ANNOTATED
INDEPENDENT CONTRACTOR
CONSULTING AGREEMENT

This INDEPENDENT CONTRACTOR CONSULTING AGREEMENT (the **"Agreement"**), is entered into and made effective _____, ____ (the **"Effective Date"**), by and between _____, a _____ corporation (the **"Company"**), and _____, a resident of the State of _____ (or a _____ corporation) (the **"Consultant"**). Company and Consultant may be referred to individually as a **"Party"** or together as the **"Parties"**.

RECITALS:

A. Company is engaged principally in the business of _____;

B. Consultant is engaged principally in the business of _____ and possesses particular skills, knowledge, and experience in _____;

C. Company wishes to retain Consultant to provide certain consulting services pursuant to the terms, and subject to the conditions, of this Agreement; and

D. Consultant wishes to be retained by Company to provide certain consulting services pursuant to the terms, and subject to the conditions, of this Agreement.

Comment [A1]: Independent contractors who are considered manufacturer sales representatives are subject to Minn. Stat. § 325E.37.

Comment [A2]: Companies in the trucking and messenger/courier industries are subject to Minn. Stat. § 176.043.

Comment [A3]: Construction contractors must comply with the requirements of Minn. Stat. § 181.723 for all sub-contractors.

AGREEMENT:

NOW THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, Company and Consultant agree as follows:

Comment [A4]: The Minnesota Drug and Alcohol Testing in the Workplace Act defines a "job applicant" as a "person, independent contractor, or person working for an independent contractor" and therefore applies to drug testing of independent contractors and their employees. Minn. Stat. § 181.950, Subd. 9.

ARTICLE I.
Scope of Services

1.1 **Term of Agreement.** Subject to the provisions for termination set forth in Article XII of this Agreement, the term of this Agreement shall commence on the Effective Date and shall continue until terminated by Company or Consultant as provided in Article XII of this Agreement (the **"Term"**). Upon the effective date of such termination, all of Company's and Consultant's obligations and rights under this Agreement (except those covenants, restrictions, and obligations which expressly survive the termination of this Agreement) shall terminate.

1.2 **Scope of Consulting Services.** Company shall retain Consultant to perform consulting services for Company and its clients and vendors as requested by Company from time to time (the **"Consulting Services"**) pursuant to one or more Work Orders substantially in the form attached as Exhibit A (the **"Work Orders"**). The terms of this Agreement shall apply to

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all Work Orders. Consultant is free to accept or reject any Work Orders requested by Company; *provided, however,* that once Consultant accepts a Work Order, Consultant agrees to complete the project so accepted and assumes liability for damages resulting to Company arising from failure to complete such project in accordance with this Agreement, including any additional cost incurred by Company associated with hiring a replacement and all resulting damages suffered by Company.

1.3 **Effort and Supervision.** Consultant will devote that effort Consultant determines necessary to effectively perform the Consulting Services rendered under this Agreement. Consultant shall fulfill Consultant's responsibilities under this Agreement independent of, and without supervisory control by, Company. In this regard, Company shall have no right to control the means, manner, method, timing, and/or location of Consultant's performance under this Agreement. Consultant shall apply Consultant's independent discretion and judgment in rendering the Consulting Services under this Agreement, determining how much time and effort should be devoted to complete Work Orders accepted by Consultant, determining when to perform the Consulting Services under this Agreement, and determining the location from which Consultant shall provide such Consulting Services. Consultant likewise shall determine Consultant's schedule for providing the Consulting Services provided under this Agreement. Consultant has no obligation to work during any particular hours or days. Consultant, however, shall meet all applicable project deadlines. Consultant shall not be subject to the work rules, policies, and procedures disseminated by Company to its employees from time to time, including but not limited to, the provisions of Company's employee handbooks. Company shall have no right to Consultant's exclusive services, and both Company and Consultant have the right to contract with others. Notwithstanding anything to the contrary in this Section, Consultant shall comply with all requirements and specifications set forth in any Work Order accepted by Consultant under this Agreement.

ARTICLE II.
Compensation and Taxes

2.1 **Hourly Rate.** As compensation for the Consulting Services provided by Consultant under this Agreement, Company will pay Consultant $_____ per hour or such other rate as may be specified in any particular Work Order accepted by Consultant.

Comment [A5]: Non-payment of commissions to an independent contractor may result in penalties under Minn. Stat. § 181.145.

2.2 **Invoices.** Consultant shall provide invoices to Company by the 15th of each month covering all services rendered and expenses incurred during the prior month. Consultant's compensation shall be paid within ten (10) days after Company receives an invoice from Consultant describing the date of services rendered, the work performed, the number of hours, and the total amount owed pursuant to this Agreement. Company shall have the right to withhold payment on any disputed invoice for a reasonable period of time while Company investigates such dispute.

2.3 **No Fringe Benefits.** Consultant agrees and acknowledges that Consultant and its employees and assistants are not entitled to any benefits that Company may provide to its own

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employees such as paid vacations, paid time off, holiday pay, sick leave, health insurance, dental insurance, life insurance, disability benefits, pension or retirement benefits, or any other employee welfare, pension, or retirement benefits or fringe benefits provided to Company's employees. Consultant, for itself and Consultant's employees and assistants, hereby irrevocably waives the right to receive or participate in such employee benefits.

2.4 **Taxes.** Consultant is responsible for paying all federal, state, and local income taxes in connection with all payments received from Company under this Agreement. Company shall have no responsibility to withhold, contribute, or pay federal, state, or local income, social security, FICA, Medicare, federal healthcare, payroll, unemployment compensation, or other taxes in connection with payments made to Consultant under this Agreement. Company shall report amounts paid to Consultant under this Agreement on IRS Form 1099. Consultant agrees to report for tax purposes to the appropriate federal, state, and local tax authorities all income received from Company under this Agreement and otherwise to comply with all federal, state, and local income tax reporting requirements in connection with its business relationship with Company. Consultant agrees to indemnify, hold harmless, defend, and protect Company and its shareholders, members, owners, officers, managers, directors, governors, employees, agents, representatives, insurers, and their respective successors and assigns, from and against all demands, claims, liability, losses, damages, deficiencies, fines, penalties, assessments, causes of action, actions, arbitration, audits, inquiries, investigations, administrative relief, judgments, settlements, awards, orders, decrees, injunctive relief, interest, costs and expenses (including, but not limited to, expenses of investigation, settlement, litigation and reasonable attorney's fees, including those on appeal), related to or arising out of Consultant's failure to report or pay any taxes due and owing on account of Consultant's receipt of payments under this Agreement, including but not limited to, all taxes, penalties, assessments, fines, and interest. The obligations of this Section are continuing and survive the termination or expiration of this Agreement for any reason.

Comment [A6]: For Minnesota Unemployment Compensation, see Minn. R. 3315.0555, subp. 1. *See also Speaks, Inc. v. Jensen*, 243 N.W.2d 142 (Minn. 1976), and *Lakeland Tool and Engineering, Inc. v. Engle*, 450 N.W.2d 349 (Minn. Ct. App. 1990)
According to Minnesota common law, including eligibility for unemployment compensation and application of the Minnesota Human Rights Act, the factors for determining whether one is properly considered an independent contractor and not an employee are:

1. the right to control the means and manner of performance;
2. the mode of payment;
3. the furnishing of material or tools;
4. the control of the premises where the work is to be done; and
5. the right of the employer to discharge.

St. Croix Sensory Inc. v. Dep't of Emp't and Econ. Dev., 785 N.W.2d 796, 800 (Minn. Ct. App. 2010), *Guhlke v. Roberts Truck Lines*, 128 N.W.2d 324 (Minn. 1964).

Article III.
Expenses

3.1 **Consultant's Responsibility.** Consultant shall be responsible for all expenses incurred while performing Consulting Services under this Agreement, including but not limited to, the cost of providing offices and facilities, license and permit fees, meals, travel expenses, lodging, entertainment, computers, software, electronic devices, tools and equipment, printers, internet connection, e-mail service, telephones, office supplies, materials, staff, insurance premiums (including but not limited to workers' compensation insurance as required by law), items of general business overhead associated with operating Consultant's business, and all other expenses incurred by Consultant in the course of performing Consulting Services.

3.2 **Consultant's Representations.** Consultant represents to Company that Consultant has made a substantial investment in acquiring and maintaining the following: suitable offices, computers, software (including reputable anti-virus software), equipment, printers, internet connection, e-mail service, telephone service, office supplies, insurance, and

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other general business expenses sufficient to allow Consultant to render the Consulting Services in a professional and workmanlike manner. Consultant shall continue to pay for such expenses and maintain such items during the Term of this Agreement.

Article IV.
Independent Contractor Relationship

4.1 Independent Contractor Relationship. The Parties enter into this Agreement as, and shall continue to be, independent contractors. Each Party shall act in accordance with this status and shall not, nor shall its employees or representatives, hold itself out as an employee or agent of the other Party. Under no circumstances shall either Party or their respective employees or agents look to the other Party as their employer, or as a partner, agent, or principal. This Agreement does not create an employment relationship, partnership, franchise, or joint venture relationship between Company and Consultant. This Agreement is a contract for services between independent business parties.

4.2 No Agency Relationship. Consultant is not the agent of Company and has no authority to bind Company or act on Company's behalf. Consultant has no authority to incur debts or obligations on behalf of Company or to obligate Company to otherwise pay any monies. Consultant shall not make any representations, express or implied, that Consultant has any authority to act for or to bind Company in any way.

Article V.
Insurance

5.1 Workers' Compensation Insurance. Consultant agrees that Company is not responsible for providing and will not provide workers' compensation coverage for any injury, death, disease, or occupational injury suffered by Consultant or any of its employees or assistants while performing services under this Agreement. To the extent required by applicable law, Consultant shall obtain workers' compensation insurance coverage for Consultant and all employees or assistants retained by Consultant. Consultant and its employees and representatives shall not be entitled to, nor shall they make any claim for, any benefits accorded to Company's employees including workers' compensation. Consultant agrees to indemnify, hold harmless, defend, and protect Company, its subsidiaries and affiliates, and their respective successors and assigns, from and against all demands, claims, liability, losses, damages, deficiencies, fines, penalties, assessments, causes of action, actions, arbitration, audits, inquiries, investigations, administrative relief, judgments, settlements, awards, orders, decrees, injunctive relief, interest, costs and expenses (including, but not limited to, expenses of investigation, settlement, litigation and reasonable attorney's fees, including those on appeal), related to or arising out of any claim of Consultant or Consultant's employees, personnel, agents, or representatives related to any injury, death, disease, or occupational injury suffered by them except to the extent caused by the intentional, willful, or wanton acts of Company. The obligations of this Section are continuing and survive the termination or expiration of this Agreement for any reason.

Comment [A7]: There are several tests for whether one is properly considered an independent contractor and not an employee.

According to the Internal Revenue Code (IRC), publication 15-A http://www.irs.gov/pub/irs-pdf/p15a.pdf, the factors and sub-factors are:

1.Behavioral - Does the company control or have the right to control what the worker does and how the worker does his or her job?
a)Instructions that the business gives to the worker
b)Training the business gives to the worker

2.Financial - Are the business aspects of the worker's job controlled by the payer? (These include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
a)The extent to which the worker has unreimbursed business expenses
b)The extent of the worker's investment
c)The extent to which to worker makes his or her services available to the relevant market
d)How the business pays the worke ... [1]

Comment [A8]: *See* Minnesota Workers' Compensation Act, Minn. Rules 5224.0330 – 0340 and
Minnesota Rules 5224.0010 – 0312, and Minnesota Department of Labor & Industry http://www.dli.mn.gov/WC/IndpCont.asp. The generally accepted test for the Minnesota Workers' Compensation Act as to whether one is an employee or independent contractor is whether the worker is subject to control. Minnesota Rules 5224.0010 – 0312 lists distinguishing criteria for specific occupations. E.g. Minnesota Statute § 181.723 (Minnesota Workers' Compensation Act – Independent Contractors in Construction). Under these criteria, an individual is considered an independent contractor only if he or she:
1.maintains a separate business with the individual's own office, equipment, materials and other facilities;
2.(i) holds or has applied for a federal employer identification number or (ii) has filed business or self-employment income tax returns with the federal Internal Revenue Service if the individual has performed services in the previous year;
3.is operating under contract to perform the specific services for the person for ... [2]

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5.2 **Automobile Insurance.** Consultant shall maintain, at Consultant's own expense, automobile liability insurance to cover any and all risks arising out of the operation of automobiles in Consultant's performance of Consulting Services under this Agreement. Such insurance shall name Company as an additional insured, and shall be in amounts no less than required by law. Consultant shall deliver to Company upon its request a certificate of insurance certifying that such insurance is in force for the Term of this Agreement and may not be canceled without thirty (30) days prior written notice to Company. Consultant agrees to indemnify, hold harmless, defend, and protect Company, its subsidiaries and affiliates, and their successors and assigns, from and against all demands, claims, liability, losses, damages, causes of action, actions, arbitration, judgments, settlements, awards, orders, decrees, interest, costs and expenses (including, but not limited to, expenses of investigation, settlement, litigation and reasonable attorney's fees, including those on appeal), related to or arising out of any claim of Consultant or any third party for injury, death, or property damage related to Consultant's operation of an automobile. The obligations of this Section are continuing and survive the termination or expiration of this Agreement for any reason.

5.3 **General Liability Insurance.** Consultant shall maintain, at Consultant's own expense, commercial general liability insurance in an amount not less than $1,000,000 per event or occurrence that covers all of its activities in performance of the Consulting Services to Company under this Agreement. Consultant shall deliver to Company upon its request a certificate of insurance certifying that such insurance is in force for the Term of this Agreement and may not be canceled without thirty (30) days prior written notice to Company.

5.4 **Errors and Omissions Insurance.** Consultant shall maintain, at Consultant's own expense, errors and omissions insurance in an amount not less than $1,000,000 per event or occurrence that covers all of its activities in performance of the Consulting Services to Company under this Agreement. Consultant shall deliver to Company upon its request a certificate of insurance certifying that such insurance is in force for the Term of this Agreement and may not be canceled without thirty (30) days prior written notice to Company.

ARTICLE VI.
Non-Disclosure of Confidential Information

6.1 **Non-Disclosure of Confidential Information.** Consultant shall not in any manner or form disclose, provide, or otherwise make available, in whole or in part, any Confidential Information to any person or entity, or use any Confidential Information for Consultant's own benefit or for the benefit of any person or entity other than Company, without the prior written consent of Company. Consultant shall take all necessary action to ensure the protection, confidentiality and security of all Confidential Information. Among other things, Consultant shall require all of its employees, agents, contractors, and representatives who may be given access to Company's Confidential Information to sign a non-disclosure agreement in which they agree not to use or disclose Company's Confidential Information except for the benefit of Company.

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6.2 Definition of Confidential Information. For purposes of this Agreement, **"Confidential Information"** shall mean any information, compilation of information, knowledge or know-how that Consultant receives from Company, becomes aware of, learns of, or develops while performing services under this Agreement which is not generally known or readily ascertainable by proper means by persons who are not affiliated with Company. It includes, but is not limited to, information relating to the business affairs of Company, trade secrets, pricing information, sales and marketing information, strategic planning, financing information, compensation information, customer and client information, customer lists, vendor lists, supplier lists, manuals, training materials, research and development, work in progress, engineering and other manufacturing processes, and any other non-public material relating to the business of Company. All information disclosed or accessible to Consultant or generated by Consultant, alone or jointly with others, in connection with Consultant's services under this Agreement shall be presumed to be Confidential Information if Consultant has any reasonable basis to believe that Company considers it confidential. Confidential Information may be written or oral, expressed in electronic media, tangible or intangible, or reside solely in Consultant's memory. Confidential Information does not include information that: (a) has legitimately entered the public domain through a source other than Consultant or Consultant's representatives; (b) becomes or is made available to Consultant by a third party having a lawful right to disclose such information to Consultant who is not known by Consultant to be bound by any covenant of confidentiality or disclosure; (c) is ascertainable, through legitimate means, with reasonable effort, by a person generally knowledgeable of the industry in which Company operates; or (d) must be disclosed by Consultant pursuant to any law, regulation, subpoena, order, inquiry, or judicial or administrative proceeding (provided that Consultant shall provide prompt written notice to Company of any legal obligation to make such disclosure).

6.3 Ownership by Company. Consultant acknowledges and agrees that all data, records, documents, databases, software, electronically stored data or images, digitally stored information, computer files, manuals, drawings, blueprints, schematics, designs, purchase orders, service orders, bids, quotations, contracts, summaries, customer lists, vendor lists, supplier lists, outlines, printouts, work in progress, checklists, business forms, training materials, catalogs, and other documentary evidence or manifestations of Confidential Information provided to Consultant by Company or created by Consultant while rendering Consulting Services under this Agreement, is the sole property of Company. Immediately upon termination of this Agreement or at any other time upon request of Company, Consultant shall immediately return without copying, summarizing, or retaining all materials containing Confidential Information.

6.4 Personally Identifiable Information. Consultant acknowledges that federal, state, and local privacy statutes and regulations protect information including (a) protected health information and medical records; (b) personally identifiable information such as banking and financial records, social security numbers, tax identification numbers, and credit information; and (c) other private information. Should Consultant have access to information implicated by such privacy laws, Consultant shall act in accordance with the requirements of these laws and treat such information as Confidential Information under this Agreement.

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6.5 **Protection of Third Party Information.** Consultant recognizes that Company has received and in the future may receive from customers, suppliers, vendors, and other third parties their confidential or proprietary information subject to a duty on Company's part to maintain the confidentiality of such information and to use it only for certain limited purposes. Consultant agrees that Consultant owes Company and such third parties a duty to hold all such confidential and proprietary information in the strictest confidence and not to use or disclose it (except as necessary in performing duties for Company or such third party consistent with Company's agreement with such third party) without the express written authorization of Company and to treat such information as Confidential Information under this Agreement.

6.6 **Rights of Others.** Company has advised Consultant that it prohibits Consultant from improperly using or disclosing the confidential, proprietary, or trade secrets information of others, including but not limited to, Consultant's former or concurrent clients, vendors, suppliers, or business associates. Consultant hereby agrees not to use or disclose any such materials while rendering services to Company under this Agreement and will not bring onto the premises of Company or save to any computer system or electronic media owned by Company any unpublished documents, confidential or proprietary information, trade secrets, or any other property belonging to third parties without the written permission of the owner of such materials and of an officer of Company.

6.7 **Trade Secrets Act.** Consultant acknowledges that Consultant been requested by Company, and has had an opportunity, to review Chapter 325C of Minnesota Statutes, known as the Minnesota Uniform Trade Secrets Act (the **"UTSA"**), and acknowledges that violation of the UTSA or of Consultant's agreements, covenants, and representations contained in this Agreement may give rise to a cause of action in favor of Company against Consultant for general and special damages, exemplary damages, injunctive relief, and attorney's fees. Consultant acknowledges that the restrictions contained in this Agreement are in addition to Company's rights and remedies under the UTSA and other applicable law.

6.8 **Notice Required by DTSA**. Notwithstanding the non-disclosure obligations contained in this Agreement, pursuant to the Defend Trade Secrets Act of 2016 (**"DTSA"**), 18 U.S.C. Section 1833(b), Consultant will not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made: (a) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney, and solely for the purpose of reporting or investigating a suspected violation of law; or (b) in a complaint or other document filed under seal in a lawsuit or other proceeding.

Comment [A9]: The DTSA, 18 U.S.C. Section 1833(b)(4) defines "employee" as including "any individual performing work as a contractor or consultant for an employer."

6.9 **Third Parties.** By entering into this Agreement, Consultant represents and warrants that: (a) Consultant has disclosed to Company all non-disclosure, non-solicitation, and non-competition agreements to which Consultant is a party; (b) entering into this Agreement and rendering services to Company or its clients will not violate Consultant's obligations under any non-disclosure, non-solicitation, non-competition, or other agreement; and (c) entering into this Agreement and rendering services to Company or its clients will not violate any obligations owed by Consultant to a third party. Consultant shall not accept any Work Order under this Agreement or perform any services for Company or its clients that would render

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Consultant in violation of any obligations owed to former employers or third parties. In Consultant's work for Company, Consultant shall not use or disclose any confidential or proprietary information, including trade secrets, of any former employer or other third party to whom Consultant has an obligation of confidentiality. Rather, Consultant shall use only that information which is generally known and used by persons with training and experience comparable to Consultant's, which is common knowledge in the industry or otherwise in the public domain, or which has been independently developed by Consultant without the use of any third party's confidential or proprietary information or trade secrets.

6.10 **Survival.** The obligations of this Article VI are continuing and will survive the termination or expiration of this Agreement for any reason.

ARTICLE VII.
Assignment of Innovations

7.1 **Assignment of Innovations.** Consultant hereby assigns to Company all of Consultant's right, title, and interest in and to the Innovations made, authored, conceived, or reduced to practice by Consultant either individually or jointly with others, during the course of providing Consulting Services under this Agreement.

7.2 **Works Made for Hire.** Consultant acknowledges that all original works of authorship which are made by Consultant (solely or jointly with others) during the course of providing Consulting Services under this Agreement and which are protectable by copyright are being created at the instance of Company and are "works made for hire," as that term is defined in the United States Copyright Act (17 U.S.C. § 101). If such laws are inapplicable or in the event that such works, or any part thereof, are determined by the Copyright Office or a court of competent jurisdiction not to be works made for hire under the United States copyright laws, Section 7.1 of this Agreement shall operate as Consultant's irrevocable and unconditional assignment to Company of all of Consultant's right, title, and interest (including, without limitation, all rights in and to the copyrights throughout the world, including the right to prepare derivative works and the right to all renewals and extensions) in the works for the copyright term(s).

Comment [A10]: It is especially important to include a work for hire provision with an independent contractor. Materials prepared by an employee in the scope of employment may automatically be considered a work for hire and the property of the employer under federal copyright law. 17 U.S.C. § 101. The statute does not automatically apply to independent contractors, however, so a contract provision addressing the topic is a good idea.

7.3 **Definition of Innovations.** For purposes of this Agreement, **"Innovations"** shall mean any invention, improvement, design, method, process, technique, shop practice, formula, compound, composition, discovery, or idea, whether or not in writing or reduced to practice, and works of authorship, whether or not patentable or copyrightable, including "works made for hire" as that term is defined in the United States Copyright Act (17 U.S.C. § 101), along with all intellectual property and industrial property rights and all other proprietary rights, including, without limitation, patents, patent rights, copyrights, works of authorship, mask work rights, moral rights, trademarks, service marks, trade secrets and all registrations, applications, renewals, extensions and restorations of all of the foregoing which: (a) relate directly to the business of Company; (b) relate to Company's actual or demonstrably anticipated research or development; (c) result from any work performed by Consultant under this Agreement, either

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alone or with others; or (d) are developed or conceived through the use of equipment, supplies, facilities or Confidential Information of Company.

7.4 **Disclosure and Cooperation.** Consultant shall promptly and fully disclose and describe to Company the Innovations, and shall acknowledge and deliver to Company such written instruments and do such other acts as may be necessary in the opinion of Company to preserve Company's property rights to the Innovations against forfeiture, abandonment or loss, and to obtain and maintain letters patents and copyrights to the Innovations, if applicable, and to vest the entire right, title, and interest thereto in Company.

7.5 **Survival.** The obligations of this Article VII are continuing and will survive the termination or expiration of this Agreement for any reason.

ARTICLE VIII.
Restrictive Covenants and Non-Competition

8.1 **Restrictive Covenants.** Except with the prior written consent of Company, Consultant shall not, during the Restricted Period (as defined below), within the geographic areas in which Company or any affiliate or subsidiary of Company, conducts business, in any manner, directly or indirectly, either personally, as a shareholder, member, partner, affiliate, part of a joint venture, independent contractor, agent, servant, employee, representative, or through an employer, firm, organization, or any other entity:

(a) engage in any commercial activity in competition with any part of the Business of Company as conducted during the Term of this Agreement, or with any part of Company's contemplated business with respect to which Consultant has had access to Confidential Information;

(b) solicit, accept solicitation from, contact, or initiate communications with customers or prospective customers of Company or any affiliate or subsidiary of Company, with whom Consultant had direct contact while performing Consulting Services under this Agreement, in connection with the marketing, distribution, promotion, leasing, selling, merchandising, or servicing of a product or service which competes with the business, products, or services of Company or any affiliate or subsidiary of Company;

(c) request, advise, or entice any suppliers or vendors of Company or any affiliate or subsidiary of Company, with whom Consultant had direct contact while performing Consulting Services under this Agreement, to cease doing business or change the manner in which they do business with Company or any affiliate or subsidiary of Company, or to provide services or products to Consultant or a third party which will limit or restrict the ability of such suppliers or vendors to provide such services or products to Company or any affiliate or subsidiary of Company; or

Comment [A11]: The unreported decision in *Schmit Towing, Inc. v. Frovik*, No. A10-362 (Minn. Ct. App. Nov. 9, 2010), 2010 WL 4451572, suggests that not only are non-competes enforceable against independent contractors, the requirements for independent consideration applicable to employees may be more lenient for independent contractors. Use of a non-compete could, however, cut against an ultimate finding that the worker is an independent contractor under certain tests.

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(d) employ, retain the services of, or offer to employ or retain the services of any individual who provided services to Company or any affiliate or subsidiary of Company as of the date of termination (whether as an employee, independent contractor, consultant or otherwise) or within the one (1) year period preceding the termination of this Agreement, or request, advise, or entice any such individual to leave the employment of or association with Company or any affiliate or subsidiary of Company.

8.2 **Definition of Business of Company.** For purposes of this Section, the **"Business of Company"** shall mean _____ as well as all new ventures, commercial activities, products, and services offered by Company or any affiliate or subsidiary of Company, or under development or consideration by Company or any affiliate or subsidiary of Company, at the time of the termination of this Agreement.

8.3 **Definition of Restricted Period.** For purposes of this Section, the **"Restricted Period"** shall commence on the Effective Date of this Agreement and shall continue during the Term of this Agreement and for a period of one (1) year following the termination or expiration of this Agreement, for any reason.

8.4 **Reasonableness.** Consultant acknowledges that the time period and the described scope of this Section are the reasonable and necessary time and scope needed to protect the legitimate business interests of Company and its affiliates.

8.5 **Representations and Warranties.** Consultant represents and warrants that: (a) rendering Services to Company under this Agreement will not violate Consultant's obligations under any non-competition, non-solicitation, non-disclosure, or other agreement; (b) Consultant will be able to perform Consultant's duties under this Agreement in a manner that does not violate any duty of loyalty, fiduciary duty, duty of confidentiality, or contractual obligation owed to any other client, vendor, supplier, or third party; and (d) Consultant will perform Consultant's duties under this Agreement without violating any such obligations.

8.6 **Survival.** The obligations of this Article VIII are continuing and will survive the termination or expiration of this Agreement for any reason.

ARTICLE IX.
Remedies

9.1 **Remedies.** Consultant agrees that all of the provisions contained in Articles VI, VII, and VIII of this Agreement are necessary to protect the legitimate business interests of Company, and to prevent the unauthorized dissemination and use of Confidential Information and Innovations to and by competitors of Company. Consultant also agrees that Company will be irreparably harmed, and that damages alone cannot adequately compensate Company, if Consultant breaches or threatens to breach this Agreement, and that injunctive relief is essential for the protection of Company. Consultant therefore agrees that Company shall have the right, in addition to any other rights and remedies existing in its favor, to enforce its rights

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and the obligations under Articles VI, VII, and VIII of this Agreement not only by an action or actions for damages, but also by an action or actions for specific performance, injunction and/or other equitable relief without posting any bond or security to enforce or prevent any violations, whether anticipatory, continuing or future.

9.2 **Attorney's Fees and Costs.** If Consultant breaches or threatens to breach this Agreement, Company shall be entitled to recover from Consultant, and Consultant agrees to pay, all of Company's reasonable attorney's fees and costs, including court filing fees, witness fees, expert witness fees, and computer forensics consulting fees, incurred in connection with the successful enforcement of this Agreement, and all fees on appeal and in connection with enforcing or collecting any court order, injunction, judgment, or award related to this Agreement. In the event that Company obtains a temporary restraining order and/or temporary injunction against Consultant in connection with the violation of this Agreement, Consultant shall pay such fees, costs, and expenses within twenty (20) days thereafter.

9.3 **Public Policy.** It is the desire and intent of Company and Consultant that the provisions contained in Articles VI, VII, and VIII of this Agreement be enforced to the fullest extent permissible under the laws and public policy applied in each jurisdiction in which enforcement is sought. Accordingly, if, at the time of enforcement of this Agreement, a court shall hold that the duration, scope, or area restrictions stated in Articles VI, VII, and VIII of this Agreement are unreasonable under circumstances then existing, the Parties agree that the maximum duration, scope, or area reasonable under such circumstances shall be substituted.

9.4 **Independent Covenants.** The covenants on the part of Consultant contained in Articles VI, VII, and VIII of this Agreement shall be construed as an agreement independent of any other provisions of this Agreement, and the Parties agree that relief for any claim or cause of action of Consultant against Company, whether predicated on this Agreement or otherwise, shall be measured in damages, and shall not constitute a defense to Company's enforcement of those covenants against Consultant.

9.5 **Non-Waiver.** Failure by Company to declare any breach or exercise any right under Articles VI, VII, or VIII of this Agreement shall not waive the breach, and Company will have the right at any time to declare that breach and take any action permitted by law. Company's waiver of or failure to exercise its rights under this Agreement shall not operate as a waiver of any other violation of such provision or any other provision in this Agreement.

9.6 **Survival.** The obligations of Articles VI, VII, VIII, and IX of this Agreement are continuing and will survive the termination or expiration of this Agreement for any reason.

Article X.
Representations and Warranties

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10.1 **Representations and Warranties.** During the Term of this Agreement, Consultant represents and warrants to Company and its clients that:

(a) Consultant shall provide all Consulting Services under this Agreement using Consultant's best efforts in a professional and workmanlike manner;

(b) Consultant shall exercise Consultant's best judgment and professional expertise in providing the Consulting Services to Company and its clients under this Agreement;

(c) Consultant has the qualifications and ability to perform the Consulting Services in a professional manner, without the advice, control, or supervision of Company;

(d) Consultant has all licenses or other authorizations required to enable it to lawfully perform the Consulting Services under this Agreement;

(e) Consultant will comply with all applicable international, federal, state, and local laws, rules, regulations, ordinances, decrees, and orders relating to its Consulting Services under this Agreement;

(f) Consultant is not subject to any agreement which would prevent Consultant from entering into this Agreement or providing the Consulting Services to Company;

(g) Consultant has no obligations, legal or otherwise, inconsistent with the terms of this Agreement or with Consultant's undertaking this relationship with Company;

(h) Consultant's performance of the Consulting Services under this Agreement do not and will not violate any applicable proprietary or other rights of any third party;

(i) Consultant will not use in the performance of Consultant's obligations under this Agreement any confidential information or trade secrets of any third party;

(j) Consultant has not entered into and will not enter into any agreement (whether oral, written, or implied) in conflict with this Agreement;

(k) The Consulting Services shall confirm strictly and in all respects to the specifications and standards of quality and workmanship set forth in each Work Order and customary in Company's industry;

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(l) Consultant is the owner of, or possesses a lawful license to possess and use, the ideas, know-how, software, and intellectual property utilized by Consultant while rendering Consulting Services under this Agreement;

(m) The Consulting Services shall be original, and that no portion of any resulting work product, its use, or distribution, will violate any patent, copyright, trade secret, or similar proprietary right of any third party; and

(n) Information disclosed by Consultant to Company and its personnel (other than banking, credit, and tax return data) is not confidential and/or proprietary to Consultant or any third party and Company shall have the unrestricted right to use and disclose such information to third parties.

Article XI.
Indemnification

11.1 Indemnification. Consultant shall provide all Consulting Services under this Agreement at its sole risk. Consultant agrees to indemnify, hold harmless, defend, and protect Company and its shareholders, members, owners, officers, managers, directors, governors, employees, agents, representatives, insurers, and their respective successors and assigns (the **"Company Indemnified Parties"**), from and against all demands, claims, liability, losses, damages, deficiencies, fines, penalties, assessments, causes of action, actions, arbitration, audits, inquiries, investigations, administrative relief, judgments, settlements, awards, orders, decrees, injunctive relief, interest, costs and expenses (including, but not limited to, expenses of investigation, settlement, litigation and reasonable attorney's fees, including those on appeal), related to, arising from, arising out of, or resulting from:

(a) the performance of Consulting Services by Consultant under this Agreement;

(b) the conduct and operation of Consultant's business;

(c) any activity, work or things done, permitted or suffered by Consultant or any of its owners, officers, directors, governors, employees, independent contractors, agents, or representatives;

(d) Consultant's breach or non-fulfillment of any representation, warranty, covenant, or obligation under this Agreement, including, but not limited to any third-party claims brought against Company for Consultant's breach of any agreement or duty to such third-party;

(e) Consultant's negligent or more culpable act or omission (including any negligence, recklessness, intentional act, or willful act of any kind);

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(f) claims of infringement of patent, trademark, trade secrets, or other proprietary rights arising from Consultant's activities;

(g) claims by personnel hired, employed, or assigned by Consultant for benefits, compensation, or damages from either Company or its customers or vendors;

(h) any bodily injury or death of any person or damage to real or tangible personal property caused by Consultant's negligent or more culpable act or omission (including any negligence, recklessness, intentional act, or willful act of any kind); and

(i) the payment of any taxes, penalties, fines, and/or interest assessed against Company that would not have been assessed against or payable by Company if Consultant had treated itself as an independent contractor for purposes of federal, state, and local income and employment tax purposes.

11.2 **Notice.** Company agrees to notify Consultant of any written claims or demands made against Company for which Consultant is liable under this Section.

11.3 **Survival.** The obligations of this Section XI are continuing and survive the termination or expiration of this Agreement for any reason.

Article XII.
Termination

12.1 **Methods of Termination.** This Agreement shall remain in full force and effect from the Effective Date until terminated as follows:

(a) at any time upon the mutual written consent of the Parties;

(b) by either Party for convenience without Cause (as defined below) by giving thirty (30) days' prior written notice to the other Party;

(c) by either Party for Cause (defined as the breach of any term of this Agreement by the other Party that has not been cured within ten (10) days after written notice thereof has been given by the non-breaching party to the breaching party) by giving written notice to the other Party;

(d) immediately upon Consultant's death (if Consultant is a natural person);

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(e) by either Party immediately by giving written notice to the other Party following the other Party's dissolution or liquidation, other than in connection with a merger or other corporate reorganization; or

(f) by either Party immediately by giving written notice to the other Party following the other Party's insolvency, assignment for the benefit of its creditors, the filing of a voluntary bankruptcy or reorganization petition, or the failure to vacate an involuntary bankruptcy or reorganization petition filed against such Party.

In the event either Party terminates this Agreement for convenience without Cause, such Party shall pay to the other Party an early termination fee of $_____ (the **"Early Termination Fee"**) within ten (10) days following the date of termination pursuant to Section 12.1(b) above.

12.2 **No Liability for Termination.** The right of termination provided in this Section is absolute and the Party terminating this Agreement in accordance with such Section shall not be liable to the other Party for damages of any kind (other than the Early Termination Fee described in Section 12.1 of this Agreement), including but not limited to, incidental, consequential, special, exemplary, or punitive damages; damages for loss of prospective business or loss of continuing business; lost profits; or damages which otherwise arise due to a termination in accordance with the provisions of this Section. This does not relieve either Party, however, from actual damages caused by its breaches of this Agreement or from any obligations which expressly survive the termination of this Agreement.

ARTICLE XIII.
Miscellaneous

13.1 **Notices.** All notices given under this Agreement shall be in writing, and shall be personally served or sent by registered or certified mail, postage prepaid, return receipt requested. Notices to Company shall be given to Company at its corporate headquarters, which as of the date of this Agreement is: _____, _____, _____, Minnesota _____, Attn: _____. Notices to Consultant shall be addressed to Consultant at Consultant's address as the same appears on the records of Company. Notices to Company or Consultant shall be sent to such other addresses as Company or Consultant shall specify in writing to the other. A copy of any notice to Company also shall be sent to Company's legal counsel, _____, by registered or certified mail, postage prepaid, return receipt requested, and also by e-mail to _____.

13.2 **Entire Agreement.** This Agreement is intended by the Parties as a single, final, complete, and integrated expression of their agreement and understanding with respect to its subject matter and supersedes all prior oral and written agreements, promises, negotiations, commitments, representations, inducements, statements and communications. No oral representation and no prior or contemporaneous oral or written matters extrinsic to this

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Agreement shall have any force or effect as to the provisions of this Agreement. All prior and contemporaneous discussions concerning the subject matter of this Agreement have been merged and integrated into, and are superseded by, this Agreement. Company and Consultant hereby acknowledge that there are no other agreements or understandings of any nature, oral or written, regarding Consultant's employment, apart from this Agreement.

13.3 **Modification by Writing Only.** The terms of this Agreement are contractual and may not be amended, changed, modified, altered, or supplemented, nor may any covenant, representation, warranty, or other provision be waived, except by agreement in writing signed by the Party against whom enforcement of the amendment, change, modification, alteration, supplementation, or waiver is sought.

13.4 **Non-Waiver.** No course of dealing between the Parties will change, waive, modify, vary, or terminate any provision of this Agreement or any rights or obligations of any Party under this Agreement. No delay on the part of any Party in exercising any right under this Agreement shall operate as a waiver of such right. No waiver, express or implied, by any Party of any right or any breach by any other Party shall constitute a waiver of any other right or breach by the breaching Party or any other Party to this Agreement.

13.5 **Severability.** Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision contained in this Agreement, or the application thereof, shall be held illegal, invalid, or unenforceable, this Agreement will be interpreted and enforced as if the illegal, invalid, or unenforceable provision had never been a part of this Agreement and there will be added, as part of this Agreement, a provision as similar in terms to the illegal, invalid, or unenforceable provision as may be possible and still be legal, valid, and enforceable under applicable law. In such event, the remaining provisions of this Agreement will remain in full force and effect.

13.6 **Rules of Construction.** Each Party has participated in the drafting of this Agreement and any uncertainty or ambiguity shall not be interpreted against any one Party.

13.7 **Independent Legal Counsel.** Consultant acknowledges that Consultant has had an adequate opportunity to consult with independent legal counsel of Consultant's own choosing with regard to the terms of this Agreement and has been advised by Company of Consultant's right to seek such consultation before signing this Agreement. Consultant has entered into this Agreement knowingly and voluntarily after receiving such independent legal consultation or notwithstanding the decision not to seek such consultation, as the case may be.

13.8 **Survival; Continuing Obligation.** The Parties agree that, notwithstanding the termination or expiration of this Agreement, the terms of this Agreement which relate to periods, activities, obligations, rights, or remedies of the Parties upon or subsequent to such termination or expiration (including but not limited to, the obligations pursuant to Sections 2.3, 2.4, 5.1, 5.2, 13.9, 13.11, and 13.12, and Articles VI, VII, VIII, IX and XI of this Agreement) shall survive such termination or expiration and shall govern all rights, disputes, claims or causes of action arising out of or in any way related to this Agreement.

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13.9 Additional Undertakings. The Parties agree to execute such other documents and perform such other acts as may be reasonably required by the other Party to this Agreement to effectuate the purpose and intent of this Agreement. The Parties do hereby covenant and agree that they, their heirs, executors, administrators, and permitted successors, and assigns will execute any and all instruments, releases, assignments and consents which may reasonably be required of them in order to carry out the provisions of this Agreement.

13.10 Third Parties. Nothing herein expressed or implied is intended or shall be construed to confer upon or give to any person or entity, other than the Parties to this Agreement, any right or remedies, under or by reason of this Agreement.

13.11 Governing Law; Exclusive Venue. This Agreement shall be construed and enforced in accordance with the laws of the State of Minnesota, without regard to its choice of law principles. By executing this Agreement, the Parties agree and submit to personal jurisdiction in the State of Minnesota for the purposes of any suit or proceeding arising out of or related to this Agreement or its validity, interpretation, construction, performance, breach, enforcement, or remedies, and the Parties agree that any such suit or proceeding shall be venued only in the state or federal courts located in Hennepin County, Minnesota.

13.12 Attorney's Fees and Costs. In the event of any legal proceeding arising out of this Agreement or its validity, interpretation, construction, performance, breach, enforcement, or remedies, the prevailing Party shall be entitled to recover from the non-prevailing Party the prevailing Party's reasonable attorney's fees and costs (include those on appeal and in connection with enforcing any order or judgment related to this Agreement) and the non-prevailing Party shall pay such attorney's fees and costs to the prevailing Party.

13.13 Successors and Assigns. This Agreement shall inure to the benefit of and shall be enforceable by Company and its successors and assigns. In this regard, Consultant agrees that Company may assign its rights and obligations under this Agreement in its sole discretion, including but not limited to: (a) assignment to a parent, subsidiary, operating division, joint venture, or other affiliate of Company; (b) assignment in connection with the sale or transfer of Company's stock, business or assets (whether direct or indirect, by purchase, assignment, exchange, merger, reorganization, consolidation, acquisition of stock, stock exchange plan, or otherwise); and (c) any other assignment elected by Company. In the event of such assignment, all covenants and agreements under this Agreement shall inure to the benefit of, and be enforceable by, such successors and assigns. This Agreement shall be binding upon and inure to the benefit of Consultant and Consultant's successors and assigns; *provided, however,* that any assignment or delegation of Consultant's obligations, duties, or liability under this Agreement shall not relieve Consultant from any such obligations, duties, or liability.

13.14 Counterpart Signatures. This Agreement may be executed in two or more counterparts, each of which will be deemed an original. A facsimile or electronic/digital copy of this Agreement, including its signature pages, will be binding and deemed to be an original.

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IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed and made effective as of the Effective Date, intending to be legally bound by its provisions.

"COMPANY"

[NAME OF COMPANY]

By: _____
[Name of Company Officer]
Its: _____

"CONSULTANT"

By: _____
[Name of Company Officer]
Its: _____

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EXHIBIT A

WORK ORDER

Hiring Party:	
Consultant:	
Assigned Client:	
Scope of Work:	
Deliverables:	
Estimated Start Date:	
Estimated Duration of Project:	
Position:	
Work Location:	
Hourly Rate:	
Non-Competition:	The terms of this Work Order are governed by the non-competition and non-solicitation covenants contained in the Independent Contractor Consulting Agreement between Company and Consultant. Among other things, Consultant cannot solicit or provide services to the client identified in this Work Order during the term of this Work Order and for a period of twelve (12) months following the termination or expiration of this Work Order. By accepting this Work Order, Consultant hereby reaffirms all of Consultant's non-competition and non-solicitation obligations.
Termination:	Company may terminate this Work Order at any time, for any or no reason, in its sole discretion.

The above-named Consultant accepts the terms of this Work Order and acknowledges that this Work Order is subject to the terms and conditions of the Independent Contractor Consulting Agreement between Company and Consultant, which are hereby incorporated by reference. The terms of this Work Order can be accepted by e-mail but the Consultant agrees to sign a hard copy if requested.

ACCEPTED:

Signature: _____

Print Name: _____

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Page 4: [1] Comment [A7] **Author**

There are several tests for whether one is properly considered an independent contractor and not an employee.

According to the Internal Revenue Code (IRC), publication 15-A http://www.irs.gov/pub/irs-pdf/p15a.pdf, the factors and sub-factors are:

1. Behavioral - Does the company control or have the right to control what the worker does and how the worker does his or her job?
    a) Instructions that the business gives to the worker
    b) Training the business gives to the worker

2. Financial - Are the business aspects of the worker's job controlled by the payer? (These include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
    a) The extent to which the worker has unreimbursed business expenses
    b) The extent of the worker's investment
    c) The extent to which to worker makes his or her services available to the relevant market
    d) How the business pays the worker
    e) The extent to which the worker can realize a profit or loss

3. Type of Relationship - Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?
    a) Written contracts describing the relationship the parties intended to create
    b) Whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.
    c) The permanency of the relationship
    d) The extent to which services performed by the worker are a key aspect of the regular business of the company.

Under the Fair Labor Standards Act ("FLSA"), according to the United States Department of Labor (Revised July 2009), http://www.dol.gov/whd/regs/compliance/whdfs13.htm, the factors are:

1. the extent to which the services rendered are an integral part of the principal's business.
2. the permanency of the relationship.
3. the amount of the alleged contractor's investment in facilities and equipment.
4. the nature and degree of control by the principal.
5. the alleged contractor's opportunities for profit and loss.
6. the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. the degree of independent business organization and operation.

Page 4: [2] Comment [A8] **Author**

See Minnesota Workers' Compensation Act, Minn. Rules 5224.0330 – 0340 and Minnesota Rules 5224.0010 – 0312, and Minnesota Department of Labor & Industry http://www.dli.mn.gov/WC/IndpCont.asp. The generally accepted test for the Minnesota Workers' Compensation Act as to whether one is an employee or independent contractor is whether the worker is subject to control. Minnesota Rules 5224.0010 – 0312 lists distinguishing criteria for specific occupations. E.g. Minnesota Statute § 181.723 (Minnesota Workers' Compensation Act – Independent Contractors in Construction). Under these criteria, an individual is considered an independent contractor only if he or she:

1. maintains a separate business with the individual's own office, equipment, materials and other facilities;
2. (i) holds or has applied for a federal employer identification number or (ii) has filed business or self-employment income tax returns with the federal Internal Revenue Service if the individual has performed services in the previous year;
3. is operating under contract to perform the specific services for the person for specific amounts of money and under which the individual controls the means of performing the services;
4. is incurring the main expenses related to the services that the individual is performing for the person under the contract;
5. is responsible for the satisfactory completion of the services that the individual has contracted to perform for the person and is liable for a failure to complete the services;
6. receives compensation from the person for the services performed under the contract on a commission or per-job or competitive bid basis and not on any other basis;
7. may realize a profit or suffer a loss under the contract to perform services for the person;
8. has continuing or recurring business liabilities or obligations; and
9. the success or failure of the individual's business depends on the relationship of business receipts to expenditures.