

---

---

**PERFORMANCE AGREEMENT**

**Dated as of November 1, 2018**

---

**BETWEEN THE**

**CITY OF LAWRENCE, KANSAS**

**AND**

**KCI LAWRENCE 153, LLC**

---

---

**Prepared By:**

**Gilmore & Bell, P.C.  
Kansas City, Missouri**

## PERFORMANCE AGREEMENT

**THIS PERFORMANCE AGREEMENT**, dated as of November 1, 2018 (the **“Agreement”**), between the **CITY OF LAWRENCE, KANSAS**, a municipal corporation organized and existing under the laws of the State of Kansas (the **“Issuer”**), and **KCI LAWRENCE 153, LLC**, a Kansas limited liability company (the **“Company”**);

### WITNESSETH:

**WHEREAS**, the Issuer is authorized by K.S.A. 12-1740 to 12-1749d, inclusive, as amended (the **“Act”**), to acquire, construct and improve certain facilities for commercial, industrial and manufacturing purposes, to enter into leases and lease-purchase agreements with any person, firm or corporation for said projects, and to issue revenue bonds for the purpose of paying the cost of any such facilities;

**WHEREAS**, pursuant to such authorization, the governing body of the Issuer has passed and approved an Ordinance authorizing the Issuer to issue its Taxable Industrial Revenue Bonds (KCI Lawrence 153, LLC Project), Series 2018, in the principal amount of not to exceed \$10,200,000 (the **“Bonds”**), for the purpose of acquiring, constructing, improving, installing, furnishing and equipping an approximately 152,000 square foot industrial facility, including land, buildings, structures, improvements and fixtures (the **“Project”**, which is more fully described in the Application for Issuance of Industrial Revenue Bonds submitted to the Issuer by the Company’s predecessor in interest and attached hereto as **Exhibit A**), and authorizing the Issuer to enter into a Base Lease Agreement with the Company (the **“Base Lease”**) and lease the Project to the Company pursuant to a Lease Agreement (the **“Lease Agreement”**) to be entered into by and between the Issuer, as lessor, and the Company, as lessee, at the time the Bonds are issued;

**WHEREAS**, the Issuer is authorized and empowered under the Act and K.S.A. 79-201a, as amended (the **“Abatement Statute”**) to exempt from ad valorem taxation all or any portion of the Project financed with the proceeds of the Bonds, subject to the limitations set forth in the Abatement Statute and this Agreement; and

**WHEREAS**, pursuant to the foregoing, the Issuer desires to enter into this Agreement with the Company in consideration of the Company’s desire to acquire, construct, improve, install, furnish and equip the Project as more fully described in the hereinafter defined Application upon the terms and conditions hereinafter set forth and in the Lease Agreement;

**NOW, THEREFORE**, in consideration of the premises and the mutual representations, covenants and agreements herein contained, the Issuer and the Company hereby represent, covenant and agree as follows:

## ARTICLE I

### DEFINITIONS

**Section 1.1. Definitions of Words and Terms.** The following words and terms as used herein shall have the following meanings:

**“Abatement Statute”** means K.S.A. 79-201a, as amended.

**“Ad valorem taxes”** or **“ad valorem taxation”** means all property taxes imposed on real or personal property (including fixtures) and eligible for exemption pursuant to the Abatement Statute.

**“Agreement”** means this Performance Agreement dated as of November 1, 2018, between the Issuer and the Company, as from time to time amended and supplemented in accordance with the provisions hereof.

**“Application”** means the Application for Issuance of Industrial Revenue Bonds filed with the Issuer by the Company in connection with the request for the issuance of the Bonds, a copy of which is attached hereto as **Exhibit A**.

**“Board of Tax Appeals”** means the State of Kansas Board of Tax Appeals.

**“Bond Financed Portion of the Project”** means that portion of the Project financed in whole from the proceeds of the Bonds as evidenced by the requisitions submitted by the Company to the bond trustee in accordance with **Section 2.8** hereof.

**“Bonds”** means the Issuer’s Taxable Industrial Revenue Bonds (KCI Lawrence 153, LLC Project), Series 2018, issued in the maximum aggregate principal amount of \$10,200,000.

**“Company”** means KCI Lawrence 153, LLC, a Kansas limited liability company and its successors and assigns.

**“Event of Default”** means any Event of Default as described in **Section 5.1** hereof.

**“Exempt Period”** means calendar years 2019 through 2028, inclusive.

**“Exempt Property”** means all Property that is exempt from taxation pursuant to K.S.A. 79-201(a) *Second* and/or *Twenty-Fourth* by reason that such property was constructed or purchased with the proceeds of the Bonds authorized by and in accordance with the Abatement Statute.

**“Future Facility Additions”** means any additions, improvements or renovations to or equipping of the Bond Financed Portion of the Project. As used herein, **“Future Facility Additions”** shall never include any future additions, improvements or renovations to or equipping of the Project that are exempt from ad valorem taxes.

**“Issuer”** means the City of Lawrence, Kansas.

**“Property”** means all real and personal property subject to taxation pursuant to K.S.A. 79-101.

**“Project”** means acquiring and constructing an approximately 152,000 square foot industrial facility, including land, buildings, structures, improvements and fixtures, all located within the municipal boundaries of the Issuer located generally north of 23rd Street near O’Connell Road.

**“Project Costs”** means all costs and expenses of every nature paid after August 1, 2017, from proceeds of the Bonds and relating to the acquisition, construction, improvement, installation, furnishing and equipping of the Project.

**“Project Site”** means all of the real property described in **Exhibit B** attached hereto and by this reference made a part hereof.

**“Tax Payment”** means a payment-in-lieu of taxes in an amount equal to the amount set forth in **Section 2.3** hereof.

## ARTICLE II

### EXEMPTION; PAYMENTS IN LIEU OF TAX

**Section 2.1. Exempt Property.** During the Exempt Period, and so long as the Bonds are outstanding, the Issuer agrees to use its best efforts to cause the Bond Financed Portion of the Project to be and remain Exempt Property.

**Section 2.2 Agreement to Make Tax Payments.** The Company covenants and agrees that, for each calendar year during the Exempt Period that the Bond Financed Portion of the Project is Exempt Property, the Company will make a Tax Payment in lieu of ad valorem taxes to the Issuer (or, if the Issuer shall direct, to the County Treasurer).

**Section 2.3. Amount of Tax Payment.** Each Tax Payment shall be equal to the following amount for each year:

<u>Year</u>	<u>Tax Payment Amount</u>
2019	\$65,911
2020	78,907
2021	87,275
2022	88,863
2023	90,481
2024	92,127
2025	93,804
2026	95,511
2027	97,250
2028	99,020

**Section 2.5. Term of Agreement.** This Agreement shall become effective upon execution, and subject to earlier termination pursuant to the provisions of this Agreement (including particularly **Article V** hereof), shall terminate upon the later of (i) the expiration of the Exempt Period or (ii) the date of the final Tax Payment.

**Section 2.6. No Abatement of Special Assessments.** The Issuer and the Company hereby agree that the Abatement Statute and any tax abatement with respect to the Project shall not apply to special assessments. In the event special assessments are ever abated, the Company hereby agrees that 100% of the amount of such abated special assessments shall be paid to the Issuer at the times and in the manner that Tax Payments are paid to the Issuer pursuant to **Section 2.2** hereof.

**Section 2.7. Obligation of Issuer to Effect Tax Abatement.** The Issuer agrees to use its best efforts to cause the Bond Financed Portion of the Project to be Exempt Property during the Exempt Period, and agrees to make all filings required by the Douglas County Board of County Commissioners or the Board of Tax Appeals; provided, however, the Issuer shall not be liable for any failure of the Board of Tax Appeals

to effect the exemption permitted by the Abatement Statute. The Issuer covenants that it will not knowingly take any action that the Issuer has knowledge may cause the Bond Financed Portion of the Project to no longer be Exempt Property. In the event the Bond Financed Portion of the Project is determined to no longer be Exempt Property, the Issuer shall, at the Company's request, cooperate with the Company in all reasonable ways to cause the Bond Financed Portion of the Project to be Exempt Property, including cooperating with the Company in any related litigation. The Company agrees to pay to the Issuer the costs that the Issuer incurs (including legal fees and expenses) in cooperating with the Company in the manner required by this Section.

**Section 2.8. Compliance.** Beginning on the January 15th following the issuance of the Bonds and continuing on each January 15th thereafter until the Project is completed, and at any other time upon the request of the Issuer, the Company shall provide the Issuer with (i) copies of the requisitions submitted by the Company to the bond trustee in accordance with the Lease Agreement for the preceding calendar year, (ii) a list containing a brief description and the amount of all costs of the Bond Financed Portion of the Project, and (iii) the total costs of the Project, all in such reasonable detail as the Issuer shall request.

**Section 2.9. Value of the Project Not Determined By Bonds.** The Issuer and the Company acknowledge that it is not the intent of the parties that the principal amount of the Bonds be used for the purpose of determining the appraised value of the Project or any portion thereof for tax purposes.

**Section 2.10. Classification; Limitation on Company's Right To Protest.** If the Project Site is not currently classified as commercial, the Company acknowledges that the county appraiser may reclassify the Project Site to commercial as a result of the issuance of the Bonds. During the term of this Agreement, the Company agrees that it will not, without the written consent of the Issuer, (i) seek to change the classification of all or any portion of the Project Site from commercial to another classification, or (ii) contest the reclassification of all or any portion of the Project Site to commercial.

Except as set forth in the preceding paragraph, nothing in this Agreement shall be construed to limit or in any way restrict the ability of the Company to utilize any provision of Kansas law to appeal, protest or otherwise contest any property tax valuation, assessment or similar action with respect to the Project Site or any portion thereof.

**Section 2.11. Credits for Tax Payments; No Duplicate Tax Liability.** Nothing in this Agreement shall be construed to require the Company to make duplicate tax payments. The Company shall receive as a credit against its obligations to pay the Issuer Tax Payments, the amount of any ad valorem taxes (other than special assessments and property taxes that the Issuer may not abate under Kansas law) paid by the Company to the County to the extent that the amounts paid to the County include any taxes due with respect to the Exempt Property.

**Section 2.12. No Abatement on Appraised Value of Future Facility Additions.** In the event any Future Facility Additions are determined to be Exempt Property as a result of the issuance of the Bonds, this Agreement or for any other reason, so long as this Agreement remains in effect, the Company hereby agrees that 100% of the amount of such abated ad valorem taxes attributable to the Future Facility Additions shall be paid to the Issuer at the times and in the manner that Tax Payments are paid to the Issuer pursuant to Section 2.2 hereof. This provision shall not be construed as restricting the Company from applying to the Issuer or to any other governmental entity for any future tax abatement in connection with the Future Facility Additions.

**Section 2.13. Tax Abatement Order; Adjustment of Tax Payment.** The Issuer and the Company acknowledge that, prior to the Bond Financed Portion of the Project being determined to be Exempt Property, the Issuer must obtain on behalf of the Company an order from the Board of Tax Appeals approving

tax abatement on the Bond Financed Portion of the Project for the Exempt Period. In the event the Board of Tax Appeals issues an order stating that less than 100% of the Bond Financed Portion of the Project is Exempt Property, the parties agree that the Tax Payment shall be decreased by an amount necessary to result in the sum of the new Tax Payment plus the payment of ad valorem taxes by the Company with respect to the Bond Financed Portion of the Project is equal to the original Tax Payment. In the event the Board of Tax Appeals issues an order stating that none of the Bond Financed Portion of the Project is Exempt Property, then the Tax Payment shall be reduced to 0.

Notwithstanding the foregoing, if (i) the entire Bond Financed Portion of the Project is not determined to be Exempt Property, or (ii) the Board of Tax Appeals issues an order that less than 100% of the Bond Financed Portion of the Project is Exempt Property, and such determination or order is a result of the Company's failure to comply with the terms and provisions of this Agreement (after any applicable notice and cure period), the Issuer shall be under no obligation to decrease the Tax Payment as provided in this Section. Furthermore, in no event shall the Issuer be under any obligation to make any payment to the Company as a result of the Board of Tax Appeals determining that less than 100% of the Bond Financed Portion of the Project is Exempt Property. Notwithstanding any provisions herein to the contrary, in no event shall the Company be liable for the payment of any amounts, including the Tax Payments, which are in the aggregate greater than the amount of ad valorem taxes on the Project in the event there is no abatement of the same.

**Section 2.14. Projected Construction Schedule.** The Company expects to commence and complete construction of the Project as in accordance with the schedule set forth on **Exhibit C**. Failure of the Company to actually commence or complete construction of the Project in accordance with the schedule set forth on **Exhibit C** shall not constitute a breach or default under this Agreement.

**Section 2.15. Determination of Appraised Value and Assessments.** The Company acknowledges that the county appraiser independently determines the appraised value of Property. The Company further acknowledges that the Issuer does not have input in or in any way control the determination of the appraised value of Property or the assessment of Property, and that the Issuer cannot and is not attempting to bind the county appraiser or any other governmental authority with respect to a determination of the appraised value of the Bond Financed Portion of the Project.

### ARTICLE III

#### COVENANTS OF THE COMPANY

**Section 3.1. Inspection.** The Company agrees that the Issuer and its duly authorized agents shall have the right at reasonable times (during business hours), subject to at least 48 hours advance notice and to the Company's usual business proprietary, safety and security requirements, to enter upon the Project Site to examine and inspect the Project and the records of the Company which demonstrate compliance with this Agreement, including, but not limited to, inspections necessary to confirm compliance with **Section 3.2**.

**Section 3.2. Compliance with Laws.** The Project will comply in all material respects with all applicable building and zoning, health, environmental and safety ordinances and regulations and all other applicable laws, rules and regulations.

**Section 3.3. Construction.** The Project will be constructed, equipped and operated in a manner that is consistent with the description of the Project herein. In the event the Project is constructed in a

manner that the Issuer determines, in its reasonable discretion, is materially inconsistent with the description of the Project herein, the Issuer reserves the right to declare an Event of Default in accordance with Section 5.1 hereof.

**Section 3.4. Employment Certification.** Beginning on March 1, 2019, and on each March 1 thereafter and at any other time that the Issuer may request, for the term of this Agreement, the Company may provide a written certification to the Issuer stating the total number of full-time employees employed at the Project (based upon the Company's actual knowledge of the full-time employees employed by the subtenants occupying the Project). The Issuer hereby acknowledges that the Company may be unable to obtain precise employment figures from any subtenant of the Project, but will endeavor in good faith to do so.

**Section 3.5 Payment of Fees and Reimbursement or Payment of Costs.**

(a) The Company and Issuer agree that the Issuer will not charge the Company an initial application fee, a service fee for issuance of the Bonds, or an annual administrative fee.

(b) The Company agrees to promptly reimburse the Issuer, upon receipt by the Company of an invoice from the Issuer, for any amounts that the Issuer pays to any other party as a result of the Issuer pursuing, obtaining or maintaining the tax abatement granted to the Company pursuant to this Agreement. These costs shall include, but shall not be limited to, all fees and expenses for filings with the Board of Tax Appeals (including the application fee and annual administration fee), legal notice publication expenses, and the costs and expenses of the Issuer's legal counsel. The Company agrees that the Issuer may, in lieu of seeking reimbursement from the Company, forward any invoice received by the Issuer to the Company, which invoice is for a cost which the Issuer could seek reimbursement from the Company pursuant to this paragraph, and the Company agrees to promptly pay such invoice and to promptly provide the Issuer with evidence of such payment.

**Section 3.6. Abatement of Property.** The Abatement Statute provides that, with certain exceptions, any property constructed or purchased in part with the proceeds of revenue bonds issued under the authority of the Act is exempt from taxation for a period of up to ten years to the extent of the value of that portion of the property financed by the revenue bonds. The tax abatement commences in the year following the year in which the Bonds are issued.

Company understands that real and personal property will be exempt under the Abatement Statute only if such property is purchased with the proceeds of the Bonds. In order to be purchased with Bond proceeds, the trustee for the Bonds must receive a requisition request from the Company and must make a draw on the Bonds and use the money to either (a) pay, or (b) reimburse the Company for the payment of, the cost of the property.

The Abatement Statute also provides that if property purchased with proceeds of the Bonds is used in any retail enterprise identified under the NAICS sectors 44 and 45 ("**Prohibited NAICS**"), the property will not be exempt from taxation, unless the property is a facility used exclusively to house the headquarters or back office operations of a prohibited retail enterprise.

The Abatement Statute further provides that property purchased with bond proceeds is not exempt from taxation if the property is (i) a swine production facility (as described in K.S.A. 12-1749b), (ii) property located in a redevelopment project area established under the authority of K.S.A. 12-1770 or (iii) a poultry or rabbit confinement facility (as described in K.S.A. 17-5903).

Company hereby represents that the NAICS code for the Project is not included within the list of Prohibited NAICS and agrees that during the term of the tax abatement, the property purchased with the proceeds of the Bonds will not be used in any of the Prohibited NAICS. Company understands that if any property purchased with the proceeds of the Bonds is used in a Prohibited NAICS, that property will not be subject to property tax abatement under Kansas law.

Company represents that the Project is not, and will not become, a swine production facility, a poultry or rabbit confinement facility or inventory, and that the Project is not located in a redevelopment project area.

#### ARTICLE IV

##### SALE AND ASSIGNMENT

The benefits granted by the Issuer to the Company pursuant to this Agreement shall belong solely to the Company and such benefits shall not be transferred (other than to an affiliate of the Company), assigned, pledged or in any other manner hypothecated without the express written consent of the Issuer, which consent shall not be unreasonably withheld, conditioned or delayed; provided, nothing herein shall preclude the Company from assigning or pledging its interest in the Project upon written notice to the Issuer so long as (1) the Project will continue to be utilized as a distribution warehouse and (2) such assignee expressly assumes the obligations of the Company hereunder, in which case, the assigning party shall be expressly released from any further obligations arising under this Agreement. Notwithstanding the foregoing, in the event the Project is subject to a foreclosure action in which a lender of Company assumes ownership of the Project, the Issuer hereby consents to the assignment of this Agreement to such lender, or such lender's designee, upon written notice of such party assuming ownership of the Project.

#### ARTICLE V

##### DEFAULT AND REMEDIES

**Section 5.1. Events of Default.** If any one or more of the following events shall occur and be continuing, it is hereby defined as and declared to be and to constitute an "Event of Default" hereunder:

- (a) the Company shall fail to perform any of its obligations hereunder;
- (b) the Company shall breach any covenant contained herein or any representation of the Company contained herein shall prove to be materially false or erroneous; or
- (c) the Company shall be in default under the Lease Agreement.

**Section 5.2. Remedies on Default.** Upon the occurrence of an Event of Default hereunder, the Company shall be given 60 days (or such longer period as the Issuer and the Company may agree), following written notice by the Issuer to the Company of the occurrence of such Event of Default, to cure such Event of Default. If such Event of Default is not cured within such time, this Agreement may be terminated by written notice to the Company from the Issuer. Such termination shall be effective immediately following delivery of such written notice. Upon the termination of this Agreement, the Company shall make a payment to the Issuer (or as the Issuer may otherwise direct) in an amount equal to the sum of (i) all due but unpaid Tax Payments attributed to prior calendar years, (ii) the pro rata total Tax Payments that would be due with respect to the current calendar year, (iii) the pro rata amount of any taxes



that would be due for the remaining portion of the current calendar year assuming the Bond Financed Portion of the Project were not Exempt Property, and (iv) the amount of any costs and attorneys' fees incurred by the Issuer as a result of such Event of Default and in enforcing this Agreement.

**Section 5.3. Payments on Defaulted Amounts.** Any amounts due hereunder which are not paid when due shall bear interest at the interest rate imposed by Kansas law on overdue ad valorem taxes from the date such payment was first due. In addition, amounts payable hereunder in lieu of ad valorem taxes that are not paid when due shall be subject to the same penalties imposed by Kansas law on overdue ad valorem taxes.

## ARTICLE VI

### MISCELLANEOUS PROVISIONS

**Section 6.1. Notice and Waiver of Company.** The Issuer reserves the right to grant tax abatement for projects that are located adjacent to or in the proximity of the Project or for projects that are located elsewhere within the Issuer but are similar to the Project in amounts that are above or below the amounts set forth herein. The Company acknowledges and agrees that the Tax Payment, the Exempt Period and the other terms of the tax abatement granted by the Issuer with respect to such other projects may be more favorable than the terms provided for in this Agreement. As a condition to the Issuer entering into this Agreement, the Company waives any claim it may have against the Issuer as a result of the Issuer granting tax abatement to other projects with terms that are more favorable than the terms provided for in this Agreement. Additionally, the Company agrees that it will not request that the Issuer modify this Agreement because the Issuer plans to grant or has granted tax abatement to another project or projects on terms that are more favorable than the terms provided for in this Agreement. Upon the occurrence of the Company's breach of its obligations set forth in this Section, the Issuer shall have the right to immediately terminate this Agreement and require that the Company pay to the Issuer the amounts specified in clauses (i) through (iv) of Section 5.2.

**Section 6.2. Severability.** If for any reason any provision of this Agreement shall be determined to be invalid or unenforceable, the validity and enforceability of the other provisions hereof shall not be affected thereby.

**Section 6.3. Governing Law.** This Agreement shall be construed in accordance with and governed by the laws of the State of Kansas.

**Section 6.4. Execution in Counterparts.** This Agreement may be executed simultaneously in several counterparts, each of which shall be deemed to be an original and all of which shall constitute but one and the same instrument.

**Section 6.5. Waiver.** The Issuer and the Company acknowledge and agree that the amounts payable hereunder shall constitute payments due the Issuer under the Lease Agreement. The Company shall not be entitled to any extension of payment of such amounts as a result of a filing by or against the Company in any bankruptcy court.

**Section 6.6. Notices.** All notices, certificates or other communications required or desired to be given hereunder shall be in writing and shall be given to or filed with the Issuer, the Trustee, the Company or the Owners of the Bonds if the same is given or filed in the manner and at the addresses specified in the Indenture.

**Section 6.7. Further Assurances.** The parties each agree to do, execute, acknowledge and deliver any and all other documents and instruments and to take all such further action as shall be reasonably necessary or reasonably required in order to fully carry out this Agreement and to fully consummate and effect the transactions contemplated hereby.

**Section 6.8. Authority, etc.** Each party to this Agreement represents and warrants to each other party as follows: (i) that such party has the requisite power and authority to enter into and perform this Agreement; (ii) that this Agreement has been duly authorized by all necessary action on the part of such party; (iii) that the execution and deliver and performance by each party of this Agreement will not conflict with or result in a violation of such party's organizational documents or any judgment, order or decree of any court or arbiter to which such party is bound; and (iv) that this Agreement constitutes the valid and binding obligation of such party, and is enforceable against such party in accordance with its terms, subject to applicable bankruptcy, insolvency, reorganization, creditor's rights and other similar laws.

**Section 6.9. Electronic Storage.** The parties agree that the transactions described herein may be conducted and related documents may be stored by electronic means. Copies, telecopies, facsimiles, electronic files, and other reproductions of original executed documents shall be deemed to be authentic and valid counterparts of such original documents for all purposes, including the filing of any claim, action or suit in the appropriate court of law.

**Section 6.10. Estoppel Certificate.** The Issuer agrees that it will, from time to time, upon request by the Company, execute and deliver to the Company and to any parties designated by the Company, within ten (10) days following demand therefor, an estoppel certificate on the Company's form, certifying (i) that this Agreement is unmodified and in full force and effect (or if there had been modifications, that the same are in full force and effect as so modified, (ii) that there are no defaults hereunder (or specifying any claimed defaults), and (iii) such other matters as may be reasonably requested by the Company.

[Remainder of page intentionally blank.]

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be executed by their duly authorized officers, all as of the date first above written.

**CITY OF LAWRENCE, KANSAS**

(SEAL)

ATTEST:

By: \_\_\_\_\_  
Mayor

By: \_\_\_\_\_  
City Clerk

**KCI LAWRENCE 153, LLC,**  
a Kansas limited liability company

By:   
Name: *Dave Harrison*  
Title: *Manager*

**EXHIBIT A**

**APPLICATION FOR THE ISSUANCE OF INDUSTRIAL REVENUE BONDS**

**EXHIBIT B**

**PROJECT SITE**

Lot 1, Block A, of VenturePark Subdivision No. 1, City of Lawrence, Douglas County, Kansas.

**EXHIBIT C**

**ESTIMATED CONSTRUCTION SCHEDULE**

<b><u>Event</u></b>	<b><u>Projected Date</u></b>
Substantial Completion of Construction	November 15, 2018
Final Completion	May 1, 2020