

# **MECHANICAL ENGINEERING PROFESSIONALS**

## **INDEPENDENT CONTRACTOR AGREEMENT**

This Independent Contractor Agreement (this "Agreement") is entered into as of \_\_\_\_\_ 2008 (the "Effective Date"), is made by and between Mechanical Engineering Professionals, LLC., a California limited liability company ("MEP" or "Contractor"), with a principal place of business at 1504 Madison Ave., San Diego, CA 92116, and \_\_\_\_\_, a \_\_\_\_\_ ("Client"), with a principal place of business as set forth on the signature page hereto. MEP and Client are sometimes referred to herein individually as a "Party" and collectively as the "Parties."

### **RECITALS**

**WHEREAS**, Client wishes to engage MEP to provide certain mechanical engineering consultant services, including but not limited to performing the services (the "Services") and manufacturing the products (the "Products") listed in the Statement of Work, attached hereto as Exhibit A hereto (the "SOW"); and

**WHEREAS**, MEP wishes to enter into an independent contractor relationship with Client and provide the Services and Products to Client according to the SOW,

**NOW THEREFORE**, in consideration of the premises and of the mutual covenants, agreements and warranties herein contained, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, the Parties hereto agree as follows:

### **AGREEMENT**

**1. TERM OF AGREEMENT**. The term (the "Term") of this Agreement shall commence as of the Effective Date and terminate as set forth in the attached Statement of Work, unless sooner terminated as provided in this Agreement.

### **2. STATEMENT OF WORK AND PERFORMANCE**.

**2.1. *Work***. Contractor agrees to provide the Services and Products listed in the SOW (hereinafter, the "Work").

**2.2. *Location***. Contractor may perform the Work at any location necessary, but shall only be required at the offices of Client as set forth in the SOW.

**2.3. *Illness or Injury***. Contractor shall not be obligated to perform Work during any period when Contractor (or his employee(s), agent(s) or representative(s) who are performing services as authorized pursuant to this Agreement with respect to the Services) is disabled due to illness or injury. Any schedule set forth in the SOW shall be reasonably extended to account for such time.

**2.4. *Expenses***. Client agrees to reimburse Contractor for all reasonable costs or expenses arising out of this Agreement.

**2.5. *Materials***. Other than as specifically set forth in the SOW, Contractor will furnish all materials, tools and equipment used to perform the Services. Notwithstanding the foregoing,

Client may provide Contractor with certain materials as specifically requested by Contractor, or as set forth in the SOW.

**3. COMPENSATION.** In consideration for the Work, Client agrees to pay Contractor as set forth in the SOW. Should the SOW be silent or not complete, or should Contractor perform any services not covered in the SOW, Client agrees to pay Contractor on a time and materials basis for such work, at Contractor's then-current rates.

**4. INDEPENDENT CONTRACTOR STATUS.** Contractor is an independent contractor, not Client's employee. Contractor's employees, agents, representatives and contract personnel are not Client's employees. Contractor and Client agree to the following rights consistent with an independent contractor relationship:

4.1. *Non-Exclusive.* Contractor has the right to perform services for others during the term of this Agreement.

4.2. *No Additional Obligations.* Contractor may be requested, but shall have no obligation, to perform any work other than as listed in the SOW.

4.3. *Control of Services.* Contractor has the sole right to control and direct the means, manner and method by which the Services and Products required by this Agreement will be performed or manufactured. Consistent with this freedom from Client's control, Contractor shall adopt and carry out his own strategy and methods to accomplish the Services and develop the Products.

4.4. *Location and Time.* Unless otherwise set forth in the SOW, Contractor has the right to perform the Services required by this Agreement at any location or time.

4.5. *Use of Agents and Employees.* Contractor has the right to hire assistants as subcontractors, or to use employees to perform the Work, unless specifically prohibited under the SOW.

4.6. *No Full-Time Requirement.* Client shall not require Contractor or Contractor's approved employees, agents, representatives or contract personnel to devote full time to performing the Work.

4.7. *Business Permits, Certificates and Licenses.* Contractor has complied with all federal, state and local laws requiring business permits, certificates and licenses required to carry out the Services.

4.8. *Fringe Benefits.* Contractor understands that neither Contractor nor Contractor's employees or contract personnel are eligible to participate in any employee pension, health, vacation pay, sick pay or other fringe benefit plan of Client.

4.9. *Workers' Compensation.* Client shall not obtain workers' compensation insurance on behalf of Contractor or Contractor's employees. If Contractor hires employees to perform any work under this Agreement, Contractor will cover them with workers' compensation insurance to the extent required by law and provide Client with a certificate of workers' compensation insurance before the employees begin the work.

4.10. *Unemployment Compensation.* Client shall make no state or federal unemployment compensation payments on behalf of Contractor or Contractor's employees or contract personnel. Contractor shall not be entitled to these benefits in connection with work performed under this Agreement.

## **5. TAXES.**

5.1. Client shall not withhold FICA (Social Security and Medicare taxes) from Contractor's payments or make FICA payments on Contractor's behalf, make state or federal unemployment compensation contributions on Contractor's behalf, or withhold state or federal income tax from Contractor's payments.

5.2. Contractor shall pay all taxes incurred while performing Services, including all applicable income taxes and, if Contractor is not a corporation, self-employment (Social Security) taxes. Upon demand, Contractor shall provide Client with proof that such payments have been made.

5.3. Unless otherwise specified in the SOW, all prices are exclusive of duties and taxes imposed on the Client by any governmental agency. Client shall be solely responsible for obtaining and providing any certificate of exemption or any similar document required to exempt a sale from sales, use or similar tax liability, and Client shall be and is solely liable for the payment of any such sales, use or other transactional tax imposed on or arising from the sale of the Products to Client.

## **6. TERMINATION.**

6.1. *Upon Breach, Notice, or Bankruptcy.* Either Party may terminate this Agreement (i) if the other Party has materially breached its obligations under this Agreement and such breach is not cured in fifteen (15) days, (ii) upon thirty (30) days written notice (the "Termination Notice") by one Party to the other Party or (iii) immediately if one Party makes a general assignment for the benefit of its creditors, files a voluntary petition in bankruptcy or for reorganization under the bankruptcy laws or if a petition is filed against it, or if a receiver or trustee is appointed for such Party.

6.2. *Upon Death or Disability.* This Agreement shall terminate upon the death or permanent disability of Contractor.

6.3. *Effect of Termination.*

6.3.1 Survival of Certain Sections and Payment Obligations. The provisions of this Section 6; Section 7 (Confidentiality); Section 8 (Intellectual Property and the Work), Section 10 (Indemnification); Section 11 (Limitation on Liability); and Section 12 (General) and any payment obligation that has accrued and is owed by Client to another Contractor but has not been paid prior to the termination of this Agreement, shall survive the termination of this Agreement.

6.3.2 Payment Upon Termination and Return of Client Property. The Parties expressly agree that if this Agreement is duly terminated in accordance with this Section 6, within thirty (30) days of such termination: Client shall immediately pay all outstanding invoices and the further agrees to (a) pay the reasonable value of all work in progress as of the date of any such notification, and (b) any costs or expenses which Contractor may incur as a result of the premature cancellation of the Agreement.

## **CONFIDENTIALITY.**

6.4. *Confidential Information.* Any intellectual property, technology, methods, processes, tools, software, customer lists, and the ideas and the expressions contained therein and any information or other documentation relating thereto ("Confidential Information"), are

confidential, proprietary information and trade secrets that of the providing Party that the other Party will receive in confidence.

*6.5. Use of Client Confidential Information.* The receiving Party shall use any Confidential Information solely to the extent necessary in connection with this Agreement and in furtherance of the Work, and shall make only that number of copies of Confidential Information as are necessary to the Work.

*6.6. Non-Disclosure.* The receiving Party shall not in any manner or form disclose, provide or otherwise make available, in whole or in part, any Confidential Information, to any third parties except for the employees, agents and consultants, if any, who are bound by appropriate and equally restrictive non-disclosure agreements. The receiving Party acknowledges and agrees that all Confidential Information, except as specified in Section 7.5 below, that comes to be known by reason of work under this Agreement, is confidential and will not be disclosed to unauthorized third parties.

*6.7. Standard of Care.* The receiving Party will use the same standard of care, and will bind its employees, agents or representatives, if any, to such standard, to prevent disclosure of Confidential Information as the receiving Party uses to protect its own confidential information and trade secrets, but in no case less than reasonable care.

*6.8. Exceptions.* Information under this Agreement will not be considered Confidential Information if such information: (a) is already known to or is already in the receiving Party's lawful possession at the time of executing this Agreement; (b) is in the public domain at the time of disclosure; (c) is independently developed not in connection with the Work; (d) is disclosed by a third party with written approval of the owner; or (e) is required to be disclosed by a court or other administrative body of competent jurisdiction, provided that the receiving Party provides prompt notice prior to any such mandated disclosure.

## **7. INTELLECTUAL PROPERTY AND OWNERSHIP.**

*7.1. Client Intellectual Property.* Client and Contractor each agree that all intellectual property of Client used in the Work, including without limitation, patents, patentable intellectual property, analytical tools, testing protocols, hardware, software, firmware, algorithms, methodologies and all other proprietary information and trade secrets of Client which are used in the Work (the "Client IP") shall remain the sole and exclusive property of Client. Client shall retain the right to seek, apply for and obtain any or all copyrights, patents, registrations and similar protections which may available in the Client IP, including reissues, extensions, divisions and continuations thereof. MEP acknowledges and agrees that the Client IP is Confidential Information.

*7.2. MEP Intellectual Property.* Client and Contractor each agree that all intellectual property of MEP used in the Work, including without limitation, patents, patentable intellectual property, analytical tools, testing protocols, hardware, software, firmware, algorithms, methodologies and all other proprietary information and trade secrets of MEP which are used in the Work (the "MEP IP") shall remain the sole and exclusive property of MEP. MEP shall retain the right to seek, apply for and obtain any or all copyrights, patents, registrations and similar protections which may available in the MEP IP, including reissues, extensions, divisions and continuations thereof. Client acknowledges and agrees that the MEP IP is Confidential Information. Unless explicitly stated otherwise in the SOW, all tooling and methods used in the assembly and manufacture of products shall be the sole and exclusive property of MEP, whether or not the Client has provided Non-Recurring Engineering funding (also called NRE charges) for such tools and methods.

7.3.*Works for Hire.* All designs, drawings, renderings, computer programs or other work product fixed in a tangible medium of expression that Contractor prepares, creates and/or otherwise makes under and/or within the scope of this Agreement shall be treated as a “work made for hire” according to the copyright laws of the United States for the sole and exclusive benefit of Client. Unless otherwise stated in the SOW, Client shall have the sole and exclusive right to register all such works in its name as the owner and author of such works. Notwithstanding the foregoing, MEP shall be the sole owner of any MEP IP, even if such MEP IP is incorporated into a deliverable.

## 8. REPRESENTATIONS AND WARRANTIES.

8.1.*Client.* Client represents and warrants to Contractor that:

8.1.1Power and Authority. Client has the full right, power and authority to enter into this Agreement and perform its obligations hereunder; and

8.1.2Valid Obligation. This Agreement, when executed by Client, shall constitute the valid and binding obligation of Client, enforceable in accordance with its terms.

8.1.3Materials. Any Materials provided to Contractor pursuant to the SOW are original to Client, or Client has the requisite authority to allow Contractor’s use of such Materials in his provision of the Services or manufacture of any Product

8.2.*Contractor.* Contractor represents and warrants to Client that:

8.2.1Power and Authority. Contractor has the full right, power and authority to enter into this Agreement and perform his obligations hereunder;

8.2.2Valid Obligation. This Agreement, when executed by Contractor, shall constitute the valid and binding obligation of Contractor, enforceable in accordance with its terms;

8.2.3No Breach of Third-Party Agreements. Contractor’s performance of his obligations under this Agreement does not and will not breach any agreement with any third party to keep confidential proprietary information acquired by Contractor in confidence or trust prior to entering into this Agreement, and Contractor will not disclose to Client or use any confidential or proprietary information or material belonging to any previous employer or other third party in the performances of services under this Agreement.

8.3.*No Other Warranty.* Except as expressly set forth in this Agreement and the SOW, MEP MAKES NO REPRESENTATIONS AND EXTENDS NO WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED. THERE ARE NO EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, NOR THAT THE USE OF THE PRODUCT(S) WILL NOT INFRINGE ANY PATENT, COPYRIGHT, TRADEMARK, OR OTHER INTELLECTUAL PROPERTY RIGHTS, OR ANY OTHER EXPRESS OR IMPLIED

## 9. INDEMNIFICATION.

9.1.*Indemnification by Client.* Client (the “Indemnifying Party”) agrees to indemnify Contractor, and each of its affiliates and their respective officers, directors, employees, agents and representatives (each, an “Indemnified Party” and together the “Indemnified Parties”) against, and agrees to hold each of them harmless from, any and all Losses incurred or

suffered by them relating to or arising out of or in connection with the Work, including, but not limited to, (i) Client's improper use of any Product, or (iv) the Client IP. The Indemnified Party shall not be entitled to indemnification hereunder to the extent that the act or omission for which indemnification is claimed arises out of the Indemnified Party's gross negligence, fraud, bad faith or willful misconduct.

*9.2. Notice.* As soon as is reasonably practicable after becoming aware of a claim for indemnification under this Agreement, but in no case later than three (3) business days, the Indemnified Party shall promptly give written notice to the Indemnifying Party of such claim and the amount the Indemnified Party will be entitled to receive hereunder from the Indemnifying Party; provided that the failure of the Indemnified Party to give written notice shall not relieve the Indemnifying Party of its obligations hereunder except to the extent, if any, that the Indemnifying Party shall have been prejudiced thereby. If the Indemnifying Party agrees that it has an indemnification obligation but objects that it is obligated to pay only a lesser amount, the Indemnified Party shall nevertheless be entitled to recover promptly from the Indemnifying Party the lesser amount, without prejudice to the Indemnified Party's claim for the difference.

*9.3. Participation in Defense.* After receiving a claim as set forth above, the Indemnifying Party may, at its own expense, (i) participate in the defense of any claim, suit, action or proceeding and (ii) upon notice to the Indemnified Party and the Indemnifying Party's delivering to the Indemnified Party a written agreement that the Indemnified Party is entitled to indemnification for all Losses arising out of such claim, suit, action or proceeding, assume the defense thereof; provided however, that (x) the Indemnifying Party's counsel is reasonably satisfactory to the Indemnified Party, and (y) the Indemnifying Party shall thereafter consult with the Indemnified Party upon the Indemnified Party's reasonable request for such consultation from time to time with respect to such claim, suit, action or proceeding. If the Indemnifying Party assumes such defense, the Indemnified Party shall have the right, but not the duty, to participate in the defense thereof and to employ counsel, at its own expense, separate from the counsel employed by the Indemnifying Party. If, however, the Indemnified Party reasonably determines in its judgment that representation by the Indemnifying Party's counsel of both the Indemnifying Party and the Indemnified Party would present such counsel with a conflict of interest, then such Indemnified Party may employ separate counsel to represent or defend it in any such claim, action, suit or proceeding and the Indemnifying Party shall pay the reasonable fees and disbursements of such separate counsel. Whether or not the Indemnifying Party chooses to defend or prosecute any such claim, suit, action or proceeding, all of the parties hereto shall cooperate in the defense or prosecution thereof.

*9.4. Settlement.* Notwithstanding anything in this Section 10 to the contrary, neither the Indemnifying Party nor the Indemnified Party shall, without the written consent of the other, settle or compromise any claim or permit a default or consent to entry of any judgment unless the claimant and such party provide to such other party an unqualified release from all liability in respect of such claim. Notwithstanding the foregoing, if a settlement offer solely for money damages is made by the applicable third party claimant, and the Indemnifying Party notifies the Indemnified Party in writing of the Indemnifying Party's willingness to accept the settlement offer and pay the amount called for by such offer, and the Indemnified Party declines to accept such offer, the Indemnified Party may continue to contest such claim, free of any participation by the Indemnifying Party, and the amount of any ultimate liability with respect to such claim that the Indemnifying Party has an obligation to pay hereunder shall be limited to the lesser of (i) the amount of the settlement offer that the Indemnified Party declined to accept or (ii) the aggregate Losses of the Indemnified Party with respect to such claim. If the Indemnifying Party makes any payment on any claim, the Indemnifying Party shall be subrogated, to the extent of such payment, to all rights and remedies of the

Indemnified Party to any insurance benefits or other claims of the Indemnified Party with respect to such claim.

*9.5.No Assumption of Defense.* In the event that the Indemnifying Party does not elect to assume the defense of any claim, suit, action or proceeding, then any failure of the Indemnified Party to defend or to participate in the defense of any such claim, suit, action or proceeding or to cause the same to be done, shall not relieve the Indemnifying Party of its obligations hereunder.

**10.LIMITATION ON LIABILITY.** In no event shall either party be liable to the other for any special, indirect, incidental, exemplary or consequential damages resulting from any act or event occurring in connection with, or during the course of, the Work, including loss of profits and good will, even if a party has actually been advised of the possibility of such damages.

**11.GENERAL PROVISIONS.**

*11.1.Governing Law; Venue; Service of Process.* All matters arising out of or relating to this Agreement, and all the transactions contemplated thereby (including, but not limited to validity, interpretation, construction, performance and enforcement), shall be governed by the laws of the State of California without regard to its conflict of law principles. Any Party bringing a legal action or proceeding against any other Party arising out of or related to this Agreement may bring the legal action or proceeding in any Federal or State Court sitting in Los Angeles County, CA. Each Party waives, to the fullest extent permitted by law, any objection to venue or action for inconvenient forum. The Parties agree to submit to the exclusive and irrevocable personal jurisdiction of such courts, and agrees that either Party may effect service of process on the other by registered mail at the address set forth on the signature page hereto, as the same may be amended upon notice to the other Party.

*11.2.Resolution Period.* If a Party (the “Claiming Party”) claims another Party (the “Potentially Breaching Party”) has breached this Agreement, before the Claiming Party seeks any relief against the Potentially Breaching Party, the Claiming Party must notify the Potentially Breaching Party in writing. For a period of thirty (30) days after such written notice is given (the “Resolution Period”), the Parties involved shall attempt to cure, if curable, or otherwise resolve the claim. If after expiration of the Resolution Period, the Parties involved are not able to resolve such claim, the Claiming Party may assert a claim subject to any and all claims and/or defenses of the other Party.

*11.3. Force Majeure.* No Party shall be liable to another Party because of any failure to perform hereunder caused by any cause beyond said Party’s control, including without limitation fire, earthquake, flood, epidemic, accident, explosion, casualty, strike, lockout, labor controversy, riot, civil disturbance, act of public enemy, embargo, war, act of God or law, except as expressly provided herein to the contrary. Notwithstanding the foregoing, should such failure to perform last for 180 days, then the Party affected shall be able to terminate this Agreement.

*11.4. No Waivers.* No waiver by any Party to this Agreement of any breach of this Agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other provision hereof. The exercise of any right granted to a Party hereunder shall not operate as a waiver.

11.5. *Amendment.* The terms of this Agreement may not be amended, waived or modified, except by a writing duly signed by the Parties referring to the specific provision to be waived, amended or modified. Notwithstanding the foregoing, Client, without the consent of the other Parties, may amend any provisions of this Agreement to cure any ambiguity or correct or supplement any provision herein which may be inconsistent with any other provision of this Agreement, or any amendment or attachment hereto, or to correct any printing, stenographic or clerical errors or omissions in order that this Agreement shall accurately reflect the understanding of the Parties. Any amendment to this Agreement, or attachment hereto, shall be delivered to the Parties under the notice provisions of Section 12.9 of this Agreement.

11.6. *Severability.* Whenever possible, each provision of this Agreement will be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is held to be invalid, illegal or unenforceable in any respect under any applicable law or rule in any jurisdiction, such invalidity, illegality or unenforceability will not affect any other provision or any other jurisdiction, but this Agreement will be reformed, construed and enforced in such jurisdiction as if such invalid, illegal or unenforceable provisions had never been contained herein.

11.7. *No Representations.* Neither Party has relied upon any representations or statements made by another Party hereto which are not specifically set forth in this Agreement.

11.8. *Notice.* Any notice or other communication provided for herein or given hereunder to a Party hereto shall be in writing and shall be given by delivery, by facsimile or by mail (registered or certified mail, postage prepaid, return receipt requested) to the respective Party at the addresses set forth on the signature page hereto. The Parties shall be entitled to change its address for purposes of this section by notice to the other. All notices shall be effective upon actual receipt, or upon the passing of five (5) days from the mailing of such notice, whichever occurs first.

11.9. *Headings.* The headings in this Agreement are solely for convenience of reference and shall not effect its interpretation.

11.10. *Entire Agreement.* This Agreement, including exhibits, schedules, and attachments, if any, constitutes the entire agreement between the Parties with respect to the subject matter hereof, and supersedes and replaces any prior correspondence, negotiations, agreements, understandings and representations with respect thereto.

11.11. *Execution in Counterparts and Electronic Signatures.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which shall constitute one and the same instrument. For purposes of this Agreement, use of a facsimile, e-mail or other electronic medium shall have the same force and effect as an original signature.

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IN WITNESS WHEREOF, the Parties have executed this Agreement as of this \_\_\_\_ day of \_\_\_\_\_, 2008.

**MECHANICAL ENGINEERING PROFESSIONALS, LLC:**

**CLIENT:**

By: \_\_\_\_\_  
Jonathan Iungerich  
President and Founder

By: \_\_\_\_\_  
[Name]

**Mechanical Engineering Professionals, LLC**  
4565 Cleveland Ave #3  
San Diego, CA 92116  
Phone: (888) 585-6419  
Fax: (213) 596-0329

[Name]  
\_\_\_\_\_  
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\_\_\_\_\_  
Phone: ( ) -  
Fax: ( ) -

**STATEMENT OF WORK**