



## CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

This **CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT** (“Agreement”) is made this day of \_\_\_\_\_ by and between \_\_\_\_\_, a Corporation, with its principal place of business located at (“\_\_\_\_\_”), and **AMERICAN POWER SYSTEMS, INC.**, an Iowa corporation, with its principal place of business located at 426 W. 2<sup>nd</sup> Street, Davenport, Iowa 52801 (“APS”). (\_\_\_\_\_ and APS are each a “Party” and collectively the “Parties.”).

**1. Purpose.** The Parties wish to collaborate for the sole purpose of

(the “Purpose”), and the Parties expect to disclose to one another Confidential Information as defined in Section 2 below. The Parties acknowledge that each of them are relying on this Agreement before granting access to any Confidential Information.

**2 Confidential Information Defined.** As used in this Agreement and, except as set forth in Section 3 below, the term “Confidential Information” means and includes all information disclosed by one Party (“Disclosing Party”) to the other Party or Parties (“Receiving Party”) that, at the time of initial disclosure to the Receiving Party, (a) is clearly and conspicuously marked, labeled or specifically designated in writing as “confidential” or “proprietary”; (b) is orally identified as confidential or proprietary; or (c) qualifies as confidential or proprietary information because it is information in any form whatsoever relating to the Disclosing Party’s or to any affiliate or subsidiary of the Disclosing Party’s (i) financial information, including, but not limited to, financial statements, business plans, projections, data and accounting systems; (ii) product specifications and designs, models or builds, manufacturing processes, methods and know-how, production machinery, production schedules, quality assurance methods, new product development technology, prices, tariffs, trade secrets and secret procedures; (iii) sales, marketing and customer information, including, but not limited to, sales projections, business procedures and plans, the identity and lists of customers and the Disclosing Party’s, methods of marketing and promotion, advertising, marketing plans and proposals, operations, work product, names of, or agreements with, any of the Disclosing Party’s customers, or improvements in any of the foregoing; (iv) computer software, including, but not limited to, source and object codes, flowcharts, algorithms, record layouts, routines, report formats, data compilers, assemblers, design concepts, and related documentation, manuals, and other materials; or (v) discoveries, inventions, copyrights, concepts and ideas, whether patentable or not, and including without limitation the nature and result of research, development, manufacturing, marketing, planning, and other business activities.

Failure to mark, label or specifically designate information as “Confidential Information” at the time of initial disclosure to the Receiving Party shall not affect its status as Confidential Information.

**3. Exceptions to Confidential Information.** The definition of Confidential Information set forth in Section 2 above does not include any information, which (i) was publicly available at the time of disclosure; (ii) became publicly available through no act or failure to act on the part of the Receiving Party; (iii) was already in the Receiving Party’s rightful possession prior to disclosure, as evidenced by the Receiving Party’s written record; (iv) was disclosed to the Receiving Party by

a third party having no duty of confidentiality to the Disclosing Party or any other third party; or (v) is independently developed without using the Disclosing Party's Confidential Information.

**4. Ownership of Data and Information.** Unless otherwise agreed to in writing, the Receiving Party agrees that the Disclosing Party shall retain all ownership rights, title and interest in any specifications, blueprints, designs, documentary technical know-how, instructions, customer data, and all market data and analysis and any other Confidential Information provided by the Disclosing Party to the Receiving Party. No license under any trademark, patent or copyright, or application for same which are now or hereafter may be obtained by the Disclosing Party is either granted or implied by the disclosure of Confidential Information.

**5. Non-Disclosure and Non-Use.** The Receiving Party hereby agrees that at all times, it shall (i) maintain the confidential nature of any and all Confidential Information disclosed to it pursuant this Agreement including the existence of this Agreement; (ii) use such Confidential Information solely to accomplish the Purpose set forth in Section 1 hereto; (iii) use reasonable efforts and diligence to safeguard such Confidential Information and to protect it against disclosure, misuse, espionage, loss and theft; (iv) use at least the same degree of care, but no less than a reasonable degree of care, to safeguard and protect from disclosure such Confidential Information as it uses with its own confidential and proprietary information that it does not wish to disclose; (v) not disclose to others, or permit any person or entity under its control to use or disclose to others, such Confidential Information, except as expressly permitted by this Agreement, or as may otherwise be expressly authorized by the Disclosing Party in writing; and (vi) provide immediate written notice to the Disclosing Party in the event it discovers a loss or unauthorized disclosure of such Confidential Information.

**6. Permitted Disclosure.** The Receiving Party may disclose the Confidential Information (i) to only those of its employees, agents or representatives who require access to such Confidential Information to accomplish the Purpose contemplated herein, but only if such employees, agents or representatives agree to treat the Confidential Information in accordance with this Agreement; and (ii) if disclosure is required by the Receiving Party pursuant to a law, judicial order or governmental directive, in which event the Receiving Party shall provide the Disclosing Party with prompt written notice of any such required disclosure prior to disclosing the Confidential Information, and the Receiving Party shall take reasonable steps to maintain the confidentiality of the Confidential Information.

**7. Return of Confidential Information.** The Receiving Party agrees that at the completion of the purpose contemplated herein, or within five (5) days of a request by the Disclosing Party, the Receiving Party shall (i) at the Disclosing Party's direction, promptly return to the Disclosing Party, or destroy as specified by the Disclosing Party, all documents, disks or other material embodying the Confidential Information then in its possession, or under its control; (ii) certify its return or destruction of the Confidential Information, as the case may be, upon demand by the Disclosing Party; and (iii) not retain any copies or records of the Confidential Information except for a file to be retained by the Receiving Party's legal counsel. The return or authorized destruction of the Confidential Information pursuant to this Section, or as a result of any termination of this Agreement, shall have no effect on the obligations imposed on the parties with respect to the protection and non-disclosure of the Confidential Information for the full period of time required under Section 8 hereof.

**8. Survival.** All of the provisions set forth in this Agreement are continuing terms and shall survive the return or authorized destruction of the Confidential Information pursuant to Section 7 hereof, any other termination of this Agreement, and the termination date of any subsequent agreement relating to the Confidential Information that the parties may choose to enter into. The obligation to treat Confidential Information in accordance with this Agreement will expire three (3) years from the date of initial disclosure to the Receiving Party.

**9. Rights and Relationships.** The Parties agree that nothing in this Agreement shall be construed as (i) creating a right or obligation for or on a Party to purchase or sell specific goods or services or the transfer or license of technology to or from another Party; (ii) creating any form of joint venture, partnership, agency, licensor-licensee relationship or any other type of business association between the Parties; or (iii) granting or conferring any rights or license of any kind whatsoever in or to the Confidential Information disclosed under this Agreement.

**10. No Conflict.** Each of the Parties represents and warrants that it is under no obligation or restriction, nor will it assume any such obligation or restriction that does or would in any way interfere or conflict with, or that does or would present a conflict of interest concerning, the confidentiality obligations imposed under this Agreement with respect to the Confidential Information of the Disclosing Party.

**11. Irreparable Injury.** The Parties acknowledge and agree that if the Receiving Party breaches this Agreement, then the Disclosing Party will suffer irreparable injury. The Parties agree that such irreparable injury suffered by the Disclosing Party as a result of the Receiving Party's breach cannot be compensated by money alone, and agree that a court order enjoining the Receiving Party from continuing to breach this Agreement is proper and warranted.

**12. Mutual Disclaimers.** No other existing agreement between or among the Parties is modified or terminated by this Agreement. No Party confers the right to another Party, nor confers any authorization to another Party, to act as an agent on its behalf for any purpose. Nothing in this Agreement shall be construed to prohibit a Party from independently pursuing similar opportunities, or acquiring or receiving products, information, concepts or techniques similar to or competing with products, information, concepts, systems or techniques embodied in the Confidential Information, provided that the obligations of this Agreement are not breached.

**13. No Assignment.** No Party may, without the prior written consent of the other Parties, assign or transfer this Agreement or any obligation incurred hereunder, except by merger, reorganization, consolidation, or sale of all or substantially all of such Party's assets. Any attempt to do so in contravention of this Section shall be void and of no force and effect.

**13. Authority to Sign.** Each Party represents, warrants and covenants that it has full and complete authority and authorization to execute and effect this Agreement and to take or cause to be taken all acts contemplated by this Agreement and that the person signing this Agreement on behalf of such Party has the full power and authority to bind such Party to the terms of this Agreement.

**14. Construction.** This Agreement has been carefully read, the contents hereof are known and understood and it is freely signed by the Parties hereto. This Agreement shall not be construed against the Party responsible for drafting any section alleged to be ambiguous or uncertain.

**15. Entire Agreement.** This Agreement constitutes the entire agreement between the Parties with respect to its subject matter. It supersedes any prior agreement or understanding between the Parties with respect to the subject matter. This Agreement and the confidentiality obligations imposed hereunder may not be modified or amended except by a writing executed by the duly authorized representatives of the Parties.

**16. Governing Law.** This Agreement and the rights of the Parties hereunder shall be governed by and interpreted in accordance with the laws of the State of New York, without giving effect to the principles of conflicts of laws. The parties submit and consent to the exclusive jurisdiction of the federal or state courts of New York for any claim or action arising from or relating to this Agreement.

The Parties, intending to be legally bound, have caused this Agreement to be executed as of the date first written above.

**CUSTOMER NAME**

Signature:

Name:

Title:

**AMERICAN POWER SYSTEMS, INC.**

Signature:

Name:

Title: