

## MANUFACTURING AND SUPPLY AGREEMENT

AGREEMENT made as of this \_\_\_\_\_ day of November \_\_\_\_\_, 2008 (the “Effective Date”) by and between \_\_\_\_\_, a Delaware corporation with its principal place of business at \_\_\_\_\_ (“Customer”), and Acme Supply Inc., a Delaware Corporation, with its principal place of business at One Acme Center, Boston, MA (“Supplier”). Supplier and Customer are collectively referred to herein as the “Parties” or “parties”, and individually as a “Party”.

### W I T N E S S E T H

**WHEREAS**, Supplier is an international manufacturer of \_\_\_\_\_ in the United States of America (the “Target Market,” as defined below)

**WHEREAS**, Customer is engaged in the business of designing, engineering and manufacture of products and services in the Target Market and has developed expertise and extensive marketing and distribution systems as an original equipment manufacturer with respect to the Target Market;

**WHEREAS**, Customer sells products to distributors which in turn resell the products to end-users in the Target Market;

**WHEREAS**, Customer currently has own line of Customer specifications by another manufacturer and contain designs owned by Customer; and Customer will utilize Supplier to manufacture to Customer specifications products currently purchased from another manufacturer.

**WHEREAS**, Supplier and Customer have determined they will mutually benefit from a manufacturing and distribution agreement pursuant to which Supplier will manufacture certain of its products exclusively for distribution by Customer to the Target Market in exchange for certain volume commitments set forth on Exhibit A, and Customer will sell Products manufactured by Supplier to its customers in the Target Market;

sold.NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

NOW, THEREFORE, the Parties hereby agree as follows:

#### 1. PRODUCTS AND TERRITORY

1.1 The products covered by this Agreement (the “Products”) shall include those Products set forth on Exhibit A attached hereto. The Supplier agrees to sell the Products to Customer pursuant to the terms of this Agreement.

1.2 “Target Market” shall mean that segment of the marketplace within the Territory as defined in Section 1.3 which is comprised of recognizing that Customer sells to distributors and not to end-users.

1.3 The Parties agree that Customer may market, distribute and sell the Products to: (i) Target Market throughout the world and (ii) with the consent of Supplier, which consent may not be unreasonably withheld, any other entity or person located outside the borders of the United States and its territories and possessions (collectively, the “Territory”).

## 2. TERM OF THE AGREEMENT

The term of the Agreement will come into force upon the satisfaction of the conditions to the obligations of the Parties stated in Section 3 hereof (the “Effective Date”), and, unless sooner terminated as provided in Section 10 hereof, will remain in force indefinitely (the “Term”).

## 3. CONDITIONS TO OBLIGATIONS OF THE PARTIES

3.1 The parties hereby acknowledge that it is in their mutual interest to establish and build a cooperative working relationship, to increase recognition and use of the Products in the Target Market, and to increase the gross sales and market share of the Products. Accordingly, during the term of this Agreement, Customer shall:

(a) Use its best efforts to promote, market and sell the Products in the Target Market, including, but not limited to, the distribution of the Products through Customer’s direct sales force and distribution networks;

(b) Maintain a competent, trained, professional distribution network to adequately service the Target Market, familiarize the appropriate personnel and/or distributors with the Products and provide information to its personnel and distributors regarding the Products;

Maintain a sufficient inventory of the Products at a level permitting prompt filling and shipping against customer/distributor orders;

Investigate or cause its personnel and/or distributors to investigate any claim or complaint relating to any Product which comes to its attention and shall report such claim or complaint and the results of its investigation to Supplier;

Keep Supplier advised during the first twelve months that this Agreement is in effect of marketing and sales information on a regular basis, which shall not be less frequent than quarterly, relating to the Products, including information concerning market potential and trends and information concerning customer uses of Products by providing Supplier written reports regarding the same.

### 3.2

(f) Meet annual mutually-agreed sales goals and growth established by the parties in unit volume and attached hereto as Exhibit B;

### 3.3

3.4 In recognition of the parties' mutual interests stated in Section 3.1 above, during the term of this Agreement, Supplier shall:

- (a) Provide such technical support, services and assistance as may be reasonably appropriate upon Customer's request to enable Customer to effectively market, distribute and sell the Products;
- (b) Provide Customer with at least thirty (30) days prior written notice of any material physical changes in the Products;

#### 4. REPRESENTATIONS AND WARRANTIES

4.1 Representations and Warranties of the Supplier. Supplier, represents and warrants to Customer that the following statements are true and correct as of the date of this Agreement:

(a) Supplier is a corporation duly organized, validly existing, and in good standing under the laws of the jurisdiction of its incorporation.

(b) Supplier has full power and authority (including full corporate power and authority) to execute and deliver this Agreement and to perform its obligations hereunder. Without limiting the generality of the foregoing, Supplier has duly authorized the execution, delivery and performance of this Agreement by Supplier. This Agreement constitutes the valid and legally binding obligation of Supplier, enforceable in accordance with its terms and conditions.

(c) Neither the execution and the delivery of this Agreement, nor the consummation of the transactions contemplated hereby, will (i) violate any constitution, statute, regulation, rule, injunction, judgment, order, decree, ruling, charge, or other restriction of any government, governmental agency, or court to which Supplier is subject or any provision of the charter or bylaws of Supplier or (ii) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify, or cancel, or require any notice under any agreement, contract, lease, license, instrument, or other arrangement to which such Supplier is a party or by which it is bound or to which any of its assets is subject (or result in the imposition of any security interest upon any of its assets). Supplier does not need to give any notice to, make any filing with, or obtain any authorization, consent, or approval of any government or governmental agency in order for the Supplier to consummate the transactions contemplated by this Agreement.

(d) The Supplier has obtained all regulatory approvals that are necessary for manufacturing and marketing of the Products.

(e) The Supplier has obtained all licenses, patents, trademarks or other intellectual property necessary for the manufacturing and marketing of the Products.

4.2 Representations and Warranties of Customer. Customer represents and warrants to the Supplier that the following statements are true and correct as of the date of this

Agreement:

Customer is a corporation duly organized, validly existing, and in good standing under the laws of the jurisdiction of its incorporation.

Customer has full power and authority (including full corporate power and authority) to execute and deliver this Agreement and to perform its obligations hereunder. Without limiting the generality of the foregoing, Customer has duly authorized the execution, delivery and performance of this Agreement by Customer. This Agreement constitutes the valid and legally binding obligation of Customer, enforceable in accordance with its terms and conditions.

(a) Neither the execution and the delivery of this Agreement, nor the consummation of the transactions contemplated hereby, will (i) violate any constitution, statute, regulation, rule, injunction, judgment, order, decree, ruling, charge, or other restriction of any government, governmental agency, or court to which Customer is subject or any provision of the charter or bylaws of Customer or (ii) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify, or cancel, or require any notice under any agreement, contract, lease, license, instrument, or other arrangement to which Customer is a party or by which it is bound or to which any of its assets is subject (or result in the imposition of any security interest upon any of its assets). Customer does not need to give any notice to, make any filing with, or obtain any authorization, consent, or approval of any government or governmental agency in order for Customer to consummate the transactions contemplated by this Agreement.

## 5. PRODUCTION AND SUPPLY OF THE PRODUCT LINE

5.1 Orders. The Products sold to Customer shall be produced by the Supplier on a made to order basis and shall be delivered to Customer in a quantity as set forth in the applicable order.

5.2 Capacity. The Supplier shall maintain manufacturing capacity sufficient to meet Customer's needs on a timely basis. The Supplier also agree to maintain product and design support and to use their best efforts to enhance existing products based on the customer information and market requirements supplied by Customer to Supplier from time to time. Customer shall have reasonable access to Supplier's design/engineer. Such interaction shall be at Supplier's expense.

5.3 New Products. The Parties may, from time to time, desire to enter into new or additional product development or product supply agreements based upon new product ideas submitted by either Party. The terms of those arrangements shall be negotiated in good faith on a product-by-product basis.

5.4 Shipment. The Supplier will ship the Products to Customer at its premises in \_\_\_\_\_, \_\_\_\_\_ or any other location designated by Customer as its primary premises, by a carrier or delivery method specified by the Supplier. The Supplier shall pay all shipment costs.

5.5 Custom Manufactured Orders. From time to time Customer (i) may request custom manufactured Products with unique specifications on such terms and conditions as the parties may mutually agree upon, or (ii) may request shipments in excess of orders provided to Supplier. The terms of any such agreement or request may require that Supplier ship such Products directly to Customer's customers, provided, however, that all such shipments will be made at Customer's cost. If such order involves manufacture under a patent or patent application owned by Customer, Supplier shall be granted a limited, non-exclusive license under such patent or patent application to make such product exclusively for Customer under such order. Customer shall retain all ownership rights to its patents, patent applications and copyrights and to any designs (whether or not copyrighted) based in whole or in part on Customer patents, copyrights or information or developed by Supplier while performing services under this Agreement.

5.6 Packaging and Labels. Products ordered by Customer shall be packaged and labeled by Supplier in accordance with specifications to be provided by Customer. To the extent Customer sells under the Supplier name or mark, Customer is hereby authorized to use Supplier trademarks, service marks, tradenames and copyrighted designs solely in connection with its advertising, promotional materials, packaging for and sale of Products hereunder. Customer will not be required to indicate Supplier's ownership of any such trademarks, service marks, trade names or copyrights in connection with its activities hereunder, except to the extent Supplier indicates in good faith that such marking is required by law to protect Supplier's ownership rights therein. Customer will use such trademarks, service marks and trade names only in a form approved by Supplier. Customer agrees that it will not attempt to register in its own name or otherwise attempt to assert any rights or control over any of Supplier's trademarks, service marks, trade names or copyrights.

#### 5.7 Customer Trademarks and Copyrights.

(a) Products and their labels and packaging under this Agreement may bear, as Customer shall direct, Customer trademarks, corporate logo and copyright notice. Supplier's use of Customer trademarks, corporate logo and designs (whether or not copyrighted) shall be limited to Products and their labels and packaging manufactured or sold to Customer under this Agreement and, upon termination of this Agreement, Supplier shall not use any Customer designs (whether or not copyrighted) or any Customer trademark, corporate logo or any other marks confusingly similar thereto.

(b) Except as expressly provided in Section (a) above, this Agreement in no way creates or conveys a license or permission of any kind for Supplier to use Customer trademarks, corporate logo or copyrights and expressly prohibits the unauthorized use of Customer trademarks, corporate logo or copyrights.

(c) Supplier shall not at any time contest or claim rights in Customer trademarks, corporate logo or designs (whether or not copyrighted), or cause or permit any other person or entity to do anything that may tend to disparage, confuse or lessen the significance of any Customer trademarks or corporate logo or copyrights.

#### 6. RESERVED

## 7. PRICES AND TERMS OF SALE AND LICENSING

7.1 Prices and Terms of Sale. The initial price list at which Supplier will sell Products to Customer is set forth in Exhibit B attached hereto. The prices set forth do not include any sales, use, value added or other taxes which may be applicable to sales of Products to Customer. Such taxes shall be the sole responsibility of Customer and shall be added to Customer's invoice and paid by Customer together with the balance otherwise due thereon. Supplier shall invoice Customer for all Products upon shipment and such invoices shall be payable, net 30 days from date of invoice.

7.2 Changes in Price. After one (1) year from the date Products are sold to Customer, Products shall be subject to change upon mutual agreement of the parties, but in no event shall such change become effective on less than thirty (30) or sixty (60) days prior written notice to Customer, as specified below in this Section 6.2. The parties recognize and agree that a significant portion of Supplier's manufacturing costs for the Products are based on raw materials costs, and the balance thereof are based on operational or other costs. After notice and discussion between the Parties, Supplier may, in its discretion, request that it pass directly to Customer all price increases/decreases that Supplier experiences from time to time in the cost of the raw materials it uses in manufacturing the Products following thirty (30) days prior written notice. Supplier may, in its discretion, pass directly to Customer all price increases/decreases that Supplier experiences from time to time in the cost of operational or other expenses, provided, however, that such price increases/decreases (i) shall not exceed the increase/decrease, if any, in the United States Bureau of Labor Statistics' Consumer Price Index for all urban consumers in the Upper Midwest Region; and (ii) shall be made only once per year following sixty (60) days prior written notice.

7.3 Forecasting and Order Process. The parties agree to meet quarterly to cover relationship issues, prices and manufacturing costs and projected demand for Products to be purchased on a rolling twelve (12) month period. Not later than ninety (90) days prior to the beginning of each calendar year during the Term, Customer shall provide Supplier with a non-binding full-year estimate of Customer's yearly requirements for the Products, including a six (6) month rolling forecast for the Products. The forecast will be updated quarterly, on or before the 15th day of each calendar quarter. Such quarterly forecast shall be delivered in connection with strategic planning meetings between the parties.

7.4 Other Terms and Conditions of Sale. All binding orders of the Products shall be accompanied by purchase orders issued by Customer ("Order"); which purchase orders are to be consistent with the forecasting procedure as described in Section 6.3 above. To the extent that there is any discrepancy between the terms of the Order and the terms of this Agreement, the terms of this Agreement shall govern.

7.5 Specifications. During the Term, the Supplier shall assure that the Products shall conform to each of the following specifications (collectively, the "Specifications") on the date of delivery to Customer:

(a) The Products shall meet the specifications agreed upon by the Parties and shall be manufactured in accordance with the Orders approved by the Parties and as described in Schedule A attached hereto.

(b) The Products shall be manufactured in accordance with all applicable federal, state and local regulatory requirements.

(c) The Products shall be delivered to Customer within 30 days of receipt by Supplier of an Order.

(d) Regulatory Approvals. All regulatory approvals including UL, NSF and FCC approvals in the U.S. and other approvals for Canada and other countries are hereafter referred to as “Regulatory Approvals”. Supplier recognizes that time is of the essence in obtaining such Regulatory Approvals. Customer shall obtain Regulatory Approvals for the Product at the sole cost of Customer, provided Supplier will promptly provide all technical information and data necessary to obtain such approvals for the Product at Supplier’s expense, unless otherwise agreed. In the event UL, NSF and/or FCC require design or specification changes as a condition to approval in the United States, such design or specification changes shall be made by Supplier at its sole cost and expense. In the event future design/specification changes to the Product are proposed by Supplier and accepted by Customer, Supplier shall be responsible for providing Customer with technical information and data necessary to maintain US agency approvals prior to the implementation by Supplier of any such change. Customer also intends to distribute the Product in other countries within the Territory including Canada, and the same process and responsibility allocation will be utilized for other countries in the territory.

7.6 Right to Reject Delivery. Provided that Customer has notified Supplier within ten (10) days of receipt of a particular delivery of Products, Customer may refuse to accept any Products in any Order that does not conform to the Specifications, in which case such Order will not be considered to have been delivered by the Supplier. Customer and Supplier will establish procedures for the containment, accumulation, sorting and return of nonconforming Products. Supplier shall pay the round trip shipping costs for nonconforming Products not accepted by Customer. The Supplier shall, within thirty (30) days after receipt of notice from Customer that Products will not be accepted by Customer, deliver replacement Products to Customer in conformity with all of the Specifications.

## 8. WARRANTIES

### 8.1

Supplier hereby warrants and represents to Customer that each Product sold to Customer shall be manufactured in accordance with all applicable specifications and standards relating to said Product and shall be free from defects in material and workmanship in normal use, service and maintenance for a period of six (6) months from shipping date from Supplier to Customer or its customer. Supplier agrees to replace, without charge, any Product found upon examination by Customer or any of its distributors or customers to not meet such warranties. This is a limited warranty and Supplier makes no other warranties, express or implied, with respect to the

Products. Customer shall not make any representation or recommendation or extend any warranty (whether express or implied) relating to the use, effectiveness or quality of the Products except those warranties expressly described above or otherwise approved in writing by Supplier.

## 8.2

Customer will notify Supplier of any warranty claim. Customer will manage warranty claims including communications/contacts with end-users. For “significant warranty claims”, Customer would expect Supplier to promptly replace defective equipment, as necessary. In the event that new technology is used to any Products, Customer shall own any and all intellectual property rights in such new technology as it relates to the Products.

## 9. TECHNOLOGY

9.1 As the Supplier develop new technology related to the Products, the Supplier shall immediately inform Customer on a confidential basis and the Parties hereby agree to negotiate in good faith to reach mutually acceptable terms, including distribution and pricing terms, relating to the potential marketing and/or use of any such new technology. However, it is understood that the Supplier is not required to disclose to Customer or provide to Customer any opportunity to purchase or market any technology not related to the Products, developed pursuant to a venture involving an independent third party, or if otherwise restricted from doing so under any legal requirement. In the event that any new technology is used for any Products, Customer shall own any and all intellectual property rights for such new technology and Supplier agrees to take any action requested by Customer with respect to perfecting Customer’s intellectual property interest in the new technology at Customer’s sole cost and expense.

## 10. REGULATORY, TRADEMARK, LICENSING AND PATENT MATTERS

10.1 Regulatory Approvals. Supplier represents and warrants that it has obtained all regulatory approvals that are necessary for manufacturing and marketing of the Products and shall use their best efforts to obtain all necessary regulatory approvals for manufacturing and marketing of any additional Products to be developed in connection with this Agreement.

10.2 Patent Infringement. The Supplier shall indemnify, defend, and hold Customer harmless from and against all loss, liability, damages, claims, fines, penalties, demands, actions and proceedings and all costs and expenses connected therewith, including reasonable attorneys’ fees, in connection with infringement of any United States or foreign patent or other intellectual property right based on the manufacture, sale or distribution of the Products, except for claims based on modifications or unapproved promotional claims requested or made by Customer with respect to which Customer agrees to indemnify, defend, and hold Supplier harmless. The Supplier will assume the defense of any suit based on any such claim of infringement brought against Customer. The Supplier shall also indemnify, defend and hold Customer harmless from and against all loss, liability, damages, claims, fines, penalties, demands, actions and proceedings and all costs and expenses connected therewith, including reasonable attorneys’ fees, arising out of issues related to (i) trademark infringement and (ii) patent infringement, brought under any jurisdiction or arising anywhere in the world. The Supplier will assume, at their own expense,

the defense of any suit based on any such claim of infringement brought against Customer. If, as a result of any claim, proceeding or threat thereof with respect to the Products Customer is prevented from sublicensing, manufacturing, processing, selling or otherwise distributing any or all of the Products, the Supplier shall use their best efforts to procure for Customer the right, without materially altering functionality or performance, to continue to sublicense, manufacture, process, sell or otherwise distribute the Products at the Supplier' sole expense. After receipt by Customer of notice of the commencement of any action, Customer will notify Supplier of such action. The provisions of this Section 9.2 shall survive termination or assignment of this Agreement for a period of not more than five (5) years from the earlier of the date of expiration of this Agreement or the Termination Date, as the case may be.

## 11. TERMINATION

This agreement may be terminated as follows:

11.1 Either Party shall have the right to terminate this Agreement (including any pending orders placed by Customer) immediately upon written notice to the other Party in the event Supplier files or has filed against it, any petition in a bankruptcy or similar proceeding or enters into any form of arrangement with its creditors; or demonstrates a financial condition of such a nature that in the terminating Party's reasonable judgment the terminated Party shall not be capable of performing all of its obligations hereunder.

11.2 TheSupplier may only terminate this Agreement immediately if Customer fails to perform any of its material obligations under this Agreement and such nonperformance continues for more than thirty (30) days after written notice is received by Customer. The provisions of this Section 10.2 shall not apply to nonperformance of Customer under Sections 6.1 or 6.2 for any amounts due that are in dispute or for failure to meet volume commitments set forth in Section 3.1 (f).

11.3 Customer may terminate this Agreement in accordance with the following provisions:

11.4 Customer may terminate this Agreement immediately if any representation or warranty of Supplier is materially inaccurate or if Supplier fails to perform any of its obligations under this Agreement through the failure to provide, on a timely basis, the Products in satisfactory form to Customer and such nonperformance continues for a period of sixty (60) days. At Customer's request, Supplier will continue to perform its duties hereunder until Customer enters into an agreement with a substitute supplier. In order to permit transition to a successor supplier during the 180 day termination period, the Manufacturing Instructions will be transferred to Customer if the Agreement is terminated for any reason, including Customer's breach, provided all payment obligations will be satisfied either by payment in full prior to termination or by establishment of a reasonable escrow to secure disputed claims. Supplier will agree to neither transfer nor use the Manufacturing Instructions without Customer's written consent. Customer will not unreasonably withhold consent for any application outside of the Target Market.

11.5 If the sale or distribution of any of the Products is or is reasonably likely to become prohibited by applicable laws, rules or regulations then in effect or soon to be in effect then either the Supplier or Customer may immediately terminate this Agreement at any time.

11.6 Either Party may terminate this Agreement for any other reason with a minimum of six months notice of intent to terminate except as otherwise provided herein.

11.7 In the event (i) Customer unilaterally terminates the agreement without “Good Reason” during the two year period following the effective date of the Agreement or (ii) Supplier terminates the Agreement for “Good Reason” during the same two year period, as consideration for the transfer of Manufacturing Instructions, Customer shall pay Supplier an amount equal to 10% of aggregate equipment purchases by Customer for the twelve month period preceding the date of notice of termination. “Good Reason” includes any material breach of the Agreement as set forth above.

11.8 Effects of Termination. On the date that this Agreement is terminated pursuant to any of the provisions of this Section 10 (the “Termination Date”), the following shall occur:

(a) Customer shall be required to pay to Supplier, within a reasonable time following the Termination Date, any payments due under Section 6.1 incurred as a result of Orders placed prior to the Termination Date. From and after the Termination Date, Customer shall not be required to pay to Supplier any expenses incurred after such Termination Date.

(b) Any and all Products manufactured by the Supplier in response to an Order made by Customer prior to the Termination Date shall be delivered by the Supplier to Customer pursuant to the terms of such Order.

## 12. CONFIDENTIALITY

The Parties acknowledge that each may from time to time disclose to the other Confidential Information. “Confidential Information” is defined as any information disclosed by either Party to the other in documentary or other tangible form in connection with the Agreement, and which is clearly marked at the time of disclosure as being confidential or proprietary. Any information disclosed orally by either Party to the other Party shall be considered Confidential Information, provided the same is reduced to a documentary form, marked “Confidential” or “Proprietary” and transmitted to the other Party within sixty days after the oral disclosure. Throughout the Term and at all times thereafter, each of the Parties shall retain any Confidential Information received from the other Party in strict confidence, shall not disclose any Confidential Information to any third party, and shall not use any Confidential Information for any purpose whatsoever other than to carry out the purposes of this Agreement. The disclosure of Confidential Information by either Party within its own company shall be restricted to only those of its directors, officers, employees and attorneys and other agents who have a need to know and have been advised of the restrictions on disclosure and use pursuant to this Section 11. Notwithstanding any other provisions of this Agreement, the obligations of confidentiality and non-use of each of the Parties under this Section 11 shall not apply, or shall

cease to apply, to any Confidential Information disclosed by either Party to the other Party if such information (i) is or becomes at any time publicly known through no wrongful act of the receiving Party; (ii) is at any time, without breach of the Agreement, rightfully obtained by the receiving party from a third party who is free to pass it on to the receiving Party; (iii) is at any time, without breach of this Agreement, developed by the receiving Party, completely independently of any disclosure by the disclosing Party; (iv) is approved for release by the written authorization of the disclosing Party; (v) is required to be disclosed pursuant to the requirement of a government agency or operation of law after all reasonable legal remedies to maintain confidentiality have been exhausted or the Parties have entered into an appropriate protective order restricting the disclosure of such Confidential Information; or, (vi) was provided to or in the possession of the receiving Party prior to the signing of this agreement (other than information so provided pursuant to the Customer-Supplier Agreement). Upon the termination or assignment of this Agreement for any reason, all Confidential Information in documentary or other tangible form received from the other Party shall be promptly returned by the receiving Party to the other Party together with all copies and notes thereof, and the duties of confidentiality defined herein shall survive the termination or assignment of this Agreement until the expiration of ten (10) years after the date of such termination.

### 13. PRODUCT LIABILITY INSURANCE AND LIMITATION OF LIABILITY

13.1 Products Liability. The Supplier shall be responsible for and shall defend, indemnify and hold harmless, Customer, its dealers and its customers from and against all loss, liability, damages, claims, fines, penalties, demands, actions and proceedings and all costs and expenses connected therewith, including reasonable attorneys' fees, in connection with any third party for bodily injuries and/or property damage related claims arising out of the use or alleged use of Products supplied or manufactured by the Supplier. The Supplier shall not be responsible for any claims arising solely from the alteration or contamination of any of the Products due to the repackaging, mishandling or improper storage of such Products by Customer. The Supplier shall maintain general liability insurance, with products liability coverage, in such amounts and upon such terms as the Supplier deem advisable, but in any event not less than five million dollars (\$5,000,000) in coverage. A certificate of insurance evidencing the coverage required under this Section 12.1 shall be furnished by Supplier to Customer as soon as is practicable following Customer' written request thereof. The provisions of this Section 12.1 shall survive termination or assignment of this Agreement for a period of not more than five (5) years from the earlier of the date of expiration of this Agreement or the Termination Date, as the case may be.

13.2 Limitation of Liability. Customer understands and agrees that the Supplier shall have no liability to Customer for consequential, or incidental damages or expenses in the event that the Supplier are unable to perform under the Agreement by reason of any present or future law, regulation or order of any political subdivision, authority or agency of competent jurisdiction which prevents or restricts the Supplier from manufacturing, selling, distributing, shipping, or otherwise offering any Products contemplated by the Agreement. THE SOLE REMEDY FOR BREACH OF ANY AND ALL WARRANTIES AND THE SOLE REMEDY FOR SUPPLIER'S LIABILITY OF ANY KIND WITH RESPECT TO PRODUCTS PROVIDED HEREUNDER (OTHER

THAN LIABILITY ARISING PURSUANT TO SECTION 12.1 HEREOF) AND ANY OTHER PERFORMANCE BY SUPPLIER UNDER OR PURSUANT TO THIS AGREEMENT SHALL BE LIMITED TO AMOUNTS ACTUALLY PAID BY CUSTOMER TO SUPPLIER UNDER THIS AGREEMENT. CUSTOMER AGREES THAT SUPPLIER SHALL NOT BE LIABLE FOR ANY SPECIAL, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES, OR FOR ANY LOSS OF PROFIT, REVENUE OR DATA BASED UPON SUPPLIER'S NONPERFORMANCE OR BREACH OF ANY OF ITS OBLIGATIONS UNDER THIS AGREEMENT WHETHER BASED IN CONTRACT, TORT, OR OTHERWISE, EVEN IF ANY SUPPLIER SHALL HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH POTENTIAL LOSS OR DAMAGE.

14. NON-COMPETITION.

14.1 Neither the Customer, nor any of their respective subsidiaries or affiliates shall:

(a) distribute, market or manufacture any product for anyone, which is the same as or reasonably similar to any of the Products and which is to be sold in the Territory;

(b) appoint, designate, license or grant rights to any manufacturer, other than Supplier (whether acting as an independent contractor, agent or other representative or in any other capacity), relating to any product which is the same as or reasonably similar to any of the Products and which is to be sold in the Territory;

(c) distribute, market or manufacture, any product which competes, directly with any of the Products and which is to be sold in the Territory; and

If Customer has purchased more than \$2M in product from Supplier in the twelve month period preceding any notice of termination, the provisions of Section 13.1 shall extend for a six month period following the effective date of termination provided the notice is given at least six months prior to the effective date of termination. If Customer has purchased more than \$1M or more in product from Supplier in the 12 month period preceding notice of termination the provisions of Section 13.1 shall extend for one year following the effective date of termination provided the notice is given at least one year prior to the effective date of termination.

15. Neither the Supplier, nor any of their respective subsidiaries or affiliates shall: (i) distribute, market or sell any product, to anyone other than Customer which bears the Dinex(R) Trademark or (ii) appoint, designate, license or grant rights to any distributor, marketer or seller, other than Customer (whether acting as an independent contractor, agent or other representative or in any other capacity), to any product which bears the Dinex(R) Trademark. This Section 13.2 shall survive termination of this Agreement.

16. GENERAL PROVISIONS; MISCELLANEOUS

16.1 Assignment. The rights and obligations of Supplier shall not be assigned in whole or in part (including delegation of duties) without prior written consent of Customer, and any

attempted assignment, delegation, encumbrance or other transfer by Supplier in violation of this Agreement shall be void and of no effect, and shall be a material breach hereof. The rights and obligations of Customer may be freely assigned or sublicensed, in whole or in part, to an affiliate of Customer or in a transfer or sale to an unrelated third party of all or substantially all of the assets or stock of Customer in a bona fide arm's length transaction, provided that such affiliate or third party expressly assumes Customer's obligations to Supplier hereunder. In the event of an assignment, the assignor shall not be a guarantor of the fulfillment of the obligations of the assignee.

16.2 Headings. The headings used in this Agreement are intended for guidance only and shall not be considered part of the written understanding between the Parties hereto.

16.3 Inventions. Customer agrees that any patent, license or technology in existence as of the date hereof ("Prior Invention") used in connection with the performance of this Agreement which are owned or licensed by Supplier, shall be and remain the sole property of Supplier and no license or sublicense shall be deemed to be created by this Agreement nor shall Customer have any right to use, reproduce or incorporate, directly or indirectly, any such patents, licenses or technology provided that Supplier has disclosed such Prior Invention on Exhibit C. However, if, in connection with the performance of this Agreement, Supplier incorporates a Prior Invention into a Product or process required for operation of the Product, Customer is hereby granted and shall have a nonexclusive, royalty-free, irrevocable, perpetual, non-exclusive worldwide license (without rights to sublicense ) to sell such Products which incorporate such Prior Invention.

16.4 Force Majeure. Failure of either party to perform its obligations under this Agreement shall not subject such party to any liability to the other if such failure is caused directly or indirectly by acts such as, but not limited to, acts of God, fire, explosion, flood, drought, war, riot, sabotage, embargo, strikes or other labor trouble, compliance with any order or regulation of any government entity or by any other cause beyond the reasonable control of the parties, whether or not foreseeable.

16.5 Indemnification.

(a) Supplier hereby agrees to indemnify and hold Customer harmless from and against any and all damages, losses, deficiencies, actions, demands, judgments, costs and expenses (including reasonable attorneys' fees) of or against Customer to the extent resulting from (i) the breach of any warranty or the nonfulfillment of any undertaking, warranty, covenant or agreement on the part of Supplier contained herein, (ii) a defect in any of the Products delivered to Customer or its distributors or customers, or (iii) any claim by a third party that the Products infringe the proprietary rights of any third party.

(b) Customer hereby agrees to indemnify and hold Supplier harmless from and against any and all damages, losses, deficiencies, actions, demands, judgments, costs and expenses (including reasonable attorneys' fees) of or against Supplier to the extent resulting from the breach of any warranty or the nonfulfillment of any undertaking, warranty, covenant or agreement on the part of Customer contained herein.

(c) Supplier shall give the other prompt notice of any potential liability, and promptly after receipt by a Party claiming indemnification under this Section 14.5 of notice of the commencement of any action, such indemnified Party shall notify the indemnifying Party of the commencement of the action and generally summarize such action. The indemnifying Party shall have the right to participate in and to assume the defense of such action with counsel of its choosing. An indemnified Party shall not have the right to direct the defense in such an action of an indemnified Party if counsel to such indemnified Party has reasonably concluded that there may be defenses available to it that are different from or additional to those available to the indemnifying Party; provided, however, that in such event, the indemnifying Party shall bear the fees and expenses of separate counsel reasonably satisfactory to the indemnifying Party. The failure to notify an indemnifying Party promptly of the commencement of any such action, if prejudicial to the ability to defend such action, shall correspondingly limit the liability of such indemnifying Party to the indemnified Party under this Section 14.5. No settlement of any claim or action may be made without the consent of the indemnifying Party, which consent shall not be unreasonably withheld or delayed.

#### 16.6 Product Recall.

(a) Any problem with any Product that is of a serious performance, safety or regulatory compliance nature may result is a Product recall and/or retrofit (together, "Recall"). A Product Recall can be initiated at any time by Customer without Supplier's prior consent, however Customer agrees to provide notice to and consult with Supplier relative to the conduct of any such Recall.

(b) In the event Customer is required by a government authority or regulatory agency under applicable law or regulations to conduct a Product Recall which is directly attributable to nonconformance with the Specifications, Supplier will be responsible for all such Recall costs consistent with Supplier's warranty. However, regardless of cause or fault, Supplier will reasonably assist Customer, at Customer's cost except as set forth in the preceding sentence, in any Recall activity.

(c) In the event that Customer reasonably determines that the performance or condition of the Product as received is unsatisfactory so as to reasonably cause Customer concern for material commercial or legal liability, Supplier will, upon notice from Customer, discontinue all shipments of the affected Product for that period of time necessary for Customer and Supplier to resolve the problem.

(d) The foregoing will not relieve Supplier of any obligation to notify Customer of any Product defect or nonconformance, or to effect a Product Recall on its own initiative, to the extent otherwise required under the terms hereof or under applicable law.

16.7 Limitation on Losses. Notwithstanding anything to the contrary contained herein, Supplier shall be liable only for direct and actual damages to the other Party and shall not be liable for any special, consequential (including without limitation lost profits), incidental or punitive damages.

16.8 Entire Agreement. In the event any purchase order, bill of lading, warehouse receipt, or other document contains terms that are inconsistent or conflict with the terms of this Agreement or contains terms in addition to the terms of this Agreement, such inconsistent, conflicting and additional terms shall be of no force or effect and the terms of this Agreement shall in all events take precedence. This Agreement sets forth the entire understanding of the Parties and will not be modified without written consent of both Parties. This Agreement, and all of the rights and obligations of the Parties hereunder, shall be binding upon and will inure to the benefit of and be enforceable by the Parties hereto, their respective successors, legal representatives, heirs and assigns.

16.9 No Waiver. The failure of either Party to terminate this Agreement by reason of the breach of any of its provisions by the other Party, or the failure to exercise any other rights or remedies under this Agreement, will not be construed as a waiver of the rights or remedies available for any subsequent breach of the terms and provisions of this Agreement.

16.10 Dispute Resolution.

(a) Executive Negotiations. To resolve any disputes among the parties, Supplier or Customer must first provide written notice to the other, specifying in as much detail as possible the source or reason for the dispute and the resolution proposed by the notifying party. The receiving party shall respond in writing to any such notice within seven (7) business days after receipt. The receiving party may include in its reply a detailed description of any disputes it would like to resolve and the proposed resolutions. The first notifying party shall respond within seven (7) business days. If the dispute is not then resolved, there shall follow within seven (7) business days of the last written response a meeting between at least one representative of each party. Each party agrees to have present such person or persons who are authorized to fully and finally resolve the dispute. The purpose of this meeting shall be to discuss and negotiate in good faith the complete resolution of any outstanding dispute. The date and time shall be mutually agreed (within the stated period), and the location of the meeting shall be chosen by the party responding to the first notice. Each party shall bear its own costs (including travel expenses) incident to this negotiation and meeting.

(b) Mediation. Should the procedure outlined above not bring about a resolution of the dispute, then within thirty (30) calendar days following the meeting of parties, the party first sending the notice shall initiate a voluntary, nonbinding mediation conducted by a mutually agreed mediator. ***Except as provided herein, no civil action with respect to any dispute, claim or controversy arising out of or relating to this Agreement may be commenced until the matter has been submitted for mediation.*** Should the parties for any reason be unable or unwilling to agree upon a mediator, they shall request JAMS in Boston, Massachusetts, to appoint a capable mediator for them. The parties shall bear equally all cost and expenses (including any attorneys' fees) of this mediation and endeavor in good faith to resolve their differences. While this mediation shall be nonbinding in all respects (except agreements in settlement of the dispute negotiated by the parties), each party agrees that:

(i) it shall appear when directed by the mediator, be fully prepared to work towards a resolution of the dispute, and participate in good faith in the mediation towards a resolution of all disputed issues or concerns;

(ii) the duty to mediate in good faith shall be specifically enforceable by the courts of Delaware or Massachusetts; and

(iii) Either party may seek equitable relief prior to the mediation to preserve the status quo pending the completion of that process. Except for such an action to obtain equitable relief, neither party may commence a civil action with respect to the matters submitted to mediation until after the completion of the initial mediation session, or 45 days after the date of filing the written request for mediation, whichever occurs first. Mediation may continue after the commencement of a civil action, if the parties so desire.

should a court in litigation stemming from the same general dispute or disagreement among the parties determine that either did not participate in good faith in the mediation process hereunder, the court shall impose against such party a sanction equal to the other party's attorneys' fees in the resulting litigation, up to \$100,000.

(c) Litigation. In the event that the parties are unable to resolve any outstanding disagreement or dispute as provided above, then, as a last resort, either party may commence litigation; provided, however, that it must do so in the courts (state or federal, provided the court selected has subject matter jurisdiction) of the state in which the other Party has its principal executive office (any litigation commenced against Supplier must be brought in Delaware; and litigation against Customer must be brought in Connecticut).

(d) Jury Trial Waiver. EACH PARTY IRREVOCABLY WAIVES ANY RIGHT TO A JURY TRIAL WITH RESPECT TO ANY CLAIMS OR DISPUTES ARISING OUT OF THIS AGREEMENT.

16.11 Governing Law. This Agreement shall be governed by and construed under the substantive laws of the Commonwealth of Massachusetts, conflicts of law excluded.

16.12 Notices. All notices, requests, consents, waivers, elections and other communications between the Parties hereunder shall be in writing and shall be delivered by hand, transmitted by facsimile with electronic confirmation, shipped by overnight courier service with receipt requested, or mailed by certified mail, return receipt requested, to the Party to be notified to the address first noted above unless and until notice of another or different address shall be given as provided herein. All such notices, requests, consents, waivers, elections and other communications shall be effective upon delivery and receipt as aforesaid.

16.13 Severability. The provisions of this Agreement are severable, and the invalidity of any provision shall not affect the validity of any other provision.

16.14 Captions. The captions herein have been inserted solely for convenience of reference

and in no way define, limit or describe the scope or substance of any provision of this Agreement.

16.15 Remedies. No right or remedy conferred or reserved by this Agreement shall be exclusive of any other right or remedy herein or provided by law or in equity.

16.16 Incorporation by Reference. All schedules and exhibits to this Agreement are incorporated into this Agreement as if and as though set forth entirely herein.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement,  
effective as of the date first above written.

WILELY COYOTE HOLDINGS, INC.

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

ACME SUPPLY

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

## **Exhibit A**

### **Products**

**Exhibit B**

**Pricing and Volume Commitments**

## **Exhibit C**

### **Prior Inventions**