful purpose.

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

<u>Category of Incentive:</u>	<u>Total Amount</u>
Cash grant based on new tax revenue generated over from the investment in the Localities’ respective Enterprise Zones.	\$1,734,500

If, the Company has met its Targets, but the total value of all Local-Level Incentives disbursed or provided, or committed to be disbursed or provided by the Localities or the EDAs to the Company by September 30, 2030 is less than the \$1,500,000 COF Grant local match requirement, the Localities, subject to appropriation, will make an additional grant to the Company of the difference promptly after Performance Date; or, if the actual amount earned by the Company, as determined by VEDP, is less than \$1,500,000, but the total value of all Local-Level Incentives disbursed or provided, or committed to be disbursed or provided by the Localities or the EDAs to the Company by September 30, 2030 is less than such lesser amount, the Localities, 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 amount of the cash grants obligated by each of the Localities and the EDAs shall be governed by a separate memorandum of understanding entered into by and between the Localities and EDAs. While not governed by this agreement, such local agreement is included for reference purposes as Exhibit C.

(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 Localities, the EDAs, and VEDP of the Company's progress on the Targets. The Performance Reports are due by each January 1, commencing January 1, 2026, reflecting the Company's progress toward the Targets as of the prior September 30. Further, the Company shall provide such Performance Reports at such other times as the Localities, the EDAs or VEDP may require.

(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 Localities, the EDAs, 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, the Local-Level Incentives may be reduced by an amount equal to the amount withheld, and all rights of the Company under this Agreement will automatically terminate.

Section 6. Verification of Targets.

(a) *Verification of Capital Investment:* The Company hereby authorizes the Localities, including the Localities' Commissioner of the Revenue, Assessor, 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 Localities, the Offices of the Commissioner of the Revenue, the offices of the Assessor, or the Offices 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 Localities, the EDAs, 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 Localities' Commissioner of the Revenue.

(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 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 at the Facility, rather than at the company-level.

(c) *Additional Documentation:* In addition to the verification data described above, in the sole discretion of the Localities, the EDAs, or VEDP, the Localities, the EDAs, or VEDP, may each require such other documentation or audits as may be required to properly verify the Capital Investment or New Jobs.

Section 7. Possible Termination of this Agreement and Redeployment of COF Grant Proceeds. If the Localities, the EDAs, 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 Localities, the EDAs, 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, the Local-Level Incentives required may be reduced by an amount commensurate with the amount of COF Grant proceeds not disbursed, 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.

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:

Liebherr Mining Equipment Newport News
Co.
4100 Chestnut Avenue
Newport News, VA 23607
Email: Cort.Reiser@liebherr.com
Attention: Cort Reiser, Managing Director

with a copy to:

_____, _____
Email: _____
Attention: _____

if to the Localities, to:

City of Newport News, Virginia
2400 Washington Avenue
Newport News, VA 23607
Email: archerak@nnva.gov
Attention: City Manager

with a copy to:

City of Newport News, Virginia
2400 Washington Avenue
Newport News, VA 23607
Email: pealore@nnva.gov
Attention: City Attorney

City of Hampton, Virginia
22 Lincoln Street
Hampton, VA 23669
Email: mbunting@hampton.gov
Attention: City Manager

City of Hampton, Virginia
22 Lincoln Street
Hampton, VA 23669
Email: patricia.melochick@hampton.gov
Attention: Senior Deputy City Attorney

if to the Authority, to:

Economic Development Authority of the City
of Newport News, Virginia
c/o City of Newport News, Virginia
2400 Washington Avenue, 3rd Floor
Newport News, VA 23607
Email: kingstonfg@nnva.gov
Attention: Secretary/Treasurer

with a copy to:

Economic Development Authority of the
City of Newport News, Virginia
c/o Kaufman & Canoles, P.C.
One City Center
11815 Fountain Way, Suite 400
Newport News, VA 23669
Email: rhsuttle@kaufcan.com
Attention: Counsel

if to the Hampton EDA, to:

Economic Development Authority of the City
of Hampton, Virginia
1 Franklin Street, Suite 600
Hampton, VA 23669
Email: lsledge@hampton.gov
Attention: Secretary/Treasurer

with a copy to:

Economic Development Authority of the
City of Hampton, Virginia
c/o City Attorney's Office.
22 Lincoln Street, 4th Floor
Newport News, VA 23606
Email: patricia.melochick@hampton.gov
Attention: Senior Deputy City Attorney

if to VEDP, to:

Virginia Economic Development Partnership
One James Center, Suite 900
901 East Cary Street
Richmond, Virginia 23219
Email: ceo@vedp.org
Attention: President and CEO

with a copy to:

Virginia Economic Development Partnership
One James Center, Suite 900
901 East Cary Street
Richmond, Virginia 23219
Email: generalcounsel@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 Localities, the EDAs, 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:* Attorney'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.

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IN WITNESS WHEREOF, the parties hereto have executed this Performance Agreement as of the date first written above.

CITY OF NEWPORT NEWS, VIRGINIA

By _____
Name: _____
Title: _____
Date: _____

CITY OF HAMPTON, VIRGINIA

By _____
Name: _____
Title: _____
Date: _____

**ECONOMIC DEVELOPMENT AUTHORITY
OF THE CITY OF NEWPORT NEWS,
VIRGINIA**

By _____
Name: _____
Title: _____
Date: _____

**ECONOMIC DEVELOPMENT
AUTHORITY OF THE CITY OF
HAMPTON, VIRGINIA**

By _____
Name: _____
Title: _____
Date: _____

LIEBHERR USA, CO.

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 C: Localities' MOU

PERFORMANCE REPORT COMMONWEALTH'S DEVELOPMENT OPPORTUNITY FUND

As required by Section 5 of the Commonwealth's Development Opportunity Fund (COF) performance agreement, companies are required to report annually towards their progress in meeting the outlined COF targets for capital investment, average annual wage, and job creation.

PROJECT SUMMARY:

Project	
Location	
Amount of Grant	
Performance Reporting Period	
Performance Date	

PROJECT PERFORMANCE:

Performance Measurement	Target	As of _____	% Complete
New Jobs (over 792 baseline) ¹	175		
Remote Workers ² (please indicate if any of the new jobs are remote workers as defined below)	Yes <input type="checkbox"/>	No <input type="checkbox"/>	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"/>
Capital Investment (provide breakdown below) ³	\$72,329,755	Total – Newport News – Hampton –	
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"/>
Average Annual Wage	20 at \$55,891 155 at \$47,075		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"/>
Standard Fringe Benefits (check one)	Yes <input type="checkbox"/>	No <input type="checkbox"/>	N/A

¹Data will be verified using Virginia Employment Commission records; the FC-20 for the most recent quarter should be included; the employment breakout of employees' residences in Hampton, Newport News, and other Virginia locations should also be provided.

²Remote workers are defined as residents of other states; these workers may have hybrid schedules but must physically report to the company's Virginia facility at least three days per week. Residential zip codes of non-resident employees must be provided by the company and will be used to verify that these workers reside within a reasonable commute (one hour or less drive time) from the Virginia facility. Fully remote workers with a residence outside of Virginia may not be included.

³Data may be verified with locality records.

Capital Investment Breakdown – Newport News	Amount
Land	\$
Land Improvements	\$
New Construction or Expansion	\$
Renovation or Building Upfit	\$
Production Machinery and Tools	\$
Furniture, Fixtures and Equipment	\$
Other	
Total	\$

Capital Investment Breakdown – Hampton	Amount
Land	\$
Land Improvements	\$
New Construction or Expansion	\$
Renovation or Building Upfit	\$
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 Title

Name: _____
Print Name

Date: _____

E-Mail: _____

Telephone Number: _____

Please return to:

Sujin Kim
Incentives Reporting Manager
Virginia Economic Development Partnership
804-545-5728
skim@vedp.org

**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 ____	% Complete
New Jobs (over 792 baseline) ²	175		
Remote Workers ³ (please indicate if any of the new jobs are remote workers as defined below)	Yes <input type="checkbox"/>	No <input type="checkbox"/>	N/A
Capital Investment (provide breakdown below) ⁴	\$72,329,755	Total – Newport News – Hampton –	
Average Annual Wage	20 at \$55,891 155 at \$47,075		N/A
Standard Fringe Benefits (check one)	Yes <input type="checkbox"/>	No <input type="checkbox"/>	N/A

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

²Attach the Company’s Quarterly Payroll Reports (Form FC-20) filed with the Virginia Employment Commission for the four most recent quarters; the employment breakout of employees’ residences in Hampton, Newport News, and other Virginia locations should also be provided.

³Remote workers are defined as residents of other states; these workers may have hybrid schedules but must physically report to the company’s Virginia facility at least three days per week. Residential zip codes of non-resident employees must be provided by the company and will be used to verify that these workers reside within a reasonable commute (one hour or less drive time) from the Virginia facility. Fully remote workers with a residence outside of Virginia may not be included.

⁴Data will be verified using records from the Commissioner of the Revenue and invoices.

Capital Investment Breakdown – Newport News	Amount
Land	\$
Land Improvements	\$
New Construction or Expansion	\$
Renovation or Building Upfit	\$
Production Machinery and Tools	\$
Furniture, Fixtures and Equipment	\$
Other	\$
Total	\$

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

LOCAL MATCH:

Committed	
Actual	

COMMENTS:

Discuss the project status or the importance of the project to the locality and the 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 Title

Name: _____
Print Name

Date: _____

E-Mail: _____

Telephone Number: _____

TO BE CERTIFIED BY A REPRESENTATIVE OF THE LOCALITY:

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

Locality: _____

Submitted By: _____
Signature of Official Title

Name: _____
Print Name

Date: _____

E-Mail: _____

Telephone Number: _____

Please return to:

Sujin Kim
Incentives Reporting Manager
Virginia Economic Development Partnership
804-545-5728
skim@vedp.org

Exhibit C

**MEMORANDUM OF UNDERSTANDING CONCERNING
COMMONWEALTH’S DEVELOPMENT OPPORTUNITY FUND PERFORMANCE
AGREEMENT**

This Memorandum of Understanding (“MOU”), dated and effective as of the ___ day of _____, 2024, is by and between the City of Newport News, Virginia, (“Newport News”), the Economic Development Authority of the City of Newport News, Virginia (“Newport News EDA”), the City of Hampton, Virginia (“Hampton”), and the Economic Development Authority of the City of Hampton, Virginia (“Hampton EDA”), each a political subdivision of the Commonwealth of Virginia.

WHEREAS, by that certain Commonwealth’s Development Opportunity Fund Performance Agreement dated _____, 2024 between Newport News, Hampton, Liebherr-America Inc., the Virginia Economic Development Partnership Authority (“VEDP”), the Economic Development Authority of the City of Newport News, and the Economic Development Authority of the City of Hampton, Virginia (“COF Agreement”), Newport News and Hampton agreed to provide certain grants and incentives (the “Local-Level Incentives”), as matching funds to the Commonwealth’s Development Opportunity Fund (the “COF Grant”), with the objective to facilitate the construction, expansion, equipping, improvement and operation of an existing mining equipment facility (“Facility”) and the creation of certain New Jobs by Liebherr-America Inc., a Virginia corporation (“Liebherr”). A portion of said Facility is expected to be developed and constructed in Newport News, and another portion of said Facility is expected to be developed and constructed in Hampton; however, all New Jobs are attributed solely to Newport News. Any capitalized terms not defined herein shall bear the same meaning as in the COF Agreement.

WHEREAS, the maximum COF Grant amount that may be paid to Liebherr by VEDP is \$1,500,000.00.

WHEREAS, each of Hampton and Newport News, either directly or through or in cooperation with the Hampton EDA or Newport News EDA, respectively, have each entered into separate agreements with Liebherr concerning certain local area incentives (“Local-Level Incentives”) of each locality to satisfy the local match requirements set for the in the COF Agreement, with said agreements setting forth the terms and conditions requisite for the disbursement of the Local-Level Incentives, including, without limitation, the expected timelines, benchmarks, and tracking and report requirements.

WHEREAS, the parties hereto, in collaboration with the respective zoning commissions, planning and assessment departments, (including, without limitation, the Real Estate Assessors and Commissioners of Revenue for each locality), agree to cooperate with each other in the reporting, calculation, and reassessments of each locality’s business and property tax interests in the Facility.

WHEREAS the parties hereto agreed that Newport News will serve as the fiscal agent for the COF Grant.

WHEREAS, as of September 30, 2024, Liebherr estimates it has invested approximately \$23,165,474.84 in Hampton and \$45,713,539.16 in Newport News in the acquisition, development and construction of the Facility.

WHEREAS, the COF Agreement further provides that Newport News and Hampton will together provide a Local-Level Incentive grant through a combined cash grant of \$1,734,500.00 (“Local-Level Incentive Commitment”), contingent upon Liebherr meeting the Targets by the Performance Date, as set forth in the COF Agreement.

WHEREAS, Newport News expects to provide \$1,477,500.00 and Hampton expects to provide \$257,000.00 as their respective shares of the Local-Level Incentive grant for the Facility if Liebherr meets the Targets by the Performance Date.

WHEREAS, the COF Agreement discusses, in Section 4, that:

“If, by the Performance Date the Company has met its Targets, and the total value of all Local-Level Incentives disbursed or provided, or committed to be disbursed or provided, by the Localities or the EDAs to the Company is less than the \$1,500,000 COF Grant local match requirement, the Localities, subject to appropriation, will make an additional grant to the Company promptly after the Performance Date; or if, by the Performance Date, the actual amount earned by the Company, as determined by VEDP, is less than \$1,500,000, and the total level of Local-Level Incentives disbursed or provided, or committed to be disbursed or provided is less than that lesser amount earned by the Company, the Localities, 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 amount of cash grants obligated by each of the Localities and EDAs shall be governed by a separate agreement entered into by and between the Localities and the EDAs”

WHEREAS, the parties hereto desire to memorialize the understanding between the parties hereto of the above referenced paragraph and to set forth additional information about the COF Agreement as said COF Agreement relates to the Local-Level Incentives from Hampton, the Hampton EDA, Newport News and the Newport News EDA;

NOW, WHEREFORE, it is mutually understood and agreed as follows:

1. The Local Level-Incentives to be paid by each of the parties shall be paid in the form of a cash grant based on tax revenue generated over six (6) years for Newport News and

three (3) years for Hampton from the investment in the Localities' respective Enterprise Zones.

2. Newport News agrees to cover the difference between the actual Local-Level Incentives paid to the Company and \$1,500,000.00, which number is inclusive of the \$1,477,500.00 (or 85% of the Local-Level Incentive Commitment) committed by Newport News and the \$257,000.00 (or 15% of the Local-Level Incentive Commitment) committed by Hampton, subject to the appropriation of the City Councils of Newport News and Hampton.
3. Should there be a shortfall in the actual Local-Level Incentives disbursed to Liebherr as compared to the actual amount of the COF Grant earned by and disbursed to Liebherr, the parties hereto agree to make additional disbursements, such that said shortfall is eliminated ("Shortfall Disbursements"), as further set forth in Section 4 of the COF Agreement, up to the amounts set forth in Section 2.
4. In the event the amount earned by and disbursed to Liebherr, as determined by VEDP, is less than \$1,500,000.00, the parties shall be permitted to reduce the amount of Local-Level Incentives, with the reduction to be attributed to each locality to be based on the contribution percentages set forth in Section 2.
5. Notwithstanding the foregoing, Newport News' obligation under the COF Agreement to effectuate up to \$1,477,500.00 and Hampton's obligation under the COF Agreement to effectuate up to \$257,000.00 Local-Level Incentive committed to Liebherr remains and said obligations are not waived, modified or extinguished by this MOU.
6. The parties' rights and obligations under the other terms of the MOU, except as herein specifically referenced, shall remain unchanged and in full force and effect.

IN WITNESS WHEREOF, the parties have executed this MOU as of the date and year listed above.

[SIGNATURE PAGE FOLLOWS]

CITY OF HAMPTON, VIRGINIA

City Manager or her Designee

ATTEST:

City Clerk

**ECONOMIC DEVELOPMENT AUTHORITY
OF THE CITY OF HAMPTON, VIRGINIA**

Chair/Vice Chair

APPROVED AS TO FORM and
LEGAL SUFFICIENCY:

Deputy City Attorney

APPROVED AS TO CONTENT:

Hampton EDA Secretary/Treasurer

[Signatures continue on the following page.]

CITY OF NEWPORT NEWS, VIRGINIA

City Manager

ATTEST:

APPROVED AS TO FORM:

City Clerk

City Attorney

**ECONOMIC DEVELOPMENT AUTHORITY
OF THE CITY OF NEWPORT NEWS,
VIRGINIA**

Chair/Vice Chair

[End of Signatures.]