

## **PAYMENT IN LIEU OF TAXES AGREEMENT**

**THIS PAYMENT IN LIEU OF TAXES AGREEMENT** (this “Agreement”) is made as of the 1st day of June, 2009 by and between **117 FOOTE AVENUE LLC**, a New York limited liability company having an address c/o The Krog Corp., 4 Centre Drive, Orchard Park, NY 14127 (the “Lessee”), and the **COUNTY OF CHAUTAUQUA INDUSTRIAL DEVELOPMENT AGENCY**, a corporate government agency constituting a body corporate and politic and a public benefit corporation of the State of New York having an address at 200 Harrison Street, Jamestown, New York 14701 (the “Agency”).

### **WITNESSETH:**

**WHEREAS**, the New York State Industrial Development Agency Act, constituting Title I of Article 18-A of the General Municipal Law of the State of New York, Chapter 24 of the Consolidated Laws of the State of New York, as amended (the “Enabling Act”) authorizes and provides for the creation of industrial development agencies in the several counties, cities, villages and towns in the State of New York and empowers such agencies, among other things, to acquire, expand, construct, reconstruct, lease, improve, maintain, equip, furnish, and dispose of one or more projects for the purpose of promoting, developing, encouraging, and assisting in the acquisition, expansion, construction, reconstruction, improvement, maintaining, equipping, and furnishing of industrial, manufacturing, warehousing, commercial, research, and recreational facilities, and thereby advance the job opportunities, general prosperity, and economic welfare of the people of the State of New York;

**WHEREAS**, pursuant to and in accordance with the provisions of the Enabling Act and Chapter 71 of the 1972 Laws of New York, as amended (together with the Enabling Act, hereinafter referred to as the “Act”), the Agency, which has been created and established pursuant thereto for the benefit of the County of Chautauqua, proposes to undertake the Project described below;

**WHEREAS**, the Agency on behalf of Lessee intends to (i) acquire certain land more particularly described on Schedule A hereto (the “Land”); (ii) construct certain improvements on the Land (the “Improvements”); and (iii) acquire the equipment more particularly described on Exhibit A to the Lease (as hereinafter defined) (the “Equipment”) (the Land, Improvements and Equipment are hereinafter collectively referred to as the “Project”);

**WHEREAS**, the Agency is or will be the owner in fee simple of the Land and the Improvements (collectively, the “Facility”);

**WHEREAS**, the Agency proposes to undertake the Project as an authorized project under the Act and to lease the interest of the Agency to Lessee pursuant to an Agency Lease Agreement dated as of the date hereof entered into between the Agency, as lessor, and Lessee, as lessee (as amended, modified, restated or replaced from time to time, the “Lease”); and

**WHEREAS**, under the present provisions of the Act and under the present Section 412-a of the Real Property Tax Law of the State of New York, the Agency is required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction or supervision or under its control.

**NOW, THEREFORE**, in consideration of the premises and the payments, agreements, and covenants hereinafter contained, Lessee and the Agency formally covenant and agree as follows:

Section 1. Tax-Exempt Status of Facility.

(a) Application. Lessee shall complete, and the Agency shall file, an application for tax exemption pursuant to Section 412-a of the Real Property Tax Law. Such application shall be filed with the assessor of each of the various taxing entities having jurisdiction over the Facility (such taxing entities, and any successors thereto, being hereinafter collectively referred to as the "Taxing Entities" and individually, as a "Taxing Entity"). The Facility shall not be entitled to exempt status on the tax rolls of any Taxing Entity until the first tax year of such Taxing Entity following the taxable status date of such Taxing Entity occurring subsequent to the Agency becoming the owner of record of the Facility, the filing by the Agency of the appropriate applications for tax exemption, and the acceptance of such applications by the appropriate tax assessors.

(b) Cost. On the date of this Agreement or as soon as practicable after the Improvements have been completed, Lessee shall deliver to the Agency invoices and summaries of all costs and expenses directly paid by Lessee for the Facility (collectively, the "Cost of Improvements"). The Agency reserves the right to audit and verify the Cost of Improvements.

(c) Completion Date/Assessment. The Completion Date of the Project shall be the date on which (i) the Project is substantially completed in accordance with the requirements of the Lease, and (ii) a certificate of occupancy has been issued. Lessee estimates that the Completion Date will be November 1, 2009 ("Estimated Completion Date"). Lessee shall establish the Completion Date, which shall not be more than thirty (30) days following the Estimated Completion Date.

(d) Special Assessments. The parties hereto understand that the tax exemption extended to the Agency by Section 874 of the General Municipal Law and Section 412-a of the Real Property Tax Law does not entitle the Agency to exemption from special assessments and special ad valorem levies. Pursuant to the Lease, Lessee will be required to pay all special assessments and special ad valorem levies lawfully levied and/or assessed against the Facility.

(e) Other Charges. If any taxes, assessments, service charges or other governmental charges become payable by the Agency or Lessee on the rents under the Lease or the occupancy of or any interest of the Agency or Lessee in the Facility or any part thereof or any personal property used in connection with the business conducted and located therein, the amount of any tax, assessment or charges shall be paid by Lessee. Furthermore, water charges, sewer rentals,

sewage treatment charges, solid waste charges and any other charges in the nature of utility charges shall be paid directly by Lessee and shall not be credited against nor affect in any manner any payment in lieu of general real estate taxes in any year and shall be computed pursuant to the formula adopted by the relevant Taxing Entity.

Section 2. Payments.

(a) Tax Payments. Prior to the Facility becoming entitled to exempt status as set forth in Section 1(a) above, the applicable real estate tax levies on the Facility shall be payable in full by Lessee to the applicable Taxing Entity.

(b) Pilot Payments During Construction. After the Facility becomes entitled to exempt status until the last day of the tax fiscal year of the applicable Taxing Entity in which the Completion Date occurs, Lessee shall pay to the Agency at its address set forth in the heading of this Agreement, for the account and benefit of each Taxing Entity, payments in lieu of the general real estate tax levies on the Facility ("PILOT Payments") in an amount equal to the amount of the tax levies which would be payable if the Facility were listed on the assessment rolls as fully taxable.

(c) Pilot Payments after Completion of Construction. Commencing with the first tax year for the applicable Taxing Entity following the Completion Date, Lessee shall pay to the Agency for the account and benefit of each Taxing Entity during the "Term of the PILOT" (as hereinafter defined), for each Taxing Entity, PILOT Payments in the amounts provided for under Plan A set forth on Schedule B attached hereto. The "Term of the PILOT" shall be the period of time from the first day of the first tax fiscal year of the applicable Taxing Entity following the Completion Date until the last day of the tax fiscal year of the applicable Taxing Entity following ten (10) annual PILOT Payments to such Taxing Entity. If the Term of the PILOT for any Taxing Entity shall have expired while the Term of the PILOT for any other Taxing Entity shall not have expired, Lessee shall pay to the Agency, until the termination of this Agreement, PILOT Payments in an amount equal to the amount of the tax levies which would be payable to such Taxing Entity if the Facility was listed on the assessment rolls as fully taxable.

(d) Maximum Payment. Notwithstanding anything to the contrary herein, the PILOT Payments under Section 2(c) above shall not exceed the amount Lessee would pay under normal calculations for any period. Hence, if the general real estate tax due (calculated as if Lessee were the record owner of the Facility, and the Facility were assessed at full value for purposes of taxation) otherwise due any Taxing Entity decreases due to a reduction in tax rates or otherwise below the PILOT Payments specified in Section 2(c) above, then the PILOT Payments due that Taxing Entity shall be decreased to equal the tax that would otherwise be due. If, however, a PILOT Payment has been so reduced, and the taxes that would otherwise be due subsequently increase, the PILOT Payment shall similarly increase, but not in excess of the amount specified in Section 2(c) above.

(e) Payments to Agency. All PILOT Payments shall be made by Lessee directly to the Agency promptly upon receipt of billings from the Agency. It is understood that the Agency

shall receive the PILOT Payments in trust for each of the Taxing Entities, and the Agency shall forward such payments to each such Taxing Entity within thirty (30) days after receipt thereof.

(f) Due Dates; Interest; and Penalties. The Agency will bill Lessee for the respective PILOT Payments as if the Facility were on the tax rolls at the time when taxes for each Taxing Entity are due. All payments are net if paid on or before the due dates listed below. If any PILOT Payment is not made on or before the due date, such payment shall be delinquent and Lessee shall pay, for the benefit of the applicable Taxing Entity, a late charge equal to five percent (5%) of the payment. For each month, or part thereof, that the payment is delinquent beyond the first month, Lessee shall pay an additional late charge equal to one and one-half percent (1-1/2%) per month of the total amount payable.

As of the date of this Agreement, the due dates for the PILOT Payments are as follows:

County and City Taxes:	January 30 <sup>th</sup>
School Taxes:	September 30 <sup>th</sup>

(g) Partial Sale; Transferee's Obligation; Apportionment of Reduction to Local Taxing Entities. During the term of this Agreement, in the event that any portion of the Land or the Improvements located thereon is sold or disposed of by the Agency, the transferees thereof will thereafter pay the real property taxes on such Improvements as may be located on the portion of the Land sold and on the portion of the Land sold as may be required by applicable law.

(h) Sale; Lessee's Obligation. In the event that the Agency sells the Facility to any party other than Lessee in accordance with the terms of the Lease, Lessee's obligation for PILOT Payments shall be prorated to the date of the closing of the transaction and thereupon all obligations of Lessee for PILOT Payments shall cease, but the Agency shall take such steps with the purchaser other than Lessee to assure that each of the Taxing Entities shall suffer no loss of revenue until such Facility can be placed back on the tax rolls and taxes levied and billed therefor.

### Section 3. QEZE Credit for Real Property Taxes.

(a) Lessee acknowledges and confirms that it has applied to the State of New York (the "State") for certification under the State's Empire Zones Program (the "Program") for a Qualified Empire Zone Enterprises Credit for Real Property Taxes with respect to the Project (the "Credit"). It shall be Lessee's (and not the Agency's) obligation to fully comply with all requirements of the Program, to file with the State on a timely basis (after giving effect to any extensions) all tax returns and other reports required under the Program. The Agency makes no representation or warranty with respect to the Program, Lessee's certification under the Program or Lessee's ability to claim the Credit.

(b) During the period of time that Lessee is entitled to and qualified for the Credit, the PILOT Payments set forth in Sections 2(c) hereof shall be deemed revised and amended to equal the amounts provided for under Plan B set forth on Schedule B attached hereto, subject to and in accordance with the other provisions set forth in this Agreement.

(c) Lessee shall notify the Agency in writing of any repeal or unavailability of the Credit. In the event that, at any time during the Term of the PILOT, Lessee is not entitled to the Credit for any reason other than a voluntary decision by Lessee to intentionally forego all or any portion of the Credit, Lessee agrees to make PILOT Payments for every such year during the Term of the PILOT that it is not entitled to the Credit in the amounts provided for under Plan A set forth on Schedule B attached hereto. Upon any voluntary decision by Lessee to intentionally forego the Credit, Lessee agrees to make PILOT Payments for each such year in amounts equal to the amount of the tax levies which would be payable if the Facility were listed on the assessment rolls as fully taxable.

(d) If, for any reason other than a voluntary decision by Lessee to intentionally forego all or any portion of the Credit, at any time during the Term of the PILOT: (i) Lessee is no longer entitled to receive the Credit in an amount equal to 100% of its real property tax payments including payments called for under this Agreement or the State fails to fully and timely reimburse Lessee for the refundable portion of its Credit and (ii) as a result thereof the total PILOT Payment called for under Plan B set forth on Schedule B attached hereto minus the Credit that would be generated by such total PILOT Payment exceeds the total PILOT Payment called for under Plan A set forth on Schedule B attached hereto, then Lessee shall make a total PILOT Payment in an amount that generates a Credit which, when subtracted from the total PILOT Payment called for pursuant to this clause, results in a difference equal to the total PILOT Payment called for under Plan A set forth on Schedule B attached hereto.

Section 4. Jobs. Lessee covenants and agrees that, after the Completion Date, (i) Lessee shall, throughout the term of the Lease, use its best efforts to maintain, or create and thereafter maintain (or cause to be created and maintained, as the case may be) the number of permanent, private sector jobs at the site of the Project as and when set forth in the application submitted to the Agency with respect to the Project (the "Application"), and (ii) the foregoing to the contrary notwithstanding, Lessee shall maintain, or create and thereafter maintain (or cause to be created and maintained, as the case may be), throughout the term of the Lease, not less than thirty-six (36) permanent, full-time equivalent private sector jobs within one (1) year after the Completion Date (as defined in the Lease), and not less than an additional four (4) permanent, full-time equivalent private sector jobs within two (2) years after the Completion Date, all of which jobs shall be located at the Project site. Lessee agrees to deliver to the Agency on each annual anniversary of this Agreement a written report describing its compliance or noncompliance with the provisions of this Section 3 and to permit the Agency to audit the books and records of Lessee supporting such report.

Section 5. Effective Date; Duration of Agreement. This Agreement shall become effective upon the delivery of the Lease by Lessee and the Agency and shall continue in effect until the earlier of (i) last day prior to the taxable status date following the final tax fiscal year of a Taxing Entity in which a PILOT Payment is or would be payable pursuant to Section 2(c)

above, or (ii) the date on which title to the Facility is conveyed to Lessee pursuant to the Lease or this Agreement.

Section 6. Events of Default. The following shall constitute "Events of Default" under this Agreement:

(a) failure by Lessee to make any payment specified herein and the continuance of such failure for a period of ten (10) days following written notice from the Agency or any Taxing Entity;

(b) failure by Lessee to comply with or perform any provision of this Agreement other than the payment provisions hereof and the continuance of such failure for a period of thirty (30) days following written notice thereof;

(c) failure by Lessee to establish a Completion Date within two (2) months after the Estimated Completion Date; and/or

(d) default in the terms of any agreement entered into between the Agency and Lessee (beyond any applicable grace period).

Upon the occurrence and continuance of an Event of Default hereunder, the Agency shall be entitled to sue to enforce any provision of this Agreement and to recover the payments in default from Lessee, together with all the costs and expenses of the Agency, its successors or assigns, paid or incurred in such recovery (including court costs and attorney's fees and expenses) and interest at the rate specified in Section 2(f) above. In addition, the Agency shall have the right to reconvey the Facility to Lessee at any time, and Lessee shall accept any such tender of reconveyance.

The Agency, in enforcing payment by Lessee of said amounts, may take whatever action and exercise any or all of the rights and remedies specified in this Agreement or any other remedy provided by law.

Each and every Event of Default shall give rise to a separate cause of action hereunder, and separate suits may be brought hereunder as each cause of action arises. Lessee irrevocably agrees that any suit, action, or other legal proceeding arising out of this Agreement may be brought in the courts of record of the State of New York, or the courts of the United States located within the State of New York, consents to the jurisdiction of each such court in any such suit, action, or proceeding, and waives any objection which it may have to the laying of the venue of any such suit, action, or proceeding in any of such courts.

Further, upon the occurrence and continuance of an Event of Default hereunder, if Lessee is then making PILOT Payments pursuant to Plan A under Schedule B hereto, Lessee shall be required to make payments in lieu of general real estate taxes levied by the Taxing Entities on the Facility if it were owned by Lessee, such amounts to commence to be paid for the period subsequent to the date it is determined by the Agency that there is an Event of Default

hereunder. In such event, the tax rate, interest and penalties shall be those then in effect in the jurisdiction(s) in which the Facility is located.

No delay or omission in exercising any right or power accruing upon the occurrence of any Event of Default hereunder shall impair any such right or power or shall be construed to be a waiver thereof, but any such right or power may be exercised from time to time and as often as may be deemed expedient by the Agency.

In no event shall the Agency be liable to any of the Taxing Entities for the payments specified herein, whether or not Lessee makes such payments. Lessee hereby agrees to indemnify, defend (with counsel selected by the Agency) and hold harmless the Agency from and against any such liability for such payments and against all penalties, interest, and other charges resulting from the delinquency of such payments.

Section 7. Covenants by the Agency. The Agency covenants that, unless otherwise required by law, the Agency will not enact or adopt any laws, ordinances, rules, or regulations imposing any taxes, assessments, or other charges of payments on the Project or Lessee's leasehold interest or personal property therein, or its use or occupancy thereof or its gross receipts or income therefore, except as Lessee and the Agency have herein agreed, or may agree from time to time in the future.

Section 8. Notices. All notices, certificates and other communications hereunder shall be in writing and shall be sufficiently given and shall be deemed given, if by delivery, when delivered and, if delivered by mail, on the second day following the day on which mailed by certified mail, postage prepaid, addressed as follows:

To the Agency: County of Chautauqua Industrial Development Agency  
200 Harrison Street  
Jamestown, New York 14701  
Attention: Administrative Director

With a copy to: Phillips Lytle LLP  
8 East Third Street, Suite 307  
P.O. Box 1279  
Jamestown, NY 14702  
Attention: Gregory L. Peterson, Esq.

To Lessee: 117 Foote Avenue LLC  
c/o The Krog Corp.  
4 Centre Drive  
Orchard Park, NY 14127  
Attention: Peter L. Krog

The Agency or Lessee may, by notice given hereunder, designate any further or different addresses to which subsequent notices, certificates and other communications shall be sent.

Section 9. Assignment of Agreement. This Agreement shall be binding upon the successors and assigns of Lessee, but no assignment shall be effective to relieve Lessee of any of its obligations hereunder unless expressly authorized and approved in writing by the Agency. Lessee shall have the right to assign this Agreement to Southern Tier Management Services LLC (“Southern Tier”) at such time as it conveys its interest in the Project and assigns the Lease and the other Transaction Documents to Southern Tier in accordance with Section 7.7(b) of the Lease. Upon such conveyance and assignment by Lessee to Southern Tier, and Southern Tier’s execution and delivery of the Assignment & Assumption Agreement (as defined in the Lease), Lessee shall be released of all liability accruing under this Agreement from and after the date of such conveyance and assignment by Lessee to Southern Tier.

Section 10. Independent Agreement. Notwithstanding any other provision of this Agreement, including the recitals hereof, the parties agree that the Lease executed between the parties hereto shall be a separate and independent document from this Agreement, and irrespective of whether any provision of this Agreement or the entirety hereof shall be held invalid or unenforceable by any court of competent jurisdiction, the Lease shall be construed, interpreted, and otherwise regarded separate and apart from this Agreement. The parties hereto specifically note that the considerations and terms provided for in this Agreement and provided for in the Lease are the only considerations and terms for which the parties hereto have executed this Agreement.

Section 11. Waivers. Lessee, in recognition of the benefits provided under this Agreement, and for so long as the Lease is in effect, hereby expressly waives any rights it may have for any exemption under Section 485-b of the Real Property Tax Law or any other exemption under any other law or regulation (except, however, for the exemption provided under Article 18-A of the General Municipal Law) with respect to the Facility.

Lessee, in recognition of the benefits provided under this Agreement and the Lease, hereby expressly waives the right to institute judicial or other review of an assessment of the real property with respect to the Facility, whether pursuant to the provisions of Article 7 of the Real Property Tax Law or other applicable law, as the same may be amended from time to time.

Section 12. Future Additions. If there shall be a future addition to the Facility constructed or added in any manner after the date of this Agreement that would otherwise change the assessed value of the Facility, Lessee shall notify the Agency of such future addition (the “Future Addition”). The notice to the Agency shall contain a copy of the application for a building permit, plans and specifications and any other relevant evidence that the Agency may reasonably request. Upon the earlier of substantial completion, or the issuance of a certificate of occupancy for any such Future Addition, Lessee shall become liable for payment of an increase in the total PILOT Payments as reasonably determined by the Agency. The Agency shall notify Lessee of any proposed increase in the total PILOT Payment resulting from such Future Addition. If Lessee shall disagree with the determination of Assessed Value for any Future Addition made by the Agency, then and in that event the Assessed Value for any such Future Addition shall be fixed by a court of competent jurisdiction. Notwithstanding any disagreement between Lessee and the Agency, Lessee shall pay the increased total PILOT Payment determined pursuant to this Section until a different total PILOT Payment shall be established. If a lesser



Assessed Value for any such Future Addition is determined in any proceeding or by subsequent agreement of the parties, the total PILOT Payment shall be recomputed and any excess payment shall be refunded to Lessee, or in the Agency's sole discretion, such excess payment shall be applied as a credit against the next succeeding PILOT payment(s).

Section 13. Amendments. This Agreement may not be modified, amended, supplemented, or changed without the written consent of the Agency, Lessee and any Taxing Entity which is affected by the amendment.

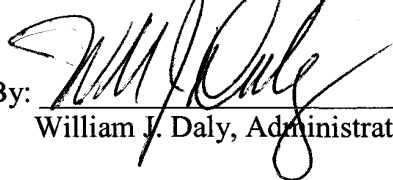
Section 14. Severability. In the event any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

Section 15. Prior Agreements; Counterparts. This Agreement constitutes the entire agreement, and supersedes all prior agreements and understandings, whether written or oral, among the parties with respect to the subject matter hereof and may be executed simultaneously in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

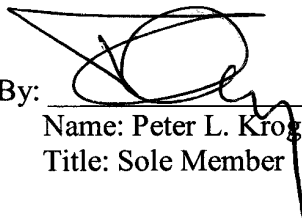
Section 16. Delivery of Agreement. The Agency agrees to use its best efforts to deliver to each Taxing Entity a copy of this Agreement within fifteen (15) days after its execution by the Agency.

**IN WITNESS WHEREOF**, the Agency and Lessee have executed this Agreement as of the date first above written.

**COUNTY OF CHAUTAUQUA  
INDUSTRIAL DEVELOPMENT AGENCY**

By:   
William J. Daly, Administrative Director

**117 FOOTE AVENUE LLC**

By:   
Name: Peter L. Krog  
Title: Sole Member

## **Schedule A**

### **LAND**

ALL THAT TRACT OR PARCEL OF LAND, situate in the City of Jamestown, County of Chautauqua and State of New York, being part of Lot 25, Town 2 and Range 11 of the Holland Land Company's Survey and being more particularly bounded and described as follows:

BEGINNING at an iron stake at the intersection of the northerly line of Water Street and the easterly line of Foote Avenue; thence North  $81^{\circ} 45' 00''$  East along the northerly line of Water Street, 216.80 feet to an iron stake; thence North  $08^{\circ} 15' 00''$  West, 120.00 feet to an iron stake in the southerly line of former Waterman Street; thence North  $81^{\circ} 45' 00''$  East along the southerly line of former Waterman Street, 21.50 feet to an iron stake; thence North  $8^{\circ} 15' 00''$ , 230.00 feet to an iron stake; thence continuing along the same line North  $08^{\circ} 15' 00''$  West, 15 feet more or less to the waters of the Chautauqua Lake Outlet (Chadakoin River); thence generally westerly along the waters of the Chautauqua Lake Outlet to the said easterly line of Foote Avenue; thence South  $03^{\circ} 39' 05''$  East along the easterly line of Foote Avenue, 23 feet to an iron stake, said iron stake being South  $65^{\circ} 56' 20''$  West, 223.49 feet (deed), 223.44 feet (measured), from the last described iron stake; thence continuing South  $03^{\circ} 39' 05''$  East along the easterly line of Foote Avenue, 290.00 feet to the iron stake at the point or place of beginning.

**Schedule B**

**PILOT PAYMENTS**

**Plan A**

Annually, an amount equal to the product of: (i) fifty percent (50%) of the Assessed Value as of the Completion Date, times (ii) the then applicable tax equalization rate for the applicable Taxing Entity, times (iii) the then applicable tax rate for the applicable Taxing Entity; provided, however, in no event shall the resulting PILOT Payments be less than \$10,144.72 per annum at any time during the Term of the PILOT. The term "Assessed Value" as used in the preceding sentence shall be deemed to mean the real property assessed value as determined by the appropriate tax assessor(s) with respect to the Facility as completed in accordance with the Plans and Specifications (as defined in the Lease) on file with the Agency.

**Plan B**

Annually, an amount equal to the greater of: (A) the PILOT Payments provided for under Plan A above, or (B) 100% of the full value real property taxes and assessments which would otherwise be levied or assessed against the Facility with respect to each Taxing Entity as if the Agency were not the owner of the Facility and no exemption was available.