

AGENT AND FINANCIAL ASSISTANCE AGREEMENT

THIS AGENT AND FINANCIAL ASSISTANCE AGREEMENT (hereinafter, the "Agent Agreement"), made as of March 28, 2014, by and between the **ERIE COUNTY INDUSTRIAL DEVELOPMENT AGENCY**, a public benefit corporation of the State of New York, with offices at 95 Perry Street, Suite 403, Buffalo, New York 14203 (the "Agency"), and **TONAWANDA PIRSON 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 5505 Main Street, Williamsville, New York 14221 (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 24.66+/- acre parcel of land located at 100 Pirson Parkway, Tonawanda, New York (the "Land") to be improved thereon with a 310,000+/- SF facility comprising of 264,000+/- SF of climate-controlled warehouse space, 32,000+/- SF of production space for manufacturing and packaging of candies and confections, and 14,000+/- SF of general 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 Improvements, the "Facility"); and

WHEREAS, by Resolution dated September 16, 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 this Agent Agreement; and

WHEREAS, by its Resolution, the Agency has conferred on the Company in connection with the Project certain benefits, exemptions and other financial assistance consisting of state and local sales and use tax exemption benefits on the acquiring, constructing and/or equipping of the Facility, mortgage recording tax exemption benefits, and real property tax abatement benefits; and

WHEREAS, the Agency requires, as a condition and as an inducement for it to provide the New York State and local sales and use tax exemption benefits, mortgage recording tax exemption benefits, and real property tax abatement benefits, that the Company provide assurances with respect to the recapture of New York State and local sales and use tax exemption benefits, mortgage recording tax exemption benefits, and real property tax abatement benefits on the terms herein set forth.

NOW THEREFORE, in consideration of the covenants herein contained and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, it is mutually agreed as follows:

1. Scope of Agency. The Company hereby agrees to limit its activities as Agent for the Agency under the authority of the Resolution to acts reasonably related to the acquisition, construction and equipping of the Facility. The right of the Company to act as Agent of the Agency shall expire on **June 30, 2015**, unless extended as contemplated by the Resolution. The aggregate amount of work performed as Agent for the Agency shall not exceed the amount identified in the Company's application to the Agency in this matter.

All contracts entered into as Agent for the Agency shall include the following language:

"Except to the extent of bond proceeds (to the extent bonds are issued by Agency with respect to the Project), the Agency shall not be liable, either directly or indirectly or contingently, upon any such contract, agreement, invoice, bill or purchase order in any manner and to any extent whatsoever (including payment or performance obligations), and the Company shall be the sole party liable thereunder."

2. Representations and Covenants of the Company. The Company makes the following representations and covenants in order to induce the Agency to proceed with the Facility:

(a) The Company is a limited liability company duly organized, validly existing and in good standing under the laws of the State of New York, has the authority to enter into this Agent Agreement, and has duly authorized the execution and delivery of this Agent Agreement.

(b) Neither the execution and delivery of this Agent Agreement, the consummation of the transactions contemplated hereby nor the fulfillment of or compliance with the provisions of this Agent Agreement will conflict with or result in a breach of any of the terms, conditions or provisions of any restriction or any agreement or instrument to which the Company is a party or by which it is bound, or will constitute a default under any of the foregoing, or result in the creation or imposition of any lien of any nature upon any of the property of the Company under the terms of any such instrument or agreement.

(c) The Facility and the operation thereof will conform with all applicable zoning, planning, and building laws and regulations of governmental authorities having jurisdiction over the Facility, and the Company shall defend, indemnify and hold the Agency harmless from any liability or expenses resulting from any failure by the Company to comply with the provisions of this subsection (c).

(d) There is no action, suit, proceeding, inquiry or investigation, at law or in equity, before or by any court, public board or body pending or, to the knowledge of the Company, threatened against or affecting the Company, to which the Company is a party, and in which an adverse result would in any way diminish or adversely impact on the Company's ability to fulfill its obligations under this Agent Agreement.

(e) The Company covenants that the Facility will comply in all respects with all environmental laws and regulations, and, except in compliance with environmental laws and regulations, (i) that no pollutants, contaminants, solid wastes, or toxic or hazardous substances

will be stored, treated, generated, disposed of, or allowed to exist on the Facility except in compliance with all material applicable laws, (ii) that the Company will take all reasonable and prudent steps to prevent an unlawful release of hazardous substances onto the Facility or onto any other property, (iii) that no asbestos will be incorporated into or disposed of on the Facility, (iv) that no underground storage tanks will be located on the Facility, and (v) that no investigation, order, agreement, notice, demand or settlement with respect to any of the above is threatened, anticipated, or in existence. The Company upon receiving any information or notice contrary to the representations contained in this Section shall immediately notify the Agency in writing with full details regarding the same. The Company hereby releases the Agency from liability with respect to, and agrees to defend, indemnify, and hold harmless the Agency, its executive director, directors, members, officers, employees, agents, representatives, successors, and assigns from and against any and all claims, demands, damages, costs, orders, liabilities, penalties, and expenses (including reasonable attorneys' fees) related in any way to any violation of the covenants or failure to be accurate of the representations contained in this Section. In the event the Agency in its reasonable discretion deems it necessary to perform due diligence with respect to any of the above, or to have an environmental audit performed with respect to the Facility, the Company agrees to pay the expenses of same to the Agency upon demand.

(f) Any personal property acquired by the Company in the name of the Agency shall be located in the Town of Tonawanda, except for temporary periods during ordinary use.

(g) In accordance with Section 875(3) of the New York General Municipal Law, the policies of the Agency, and the Resolution, the Company covenants and agrees that it may be subject to a Recapture Event Determination (as hereinafter defined) resulting in the potential recapture of any and all New York State and local sales and use tax exemption benefits, mortgage recording tax exemption benefits, and real property tax abatement benefits, as described below, if the Company receives, or its agents, consultants, subcontractors, or any other party authorized to make purchases for the benefit of the Project receives, any New York State and local sales and use tax exemption benefits ("sales and use tax exemption benefits"), and/or mortgage recording tax exemption benefits, and/or real property tax abatement benefits from the Agency, and it is determined by the Agency that:

(i) the Company, its agents, consultants, subcontractors, or any other party authorized to make purchases for the benefit of the Project is not entitled to the sales and use tax exemption benefits; or

(ii) the sales and use tax exemption benefits are in excess of the amounts authorized by the Agency to be taken by the Company, its agents, consultants, subcontractors, or any other party authorized to make purchases for the benefit of the Project; or

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

(iv) 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

(v) the Company fails to meet and maintain the thresholds and requirements as described below, as evidenced by submission, on an annual basis or as indicated below, beginning in the first year in which the sales and use tax exemption benefits and/or the mortgage recording tax exemption benefits and/or the real property tax exemption benefits are so claimed, through the conclusion of the PILOT Agreement, and as so required by the Agency, of written confirmation certifying:

(i) that the total investment actually made with respect to the Project at the time of Project completion equals or exceeds \$15,895,000 (which represents the product of 85% multiplied by \$18,700,000, being the total project cost as stated in the Company's application for financial assistance); and

(ii) that there are at least 217 existing full time equivalent ("FTE") employees located at, or to be located at, the Facility as stated in the Company's application for financial assistance (the "Baseline FTE"); and

(iii) the number of current FTE employees in the then current year at the Facility; and

(iv) that, at the conclusion of year two following Project completion and through the term of the PILOT Agreement, the Company has maintained and created FTE employment of 246 FTE at the Facility, equal to the sum of: (a) 100% of the Baseline FTE (217) plus (b) 29 [representing the product of 85% multiplied by 35 (representing the projected FTE employee positions as proposed to be created by the Company as stated in the Company's application for financial assistance)]; and

(v) that, on a quarterly basis during the construction period, the Company adheres to and undertakes or has undertaken construction activities in compliance with the Agency's Local Labor Workforce Certification Policy and Local Labor Reporting Requirements.

(h) The findings made by the Agency with respect to Section 2(g)(i), (ii), (iii) and/or (iv) and/or failure to provide the written confirmation as required by Section 2(g)(v) with respect to the thresholds and requirements as identified in Section 2(g)(v), above, and/or failure to meet the thresholds and requirements as identified in Section 2(g)(v) above, may potentially be determined by the Agency, allowing for proper notice, hearing, and the completion of any appeals process, if any, related thereto, 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 (collectively, findings and determinations made as described herein with respect to Section 2(g)(i), (ii), (iii) and/or (iv) and/or the failure under Section 2(g)(v) to submit the required certification and/or the failure to meet the required thresholds and requirements as

specified in Section 2(g)(v) are hereby defined as a "Recapture Event Determination"). If the Agency makes a Recapture Event Determination, the Company agrees and covenants that it will (i) cooperate with the Agency in its efforts to recover or recapture any and all sales and use tax exemption benefits and/or any and all mortgage recording tax exemption benefits and/or any and all real property tax abatement benefits obtained by the Company 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 New York State and/or local sales and use taxes and/or mortgage recording tax due from the Company and/or real property tax abatement benefits, together with any relevant penalties and interest due on such amounts.

(i) In accordance with the Resolution the Company further covenants that the purchase of goods and services relating to the Project and subject to New York State and local sales and use taxes are estimated in an amount up to \$9,000,000, and, therefore, the value of the sales and use tax exemption benefits authorized and approved by the Agency, subject to Section 2(g) and 2(h) of this Agent Agreement, cannot exceed \$787,500.

(j) The Company acknowledges and understands that a Recapture Event Determination made with respect to Section 2(g)(iv) of this Agent Agreement will, in addition, immediately result in the loss and forfeiture of the Company's right and ability to obtain any and all future state and local sales and use tax exemptions and/or mortgage recording tax exemptions and/or real property tax abatement benefits with respect to the Project, and may result, in the sole discretion of the Agency, of loss and forfeiture of same with respect to a Recapture Event Determination made regarding Section 2(g) (i), (ii), (iii) and/or (v) of this Agent Agreement.

3. Hold Harmless Provision. The Company hereby releases the Agency from, agrees that the Agency shall not be liable for, and agrees to indemnify, defend and hold the Agency and its executive director, directors, members, officers, employees, agents (except the Company), representatives, successors and assigns harmless from and against, any and all (i) liability for loss or damage to property or injury to or death of any and all persons that may be occasioned by any cause whatsoever pertaining to the Facility or arising by reason of or in connection with the occupation or the use thereof or the presence on, in or about the Facility or breach by the Company of this Agent Agreement or (ii) liability arising from or expense incurred by the Agency's financing, rehabilitating, renovation, equipping, owning and leasing of the Facility, including without limiting the generality of the foregoing, all causes of action and reasonable attorneys' fees and any other expenses incurred in defending any suits or actions which may arise as a result of any of the foregoing. The foregoing indemnities shall apply notwithstanding the fault or negligence on the part of the Agency, or any of its respective executive director, directors, members, officers, agents or employees and irrespective of the breach of a statutory obligation or the application of any rule of comparative or apportioned liability, except that such indemnities will not be applicable with respect to willful misconduct or gross negligence on the part of the Agency or any other person or entity to be indemnified.

4. Insurance Required. Effective as of the date hereof and until termination of this Agent Agreement and/or Lease Agreement entered into with the Agency, Certificate(s) of Insurance shall be provided *by the Company and/or Project owner* evidencing that the following

insurance is currently maintained and in force with an insurance carrier approved to do business in the State of New York and maintaining an A.M. Best Rating of A- or better showing the Erie County Industrial Development Agency as Certificate Holder.

Acceptable Certificates of Insurance shall indicate the following minimal coverage, limits of insurance, policy numbers and policy effective and expiration dates or as otherwise provided and reviewed and accepted by the Agency and their insurance representatives in their sole discretion.

(a) **Commercial General Liability:**

i) **Accepted Form: ACORD 25 (2009/09 or later revisions)**

ii) The Company shall provide evidence of insurance for the named insured's premises and operations, products-completed operations, blanket contractual liability on an occurrence basis and when applicable to multiple locations, have attached Designated Location(s) General Aggregate Limit CG 25 04 endorsement. **Limits expressed shall be no less than:**

General Aggregate	\$2,000,000
Products-Completed Operations Aggregate	\$2,000,000
Per Occurrence	\$1,000,000
Personal & Advertising Injury	\$1,000,000
Fire Damage Liability	\$ 100,000
Medical Payments (per person)	\$ 5,000

The Agency shall be named as Additional Insured per ISO Form CG 20 26-Additional Insured Designated Person or Organization or such Additional Insured endorsement specifically designed for the Named Insured's operations. Such coverage should apply on a Primary & Non Contributory Basis. All insurance required of the Company shall waive any right of subrogation of the insurers against any person insured under such policy, and waive any right of the insurers to any off-set or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any person insured under such policy.

(b) **Umbrella/Excess Liability:**

i) **Accepted Form: ACORD 25 (2009/09 or later revisions)**

ii) The Company shall provide evidence of Commercial Umbrella or Excess Liability insurance for a limit of at least \$5,000,000 per occurrence with a \$5,000,000 Aggregate. The Agency shall be named as an Additional Insured either by the attachment of an Additional Insured endorsement or carrier specific endorsement allowing for following form Additional Insured status.

(c) **Property Insurance/Builders' Risk Insurance:**

i) **Accepted Forms: ACORD 27 (2009/12 or later revisions) or ACORD 28 (2009/12 or later revisions)**

ii) The Company and/or the Project owner shall provide evidence of insurance against all direct physical loss, including mechanical breakdown.

(d) Workers Compensation/Disability Insurance:

i) The Company and/or Project Owner shall provide evidence of insurance and maintain Workers Compensation/Disability insurance as required by statute.

ii) **Accepted Forms:**

Workers Compensation Forms		DBL (Disability Benefits Law) Forms	
CE-200	Exemption	CE-200	Exemption
C-105.2	Commercial Insurer	DB-120.1	Insurers
SI-12	Self Insurer	DB-155	Self Insured
GSI-105.2	Group Self Insured		
U-26.3	New York State Insurance Fund		

If the Company and/or Project owner have no employees, the Company and/or Project owner shall provide a completed and signed Form CE-200 or later revision, which is found on the New York State Workers Compensation Board website: www.wcb.ny.gov/ This form is to be completed on-line, printed, and signed.

Agency Address:

All evidence of insurance shall be sent to:

Erie County Industrial Development Agency
95 Perry Street, Suite 403
Buffalo, NY 14203

5. Additional Provisions Respecting Insurance. (a) Such insurance may be written with deductible amounts comparable to those on similar policies carried by other companies engaged in businesses similar in size, character and other respects to those in which the Company is engaged. All policies evidencing such insurance shall provide for payment of the losses of the Company and the Agency as their respective interests may appear. The Company shall cause all contractors and agents of the Company undertaking the Project to carry and provide evidence of insurance as required within Section 4(a) and 4(b) of this Agreement, with the Agency named as an additional insured.

(b) All such certificates of insurance of the insurers indicating that such insurance is in force and effect, and all policies (if applicable), shall be deposited with the Agency on the date hereof. At least thirty (30) days prior to expiration of the policy evidenced by said certificates, the Company shall furnish the Agency evidence that the policy has been renewed or replaced or is no longer required by this Agent Agreement.

6. This Agent Agreement may be executed in any number of counterparts each of which shall be deemed an original but which together shall constitute a single instrument.

7. All notices, claims and other communications hereunder shall be in writing and shall be deemed to be duly given if personally delivered or mailed first class, postage prepaid, or by a nationally-recognized overnight courier, addressed as follows:

To the Agency: Erie County Industrial Development Agency
95 Perry Street, Suite 403
Buffalo, NY 14203
Attn: Chief Executive Officer

With a copy to: Harris Beach PLLC
726 Exchange Street, Suite 1000
Buffalo, NY 14210
Attn: Robert G. Murray, Esq.

To the Company: Tonawanda Pirson LLC
5505 Main Street
Williamsville, NY 14221
Attn: James A. Zaepfel, Manager

With a copy to: Gross Shuman, Brizdle & Gilfillan, P.C.
465 Main Street, Suite 600
Buffalo, NY 14203
Attn: Jonathan D. Schechter, Esq.

or at such other address as any party may from time to time furnish to the other party by notice given in accordance with the provisions of this Section. All notices shall be deemed given when mailed or personally delivered in the manner provided in this Section.

8. This Agent Agreement shall be governed by, and all matters in connection herewith shall be construed and enforced in accordance with, the laws of the State of New York applicable to agreements executed and to be wholly performed therein and the parties hereto hereby agree to submit to the personal jurisdiction of the Federal or state courts located in Erie County, New York.

9. The obligations of the Company under this Agent Agreement shall be absolute and unconditional and shall remain in full force and effect until the PILOT Agreement has expired or been terminated.

10. All warranties, representations, and covenants made by the Company herein shall be deemed to have been relied upon by the Agency and shall survive the delivery of this Agent Agreement to the Agency, and termination of this Agent Agreement, regardless of any investigation made by the Agency. This Agent Agreement shall survive any termination or expiration of the Leaseback Agreement, as described below.

11. The parties are contemplating that, after any applicable public hearing(s), if required, the Agency will negotiate and enter into a lease agreement (the "Lease Agreement") and leaseback agreement (the "Leaseback Agreement") with the Company. The Company agrees not to take title to any real property as agent for the Agency. The Agency will provide the Company with a bill of sale (a form of which is attached hereto as Exhibit A) which sells, transfers and delivers unto the Company and its successors and assigns, all Equipment which were acquired and installed and/or are to be acquired and installed by the Company as agent for the Agency pursuant to this Agent Agreement which Equipment is located or intended to be located at 100 Pirson Parkway, Tonawanda, New York 14150.

12. By executing this Agent Agreement, the Company covenants and agrees to pay all fees, costs and expenses incurred by the Agency for (a) legal services, including but not limited to those provided by the Agency's general counsel or bond/transaction counsel, (b) other consultants retained by the Agency, if any, in connection with the Project; in accordance with the terms of the Administrative Fee Agreement between the Company and the Agency, and (c) with respect to enforcing this Agent Agreement (including reasonable attorney fees). The Agency counsel fees are based upon the Company's representations made in its application for Agency assistance and as established in accordance with the Agency counsel fee schedule. The Company further covenants and agrees to make a non-refundable payment upon execution of this Agent Agreement in accordance with the terms of the Agency Counsel Fee Agreement. The Company further covenants and agrees that the Company is liable for payment to the Agency of all charges referred to above, as well as all other actual costs and expenses incurred by the Agency in undertaking the Project notwithstanding the occurrence of any of (i) the applicant's withdrawal, abandonment, cancellation or failure to pursue the Project; (ii) the inability of the Agency or the Company to procure the services of one or more financial institutions to provide financing for the Project; or (iii) the Company's failure, for whatever reason, to undertake and/or successfully complete the Project.

(Remainder of page intentionally left blank)

[Signature Page to Agent and Financial Assistance Agreement]

IN WITNESS WHEREOF, the parties hereto have executed this Agent Agreement as of the day and year first above written.

**ERIE COUNTY INDUSTRIAL
DEVELOPMENT AGENCY**

Dated: _____

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

TONAWANDA PIRSON LLC

Dated: _____

By: _____
Name: James A. Zaepfel
Title: Manager

[Signature Page to Agent and Financial Assistance Agreement]

IN WITNESS WHEREOF, the parties hereto have executed this Agent Agreement as of the day and year first above written.

**ERIE COUNTY INDUSTRIAL
DEVELOPMENT AGENCY**

Dated: _____

By: _____

Name: Karen M. Fiala

Its: Assistant Treasurer

TONAWANDA PIRSON LLC

Dated: 3-28-14

By:  _____

Name: James A. Zaepfel

Title: Manager

Exhibit A

BILL OF SALE

ERIE COUNTY INDUSTRIAL DEVELOPMENT AGENCY, a public benefit corporation of the State of New York with offices at 95 Perry Street, Suite 403, Buffalo, New York 14203 (the "Grantor"), for the consideration of One Dollar (\$1.00), cash in hand paid, and other good and valuable consideration received by the Grantor from **TONAWANDA PIRSON 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 5505 Main Street, Williamsville, New York 14221 (the "Grantee"), the receipt of which is hereby acknowledged by the Grantor, hereby sells, transfers and delivers unto the Grantee and its successors and assigns, the Equipment [as defined in the Agent and Financial Assistance Agreement dated March 28, 2014 (the "Agent Agreement")], which were acquired and installed and/or are to be acquired and installed by the Grantee as agent for the Grantor pursuant to the Agent Agreement, which Equipment is located or intended to be located at the Grantee's Facility located at 100 Pirson Parkway, Tonawanda, New York.

TO HAVE AND TO HOLD the same unto the Grantee and its successors and assigns, forever.

THE GRANTOR MAKES NO WARRANTY, EITHER EXPRESS OR IMPLIED, AS TO THE CONDITION, TITLE, DESIGN, OPERATION, MERCHANTABILITY OR FITNESS OF THE EQUIPMENT OR ANY PART THEREOF OR AS TO THE SUITABILITY OF THE EQUIPMENT OR ANY PART THEREOF FOR THE GRANTEE'S PURPOSES OR NEEDS. THE GRANTEE SHALL ACCEPT TITLE TO THE EQUIPMENT "AS IS," WITHOUT RECOURSE OF ANY NATURE AGAINST THE GRANTOR FOR ANY CONDITION NOW OR HEREAFTER EXISTING. IN THE EVENT OF ANY DEFECT OF DEFICIENCY OF ANY NATURE, WHETHER PATENT OR LATENT, THE GRANTOR SHALL HAVE NO RESPONSIBILITY OR LIABILITY WITH RESPECT THERETO.

IN WITNESS WHEREOF, the Grantor has caused this bill of sale to be executed in its name by the officer described below on the date indicated beneath the signature of such officer and dated as of the 28 day of MARCH, 2014.

**ERIE COUNTY INDUSTRIAL
DEVELOPMENT AGENCY**

By: Karen M. Fiala

Name: Karen M. Fiala

Title: Assistant Treasurer