

## PARTICIPATION AND PURCHASE AGREEMENT

This Participation and Purchase Agreement (the “Agreement”), is executed this \_\_\_ day of June, 2017, by and among Franklin Shell Building LLC (the “Company”), the City of Franklin Redevelopment Commission (“FRC”), and Horizon Bank (the “Bank”).

### 1. Definitions.

**2015 Bonds** shall mean those Bonds titled the City of Franklin Redevelopment District Tax Increment Revenue Bonds, Series 2015.

**Allocation Areas** shall mean those allocation areas within the City’s Franklin/I-65 Integrated Economic Development Area that commonly are known as the Franklin Eastside Business Park Allocation Area, the Franklin Power Products Economic Development Allocation Area, the Musicland Allocation Area, the Casting Technology Company Allocation Area, and the Amended Franklin Park Allocation Area.

**Bonds** shall mean: (a) the 2015 Bonds; and (b) all other bonds, notes, or similar obligations (excluding Contracts) of FRC with respect to which principal and interest are payable from the Increment.

**Closing** shall mean the closing with respect to the Transaction.

**Closing Date** shall mean the date of the Closing.

**Completion Statement** shall mean a statement from Company stating that: (a) the Project has been constructed in substantial accordance with the terms and conditions of the Project Agreement; and (b) all of the Project Costs have been determined and paid (or that: (i) all of the Project Costs have been paid, other than specified claims that are subject to dispute; and (ii) there is to be retained in the Project Fund, until resolution of the dispute, the full amount of such specified claims).

**Contracts** shall mean all contracts of FRC with respect to which amounts are payable from Increment, excluding: (a) the Installment Contract; (b) contracts entered into for the continued operations of FRC; and (c) contracts entered into on a “pay-as-you-go” basis, the term of which does not exceed 24 months.

**Contract Payment Coverage Ratio** shall mean, for a given 12-month period, the ratio of: (a) the amount of the accrued Increment (regardless of whether received) for such 12-month period; to (b) the Contract Payment Service for such 12-month period. Notwithstanding the foregoing, in determining the Contract Payment Coverage Ratio for a 12-month period that includes the final Payment Due Date, the Installment Payment due on the final Payment Due Date shall be treated as an amortizing payment of the same amount as the Installment Payment due on the penultimate Payment Due Date (and not as the balloon payment that actually is payable on the final Payment Due Date).

**Contract Payment Service** shall mean, with respect to a given period, the sum of: (a) all Installment Payments for such period; plus (b) all amounts payable under any Bonds or Contracts (excluding any Bonds or Contracts, the payments with respect to which are subordinate to the Installment Payments) for such period; plus (c) all amounts payable under the Bonds that FRC intends to issue, or the Contracts into which FRC intends to enter (excluding any Bonds or Contracts, the payments with respect to which are subordinate to the Installment Payments).

**Cure Period** shall mean a period of 30 days after a party failing to perform or observe any term or condition of this Agreement to be performed or observed by it receives notice specifying the nature of the failure; provided that, if the failure is of such a nature that it cannot be remedied within 30 days, despite the exercise of reasonably diligent efforts, then the 30-day period shall be extended as reasonably may be necessary for the defaulting party to remedy the failure, so long as the defaulting party: (a) commences to remedy the failure

within the 30-day period; and (b) diligently pursues such remedy to completion.

**Custodial Agent** shall mean Horizon Bank.

**Custodial Agreement** shall mean that certain "Custodial Agreement" to be executed at the Closing by Company, the Custodial Agent, and FRC.

**Event of Default** shall have the meaning set forth in Subsection 9(a).

**FRC Account** shall mean an account maintained by FRC with the Custodial Agent.

**Full Prepayment Price** shall have the meaning ascribed to such term in the Installment Contract.

**Increment** shall mean the allocated property tax proceeds that are: (a) generated from ad valorem real property taxes that are levied, imposed, or charged by the applicable taxing authorities on, against, for, or with respect to real property within the Allocation Areas; and (b) attributable to the assessment of such real property above a base assessed value ("increment"); which allocated property tax proceeds (increment) are to be on deposit in an allocation fund pursuant to IC §36-7-14-39(b).

**Installment Contract** shall mean that certain Installment Purchase Contract executed by and between Company and FRC, a copy of which has been provided to the Bank.

**Installment Payments** shall mean the installment payments payable by FRC pursuant to the Installment Contract. The Installment Payments are the "Installment Payments" under the Installment Contract.

**IP Principal Amount** shall mean, with respect to any given Installment Payment, the amount thereof specified on Exhibit A to the Installment Contract in the column entitled "Principal" or "Principal Amount". The IP Principal Amount is the "IP Principal Amount" under the Installment Contract.

**Laws** shall mean all applicable: (a) laws, statutes, and/or ordinances; (b) governmental rules, regulations, and/or guidelines; and (c) judicial orders, consents, and/or decrees.

**Minimum Coverage Ratio** shall mean a minimum Contract Payment Coverage Ratio of 1.25:1.0.

**Outstanding IP Principal Amount** shall mean, as of any given date, the aggregated outstanding IP Principal Amount. The Outstanding IP Principal Amount is the "Outstanding IP Principal Amount" under the Installment Contract.

**Payment Due Date** shall mean each January 15 and July 15 during the Payment Period, commencing on January 15, 2018. The Payment Due Date is the "Payment Due Date" under the Installment Contract.

**Payment Period** shall have the meaning ascribed to such term in the Installment Contract.

**Payment Rights** shall mean the rights under the Installment Contract with respect to the receipt of the Installment Payments. The Payment Rights are the "Payment Rights" under the Installment Contract.

**Payment Rights Price** shall mean the amount of \$2,392,000.00.

**Project** shall mean the project to be constructed by Company pursuant to, and in accordance with, the Project Agreement.

**Project Agreement** shall mean that certain Project Agreement executed by and between Company and FRC, a copy of which has been provided to the Bank.

**Project Costs** shall mean the fees, costs, and expenses to be incurred in connection with the Project, including: (a) the costs to draft and negotiate this Agreement, the Project Agreement, the Installment Contract, the Custodial Agreement, and any other documents contemplated by any of the foregoing; (b) the costs incurred in connection with determining that all of the conditions set forth in Section 5 of the Project Agreement have been satisfied and/or will be waived by Company; (c) the costs incurred in connection with the Closing and the purchase of the Payment Rights (to the extent that such costs are not included in Subsection (a) of this definition); (d) the cost to develop, design, and construct the Project in accordance with the terms and conditions of the Project Agreement; (e) a reasonable and customary amount for contingencies; and (f) the fee to be paid by FRC to Company.

**Project Fund** shall mean a separate and dedicated account for the benefit of Company to be established by the Custodial Agent under the Custodial Agreement, from which account disbursements shall be made to Company pursuant to the Custodial Agreement to pay Project Costs.

**Project Fund Disbursement** shall mean the disbursement by the Bank to the Custodial Agent of the amount of the Payment Rights Price set forth in the "Custodial Agent/Project Fund" line of Exhibit A for subsequent deposit into the Project Fund. The Project Fund Disbursement subsequently shall be disbursed to (or for the account of) Company as Transaction Proceeds in accordance with the terms and conditions of the Custodial Agreement.

**Transaction** shall mean the sale and absolute assignment of the Payment Rights to the Bank, as the "Payment Rights Purchaser" under the Installment Contract.

**Transaction Proceeds** shall mean the funds from the Closing that are on deposit in the Project Fund, which funds shall be disbursed by the Custodial Agent to (or for the account of) Company in accordance with the terms and conditions of the Custodial Agreement.

**2. Sale/Assignment.** Subject to the terms and conditions of this Agreement, Bank shall purchase from Company, and Company shall sell and assign to Bank, the Payment Rights for the Payment Rights Price. The Transaction Proceeds shall be used by Company to pay (or to reimburse Company for) the Project Costs. ~~To the parties acknowledge and agree that:~~ (a) best of its knowledge, Company is not an "investment advisor" under the U.S. Investment Advisers Act of 1940, and the rules and regulations adopted thereunder; and (b) neither FRC and the execution of Bank acknowledge that, with respect to the Installment Contract, nor and the Transaction, is intended to: (i) be a municipal or other securities offering; or (ii) create a securities financing; it is not the intent of Company to act as an "investment advisor". The parties acknowledge and agree that the Transaction is intended to be the purchase of payment rights by the Bank, which, essentially, is a loan by the Bank. Each of FRC and the Bank acknowledges that it has consulted such municipal financial advisors, tax advisors, and/or attorneys as it deems to be necessary or appropriate in connection with the foregoing Transaction.

### **3. Closing.**

(a) Closing. The Closing Date shall be established by the parties, acting jointly. At the Closing: (i) fully executed copies of this Agreement, the Project Agreement, the Installment Contract, the Custodial Agreement, and any other documents reasonably determined by Company, FRC, and/or the Bank to be necessary to consummate the Transaction shall be delivered to each of Company, FRC, and the Bank; (ii) pursuant to the Custodial Agreement, the Custodial Agent shall establish the Project Fund; and (iii) the Bank shall

disburse the Payment Rights Price in accordance with Exhibit A, as the same may be modified to contemplate additional Closing disbursements approved by Company and the Bank (including that, on the Closing Date, the Bank shall disburse the Project Fund Disbursement to the Custodial Agent for deposit into the Project Fund).

(b) **Absolute Assignment.** From and after the Closing: (i) this Agreement shall constitute an absolute and complete sale, assignment, and transfer by Company of the Payment Rights to the Bank; and (ii) the Installment Contract shall be deemed to be registered in the name of the Bank. If the Bank sells or assigns any of its right, title, and/or interest in or to the Payment Rights to any other entity, then the Bank shall: (i) give written notice thereof to FRC; and (ii) obtain an agreement from the assignee, enforceable against the assignee by FRC, that the assignee will give written notice to FRC of any subsequent sale or assignment of its interest in the Payment Rights.

#### **4. Payments.**

(a) **Payment.** For so long as the Bank is the owner of the Payment Rights, FRC shall pay each Installment Payment (and, if applicable, the Full Prepayment Price) to the Custodial Agent in accordance with the Custodial Agreement on or before the applicable Payment Due Date, including that, as provided in the Custodial Agreement, FRC may pay an Installment Payment by delivering to the Custodial Agent written notice, at least five business days in advance of the applicable Payment Due Date, authorizing the Custodial Agent to withdraw the amount of the Installment Payment from an FRC Account. All Installment Payments not authorized to be withdrawn by the Custodial Agent directly from an FRC Account shall be paid in lawful money of the United States of America, in immediately available funds at the place of payment, without setoff, counterclaim, or deduction.

(b) **Absolute Obligation.** The obligation of FRC to pay the Installment Payments is absolute and unconditional, and until the Outstanding IP Principal Amount, together with all interest that has accrued thereon and remains unpaid, has been paid in full: (i) FRC shall not discontinue or suspend payment of any Installment Payments; and (ii) no Installment Payment shall be: (A) subject to reduction, whether by offset or otherwise; or (B) conditional upon the performance or nonperformance by any party of any agreement (including, without limitation, the performance or nonperformance by Company under the Project Agreement) or any other cause.

(c) **Source.** The Installment Payments are payable from: (i) first, the Increment, which has been pledged to the payment of the Installment Payments; and (ii) second, such other funds of FRC that legally may be used to pay the Installment Payments. For purposes of clarity, the pledge of the Increment by FRC is junior and subordinate in all respects to the pledge of the Increment to the payment of debt service on the 2015 Bonds.

#### **5. Representations.**

(a) Each of Company and FRC represents and warrants as follows:

(i) It has: (A) the power and authority to enter into, and perform its obligations under, this Agreement and the Installment Contract; (B) the power and authority to carry out all transactions contemplated by this Agreement and the Installment Contract; and (C) complied with the Laws in all matters relating to the foregoing transactions;

(ii) It has: (A) taken all actions necessary to authorize the execution, delivery, and performance of its obligations under this Agreement and the Installment Contract; and (B) been authorized by proper action to execute, deliver, and perform its obligations under this Agreement and the Installment Contract;

(iii) Neither the execution and delivery of this Agreement by it, nor the performance by it hereunder: (A) violates any Law or any indenture, material agreement, or other instrument to which it is a party, or by which it or any of its properties or assets is bound; (B) conflicts with, results in a breach of, or constitutes a default under any such indenture, agreement, or other instrument; or (C) results in the creation or imposition of any prohibited lien, charge, or encumbrance of any nature upon any of its properties or assets;

(iv) No litigation is pending or, to its knowledge, threatened: (A) seeking to restrain or enjoin: (1) the Transaction; or (2) the collection of the Increment, or the use thereof for payment of the Installment Payments; (B) in any way contesting or affecting: (1) any authority for the consummation of the Transaction; or (2) the validity of this Agreement, the Installment Contract, or the Transaction; or (C) in any other manner contesting its existence or powers;

(v) This Agreement and the Installment Contract, when executed and delivered by it, will be its valid and binding obligation; provided that the enforceability of the foregoing may be subject to: (A) Laws relating to bankruptcy, insolvency, reorganization, moratorium, or other similar subjects; (B) the exercise of judicial discretion in appropriate cases; and/or (C) general principles of equity; and

(vi) During the last five years, it has not been in default beyond any applicable cure periods in the payment of principal or interest due and payable with respect to any obligations issued or guaranteed by it, or with respect to which it is an obligor.

(b) FRC. In addition to the representations and warranties set forth in Subsection 5(a), FRC represents and warrants as follows:

(i) FRC is a redevelopment commission organized and existing under the laws of the State of Indiana;

(ii) FRC has not issued any Bonds, or entered into any Contracts, the payments under which are superior to the Installment Payments, other than the 2015 Bonds;

(iii) There has been no material adverse change in the financial condition of FRC from that shown in the most recent financial statements of FRC that have been delivered to the Bank;

(iv) There is no litigation or governmental proceeding pending or, to the knowledge of FRC, threatened against FRC or any of its property that, if

adversely determined, would have a material adverse effect on the financial condition of FRC; and

(v) In connection with effectuating the Transaction, it has complied with all Laws, including that it has followed and/or complied with all required local procedures and requirements.

(c) Company. In addition to the representations and warranties set forth in Subsection 5(a), Company represents and warrants that it is a limited liability company organized and existing under the laws of the State of Indiana.

## 6. Consents/Covenants.

(a) FRC consents to the sale and assignment of the Payment Rights to the Bank.

(b) FRC shall: (i) comply with all of its obligations under the Installment Contract; and (ii) pay each Installment Payment: (A) on or before the applicable Payment Due Date; and (B) directly to the Custodial Agent in accordance with the Custodial Agreement; as required pursuant to Section 4.

(c) After the date hereof, FRC shall not issue any Bonds, or enter into any Contracts, the payments under which are superior to the Installment Payments. The Bank acknowledges that the 2015 Bonds, the payments with respect to which are senior to the Installment Payments, were issued prior to the date hereof. For purposes of clarity, FRC may issue Bonds, and enter into Contracts, the payments under which are subordinate to the Installment Payments.

(d) FRC shall maintain the Minimum Coverage Ratio, measured on December 31, 2018, and each December 31 thereafter during the Payment Period.

(e) FRC may issue Bonds, or enter into Contracts, the payments under which are on parity with the Installment Payments, so long as:

(i) the Contract Payment Coverage Ratio for the fiscal year immediately preceding the year in which FRC intends to issue such Bonds or enter into such Contracts was equal to, or greater than, the Minimum Coverage Ratio; and

(ii) FRC certifies to the Bank that the Contract Payment Coverage Ratio for the fiscal year immediately following the year in which FRC intends to issue such Bonds or enter into such Contracts has been projected by an independent certified public account to be equal to, or greater than, the Minimum Coverage Ratio.

(f) Promptly after knowledge thereof has come to the attention of FRC, FRC shall provide to the Bank written notice of: (i) any Event of Default; (ii) any litigation or governmental proceeding pending or threatened against FRC, or any property of FRC, that, if adversely determined, would have a material adverse effect on the financial condition of FRC; or (iii) any event that has a material adverse effect on the financial condition of FRC.

(g) For each fiscal year, FRC shall provide to the Bank audited financial statements,

which financial statements shall be provided on or before the later of the date that is: (i) 150 days after the end of the applicable fiscal year; or (ii) 15 days after FRC's receipt thereof from the State Board of Accounts.

(h) Upon receipt of written request, FRC shall provide to the Bank such other financial information as the Bank reasonably may request.

(i) Until such time as the Outstanding IP Principal Amount, together with all interest that has accrued thereon and remains unpaid, has been paid in full, Company shall maintain its primary operating deposit accounts with the Bank.

**7. Conditions.** The obligation of the Bank to proceed to the Closing is subject to the satisfaction, or waiver in writing, as of the Closing Date of the conditions set forth in this Section.

(a) The Bank shall have approved the form of the Installment Contract; provided that, if the approved Installment Contract is executed prior to the Closing, then, on the Closing Date, the Installment Contract shall: (i) be in full force and effect; and (ii) not have been amended without the prior written consent of the Bank.

(b) No general banking moratorium shall have been declared by authorities of the United States of America or the State of Indiana.

(c) The Bank shall have received an opinion from Wallack Somers & Haas P.C., as counsel to Company, which opinion shall be: (i) dated the Closing Date; (ii) addressed to Company, FRC, and the Bank; and (iii) in form and substance reasonably acceptable to the Bank.

(d) The Bank shall have received an opinion from counsel to FRC, which opinion shall be: (i) dated the Closing Date; (ii) addressed to Company, FRC, and the Bank; and (iii) in form and substance reasonably acceptable to the Bank.

(e) The Bank shall have received from FRC certified copies of the resolutions and/or approvals enacted and/or obtained by FRC authorizing the execution and delivery of all documents to be executed and delivered by FRC in connection with the Transaction, which certification shall state that such resolutions and/or approvals remain in full force and effect without amendment.

(f) The Bank shall have received from Company:

(i) certified copies of the resolutions and/or approvals enacted and/or obtained by Company authorizing the execution and delivery of all documents to be executed and delivered by Company in connection with the Transaction, which certification shall state that such resolutions and/or approvals remain in full force and effect without amendment; and

(ii) copies of the Articles of Organization, Operating Agreement, and Certificate of Existence of Company.

(g) The Bank shall have received such additional documentation as counsel for the Bank reasonably may request to: (i) evidence compliance with all Laws; or (ii) provide further assurances to the Bank.

If any of the foregoing conditions are not satisfied, or waived in writing, on the Closing Date, then the Bank may terminate this Agreement by delivery of written notice to Company and FRC.

## **8. Disbursements.**

- (a) Disbursement. The Transaction Proceeds shall be disbursed to, or on behalf of, Company in accordance with the Custodial Agreement (including, without limitation, any provisions thereof that require the consent of FRC prior to disbursement) to pay (or reimburse Company for) Project Costs.
- (b) Completion. The Custodial Agreement shall provide that, upon completion of the Project in substantial accordance with the Project Agreement such that no further disbursements from the Project Fund will be needed to pay (or reimburse Company for) Project Costs, Company will provide the Completion Statement to the Custodial Agent. After receipt of the Completion Statement, any funds remaining in the Project Fund, less the amount thereof certified by Company as sufficient to cover the full amount of any specified claims that are subject to dispute, shall be applied to the next due Installment Payments.
- (c) Use. Except to the extent set forth in this Section, neither FRC nor the Bank shall have any responsibility for ensuring that the Transaction Proceeds are used in the proper manner.

## **9. Defaults/Remedies.**

- (a) Events of Default. Each of the following shall constitute an "Event of Default":
  - (i) A material misrepresentation by Company or FRC hereunder or under the Installment Contract;
  - (ii) Any failure by FRC to pay an Installment Payment when due; provided that, it shall not be an Event of Default if such failure is due to the failure of the Custodial Agent to withdraw the amount of the Installment Payment from an FRC Account after authorized by FRC to do so in accordance with Subsection 4(a);
  - (iii) The issuance of any Bonds, or entering into of any Contracts, by FRC in violation of Subsections 6(c) or 6(e);
  - (iv) Any "Event of Default" by FRC under the Installment Contract;
  - (v) Commencement of any voluntary or involuntary bankruptcy or similar proceeding against FRC;
  - (vi) FRC becomes insolvent or generally is unable to pay its debts as they become due;
  - (vii) A receiver is appointed for a substantial portion of FRC's property; and/or
  - (viii) Company or FRC fails to observe or perform any other term or condition of this Agreement, and the continuance of such failure beyond the



Cure Period.

(b) Remedies. Company and FRC agree that, during the continuance of an Event of Default, the Bank shall have the right to exercise any right or remedy available to Company under the Installment Contract as a result of an "Event of Default" under the Installment Contract.

**10. Indemnification.** To the extent permitted by the Laws, Company and FRC shall indemnify and hold harmless the Bank from and against any and all claims, judgments, damages liabilities, injuries, losses, costs, and expenses (including, without limitation, reasonable attorneys' fees) arising from, or connected with: (a) the consummation of the Transaction; and/or (b) the breach by Company and/or FRC, respectively, of any term or condition to be observed or performed by it pursuant to this Agreement, the Installment Contract, and/or the Project Agreement. The foregoing indemnifications shall survive the termination of this Agreement.

**11. Notice.** Any notice or approval required or permitted to be given pursuant to this Agreement shall be in writing, and shall be deemed to have been given when: (a) delivered in person to the other party; or (b) sent by national overnight delivery service, with confirmation of receipt, addressed as follows: to Company at 8561 N. 175 E., Springport, Indiana 47386, Attn: Gregory W. Martz, with a copy to: Jennifer R. Shoup, Esq., Wallack Somers & Haas, PC, One Indiana Square, Suite 2300, Indianapolis, Indiana 46204; to FRC at 70 East Monroe Street, Franklin, Indiana 46131, Attn: President, with a copy to Robert H. Schafstall, Schafstall & Admire, LLP, 98 North Jackson Street, Franklin, Indiana 46131; and to the Bank at 302 North Alabama Street, Indianapolis, Indiana [REDACTED], Attn: Ben C. Jefferis, with a copy to [REDACTED]. Any party may change its address for notice from time to time by delivering notice to the other party as provided above.

**12. Miscellaneous.** This Agreement: (a) shall be binding upon, and shall inure to the benefit of, the Company, FRC, and the Bank, and no person or entity shall be deemed to be a third-party beneficiary hereof; (b) shall be governed by the laws of the State of Indiana; and (c) may be executed in counterparts, each of which shall constitute an original, but all of which together shall be a single instrument. All proceedings arising in connection with this Agreement shall be tried and litigated only in the state courts in Johnson County, Indiana or the federal courts with venue that includes Johnson County, Indiana.

IN WITNESS WHEREOF, Company, FRC, and the Bank have executed this Agreement as of the date set forth above.

FRANKLIN SHELL BUILDING LLC

By: GM Development Companies LLC

By: \_\_\_\_\_  
Gregory W. Martz, Member

CITY OF FRANKLIN REDEVELOPMENT  
COMMISSION

By: \_\_\_\_\_  
Bob Heuchan, President

HORIZON BANK

By: \_\_\_\_\_  
Ben C. Jefferis, Vice-President,  
Commercial Loan Officer

**EXHIBIT A**

Payment Rights Price \$2,392,000.00

**DISBURSEMENT OF PROCEEDS**

<u>Item Number</u>	<u>Payee Name and Address</u>	<u>Purpose of Obligation</u>	<u>Amount</u>
1	Custodial Agent/Project Fund	Project Fund Disbursement	\$ _____
2	Wallack Somers & Haas, PC One Indiana Square, Suite 2300 Indianapolis, IN 46204	Company Counsel Fees	\$ _____
3		FRC Counsel Fees	\$ _____
4		Bank Counsel Fees	\$ _____
5		Bank Fee	\$4,000.00

