

## AGENCY AGREEMENT

THIS AGENCY AGREEMENT (the "Agreement") made as of the 1<sup>st</sup> day of July, 2013 by and between the BROOME COUNTY INDUSTRIAL DEVELOPMENT AGENCY, a public benefit corporation organized and existing under the laws of the State of New York, having its principal offices at 60 Hawley Street, P.O. Box 1510, Binghamton, Broome County, New York 13902 (the "Agency") and VITALUNA, LLC, a New York limited liability company, having its principal offices at 122 State Street, Binghamton, New York 13901 (the "Company").

### WITNESSETH:

WHEREAS, the Agency was created by Chapter 564 of the 1970 Laws of the State of New York pursuant to Title I of Article 18-A of the General Municipal Law of the State of New York (collectively referred to as the "Enabling Act") as a body corporate and politic and as a public benefit corporation of the State of New York; and

WHEREAS, the Enabling Act authorizes the creation of industrial development agencies for the benefit of the several counties, cities, villages and towns in the State and empowers such agencies, among other things, to acquire, construct, reconstruct, lease, improve, maintain, equip and sell land and any building or other improvement, and all real and personal properties, including, but not limited to, machinery and equipment deemed necessary in connection therewith, whether or not now in existence or under construction, which shall be suitable for manufacturing, warehousing, research, commercial or industrial facilities, in order to advance job opportunities, health, general prosperity and the economic welfare of the people of the State and to improve their standard of living; and

WHEREAS, the Enabling Act further authorizes each such agency to lease any or all of its facilities at such rentals and on such other terms and conditions as it deems advisable; and

WHEREAS, pursuant to and in connection with the provisions of the Enabling Act, the Agency is empowered under the Act to undertake the providing of financing and accepting a leasehold interest in the Facility (as described below); and

WHEREAS, the Company has presented an application (the "Application") to the Agency, copies of which are on file at the office of the Agency, requesting that the Agency consider undertaking a project (the "Project") consisting of the following: (A)(1) the acquisition by lease of a parcel of land located at 2 Court Street in the City of Binghamton, Broome County, New York (the "Land") (2) the renovation, by the Company, on the Land of a 60,000+/- square foot building (55,651+/- square feet of leasable space) with an underground 107+/- car parking garage (the "Facility"), and (3) the acquisition and installation therein and thereon, by the Company, of certain machinery and equipment (the "Equipment") (the Land, the Facility and the Equipment being hereinafter collectively referred to as the "Property"), all of the foregoing being intended for use as a commercial office building and any other directly or indirectly related activities; (B) the granting of certain "financial assistance" (within the meaning of Section 854(14) of the Act) with respect to the foregoing, including potential exemptions from certain sales taxes, mortgage recording taxes and real property taxes, including a deviation from the Agency's Uniform Tax Exemption Policy (collectively, the "Financial Assistance"); and (C) the

leaseback of the Property, from the Agency to the Company, or to such other person(s) or entity(ies) as may be designated by the Company, and agreed upon by the Agency; and

WHEREAS, by resolution, dated March 8, 2013 (the "Resolution"), the Agency authorized the Company to act as its agent for the purposes of renovating and equipping the Facility subject to the Company entering into this Agency Agreement.

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 renovation and equipping of the Facility.
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 Project:
  - (a) Neither the execution and delivery of this Agreement, the consummation of the transactions contemplated hereby nor the fulfillment of, or compliance with, the provisions of this 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.
  - (b) The Facility and the operation thereof will conform with all applicable zoning, planning, building and environmental 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 (b).
  - (c) 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 the Company's ability to fulfill its obligations under this Agreement.
  - (d) The Company covenants that (i) the Facility will comply in all respects with all environmental laws and regulations; (ii) 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 applicable laws; (iii) 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; (iv) no asbestos will be incorporated into or disposed of on the Facility; (v) no underground storage tanks will be located on the Facility except in full compliance at all times with all applicable laws, rules, and regulations; and (vi) 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 (d), 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 chief executive officer, executive director, directors, officers, employees, members, agents (except the Company), representatives, and their respective successors and assigns and personal representatives 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.

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 chief executive officer, executive director, directors, officers, employees, members, agents (except the Company), representatives, their respective successors and assigns and personal representatives 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 Agreement, or (ii) liability arising from or expense incurred by the Agency (a) renovating and equipping the Facility; (b) taking a leasehold interest in the Facility; and (c) leasing the Facility back to the Company, including without limiting the generality of the foregoing, all causes of action and reasonable attorney 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 its chief executive officer, executive director, directors, officers, employees, members, agents (except the Company), and representatives, their respective successors and assigns and personal representatives 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 that portion of the fault or negligence attributable to the Agency or 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 the Agency consents in

writing to a termination, the Company shall maintain or cause to be maintained insurance in substantial conformity with the requirements set forth on Exhibit A attached hereto. Certificates of insurance indicating that such insurance is in force and effect, shall be deposited with the Agency on or before the commencement of the term of this Agreement. 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 Agreement.

5. Counterpart Signatures. This 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.
6. Notices. All notices provided for by this Agreement shall be made in writing, and shall be deemed to have been given on the date of delivery if personally served on the party to whom notice is to be given, or on the next day after mailing if mailed to the party to whom notice is to be given by overnight courier of national reputation providing evidence of receipt and properly addressed, or on the third day after mailing if mailed to the party to whom notice shall be given by first class, certified mail, postage prepaid and properly addressed to the following:

To the Agency:           Broome County Industrial Development Agency  
60 Hawley Street  
P.O. Box 1510  
Binghamton, New York 13902  
  
Attn: Executive Director

with a copy to:       Joseph B. Meagher, Esq.  
Thomas, Collison, Meagher & Seiden  
1201 Monroe Street  
P.O. Box 329  
Endicott, New York 13761-0329

To the Company:       Vitaluna, LLC  
122 State Street  
Binghamton, New York 13901  
Attn: Mark Huebner

with a copy to:       Alfred Paniccia, Jr., Esq.  
Centre Plaza  
Suite 400  
53 Chenango Street  
Binghamton, New York 13901

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.

7. Governing Law. This 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. The parties hereto designate a court of proper jurisdiction located in Broome County, New York as the sole venue for resolution of any disputes, which may arise under or by reason of this Agreement.

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

BROOME COUNTY INDUSTRIAL  
DEVELOPMENT AGENCY

By:   
Richard D'Attilio, Executive Director

VITALUNA, LLC

By:   
Mark Huebner, Managing Member

EXHIBIT A

INSURANCE REQUIREMENTS

(See Attached)

**INSURANCE REQUIREMENTS FOR A  
BROOME COUNTY INDUSTRIAL DEVELOPMENT AGENCY PROJECT**

- 1.1 Insurance Required. Effective as of the date of execution of the Agency Agreement and until the Agency consents in writing to a termination, at all times, including without limitation during any period of construction of the project facility, the Company shall maintain or cause to be maintained insurance against such risks and for such amounts as are customarily insured against by businesses of like size and type paying, as the same become due and payable, all premiums in respect thereto, including, but not necessarily limited to:
- (a) Insurance against loss or damage by fire, lightning and other casualties, with a uniform standard extended coverage endorsement, such insurance to be in an amount not less than the full replacement value of the Facility, exclusive of excavations and foundations, as determined by a recognized appraiser or insurer selected by the Company.
  - (b) Worker's Compensation insurance, disability benefits insurance, and each other form of insurance which the Agency or the Company is required by law to provide, covering loss resulting from injury, sickness, disability or death of employees of the Company who are located at or assigned to the Facility.
  - (c) Insurance against loss or losses from liabilities imposed by law or assumed in any written contract (including the contractual liability assumed by the Company under Section 5.2 of the Lease Agreement) and arising from personal injury and death or damage to the property of others caused by any accident or occurrence, with limits of not less than \$1,000,000 per accident or occurrence on account of personal injury, including death resulting therefrom, and \$1,000,000 per accident or occurrence on account of damage to the property of others, excluding liability imposed upon the Company by any applicable Worker's Compensation Law; and a blanket excess liability policy in the amount not less than \$2,000,000, protecting the Company against any loss or liability or damage for personal injury or property damage.
- 1.2. Additional Provisions Respecting Insurance.
- (a) All insurance required by Section 1.1(a) hereof shall name the Agency as a named insured and all other insurance required by Section 1.1 shall name the Agency as an additional insured. All insurance shall be procured and maintained in financially sound and generally recognized responsible insurance companies selected by the Company (and reasonably satisfactory to the Agency) and authorized to write such insurance in the State. Such insurance may be written with deductible amounts not exceeding \$2,500.00. All policies evidencing such insurance shall provide for (i) payment of the losses of the Company and the Agency as their respective interest may appear, and (ii) at least thirty (30) days written notice of the cancellation thereof to the Company and the Agency.
  - (b) All such certificates of insurance of the insurers that such insurance is in force and effect shall be deposited with the Agency on or before the commencement of the term of the Agency Agreement. 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 Lease.

Type of Insurance	Amount	Broome County Industrial Development Agency Status	Deductible
Liability	\$1,000,000.00 + with \$2,000,000.00 blanket	Additional Insured	not exceeding \$2,500.00
Property Damage or Builder's Risk, if in construction	Full Replacement Value	Named Insured	not exceeding \$2,500.00