

**UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

In re:	)	Chapter 11
	)	
HI-CRUSH, INC., <i>et al.</i> , <sup>1</sup>	)	CASE NO: <b>20-33495 (DRJ)</b>
	)	
DEBTORS.	)	(Jointly Administered)
	)	

**LIMITED OBJECTION OF BOWLIN ENTERPRISES, LLC AND ENDECO  
ENGINEERS, INC TO CONFIRMATION OF DEBTORS' JOINT PLAN OF  
REORGANIZATION AND RESERVATION OF RIGHTS [D.E. 289]**

TO THE HONORABLE UNITED STATES BANKRUPTCY COURT:

Bowlin Enterprises, LLC and Endeco Engineers, Inc lodge this limited objection to confirmation of the Joint Plan of Reorganization (the "Plan") filed by Debtor Hi-Crush, Inc and its affiliate debtors ("Debtors"), and in support thereof would show as follows:

1. On or about January 23, 2020, Bowlin Enterprises, LLC ("Bowlin") and Endeco Engineers, Inc. ("Endeco") entered into a License Agreement (the "Agreement") with Debtor Hi-Crush, Inc ("Hi-Crush") wherein Bowlin, as "Licensor," granted Hi-Crush an exclusive license to use Licensor's Proprietary Technology, including, but not limited to Licensed Patent(s), Licensed Know-How, and Licensed Products (as all of those terms are defined in the Agreement), to construct and operate portable or mobile sand drying plants (the "Plant(s)") for use in the petroleum industry. Endeco was to provide (and has provided) engineering services

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<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Hi-Crush Inc. (0530), OnCore Processing LLC (9403), Hi-Crush Augusta LLC (0668), Hi-Crush Whitehall LLC (5562), PDQ Properties LLC (9169), Hi-Crush Wyeville Operating LLC (5797), D & I Silica, LLC (9957), Hi-Crush Blair LLC (7094), Hi-Crush LMS LLC, Hi-Crush Investments Inc. (6547), Hi-Crush Permian Sand LLC, Hi-Crush Proppants LLC (0770), Hi-Crush PODS LLC, Hi-Crush Canada Inc. (9195), Hi-Crush Holdings LLC, Hi-Crush Services LLC (6206), BulkTracer Holdings LLC (4085), Pronghorn Logistics Holdings, LLC (5223), FB Industries USA Inc. (8208), PropDispatch LLC, Pronghorn Logistics, LLC (4547), and FB Logistics, LLC (8641). The Debtors' address is 1330 Post Oak Blvd, Suite 600, Houston, Texas 77056.



pursuant to the Agreement but is not a licensor of the Proprietary Technology referenced above. A true and correct copy of the Agreement is attached hereto as Exhibit “A.”

2. The Agreement provided that Hi-Crush pay a minimum royalty of \$3 million for the transfer and use of Licensor’s Proprietary Technology. One Plant has been completed and Hi-Crush made a royalty payment of \$1.0 million on completion. In addition, Hi-Crush has completed approximately one-half of the Plant and has made additional royalty payments of \$550,000.00 pursuant to the payment schedule. On information and belief, it appears that Hi-Crush may be arranging for the construction of a third Plant ostensibly using Licensor’s Proprietary Technology after the Effective Date of the Plan and the proposed effective rejection of the Agreement.

3. The Agreement is an executory contract within the meaning of 11 U.S.C. § 365 because performance remains due to some extent on both sides and the failure of either Bowlin/Endeco or the Debtor to perform would constitute a material breach of contract. *In re Provider Meds, L.L.C.*, 907 F.3d 845, 851 (5th Cir. 2018), *cert. denied sub nom. RPD Holdings, L.L.C. v. Tech Pharmacy Servs.*, 139 S. Ct. 1347, 203 L. Ed. 2d 570 (2019).

4. On September 4, 2020, Bowlin and Endeco received an Assumption Notice (D.E. 344) showing that no cure amounts were owed under the Agreement. At that time, Bowlin and Endeco agreed with that assessment and believed that the Agreement would be assumed. However late Friday night, September 11, 2020, Debtors issued a Plan Supplement which included the Agreement among those that Debtors planned to reject.<sup>2</sup> The Debtor concedes that

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<sup>2</sup> The non-debtor counterparty shown on the rejection notice was Endeco. However, it is clear from the context of the rejection notice that the Agreement in which both Endeco and Bowlin were non-debtor counterparties was the agreement that was being rejected.

the Agreement is an executory contract. See Schedule G of Hi-Crush, Inc. Plan Supplement (D.E. 365 at 238-240).

5. Upon approval of the Court, a rejection of the Agreement would constitute a breach allowing the counterparty to file a claim for monetary damages. See, 11 U.S.C. §§ 365(g), 502(b), 503(b) and 507(a). It does not result in the automatic termination of the contract or deprive the counterparty of its non-monetary rights or remedies. See *In re Austin Dev. Co.*, 19 F.3d 1077, 1082 (5th Cir. 1994) (rejection means “only that a breach has been deemed to occur.”). The United States Supreme Court recently reiterated this principle in the context of a trademark license when it held that the rejection of a license gives rise to a breach, and not a rescission, entitling the non-debtor counterparty to utilize its contractual and other remedies outside the bankruptcy, including its choice to terminate the agreement and/or insist on certain duties from the debtor consistent with the breach. In other words, the breach does not prevent the nonbreaching counterparty from doing what the license agreement allows. *Mission Product Holding, Inc. v. Tempnology, LLC*, \_\_\_U.S. \_\_\_, 139 S. Ct. 1652, 1162-1663 (2019),

6. While Bowlin and Endeco plan to file a proof of claim for monetary damages under the Agreement, there are other portions of the Agreement that are not susceptible to immediate monetary quantification and others which delineate the duties of the parties in the event of a default and/or termination of the Agreement as a result of a default. Among these duties are the requirement that certain information be kept confidential and duties to return certain documents and information. These, among others, survive termination of the Agreement (see Section 17.4 of the Agreement)

7. Upon a breach, Bowlin and Endeco retain the right to terminate the Agreement themselves including Hi-Crush’s exclusive right to use the Licensor’s Proprietary Technology.

They also have the right to enforce certain duties incumbent upon Hi-Crush such as the immediate cessation by Hi-Crush (and its affiliates) of all activities concerning, including all practice and use of, the Licensed Patents and Licensed Know-How (except as otherwise provided in the Agreement); cessation by Hi-Crush of Plant construction (subject to a “Sell-Off Period” of construction in progress as defined in the Agreement<sup>3</sup>); and the return or destruction by Hi-Crush of all documents and tangible materials (and any copies) containing, reflecting, incorporating or based on Bowlin’s Confidential Information (except for certain activities specifically allowed under the Agreement); and certification in writing to Bowlin that Hi-Crush has complied with these and other requirements.

8. As pointed out above, Hi-Crush (presumably as reorganized debtor) may be attempting to start of third Plant which would necessarily involve the use of Licensor’s Proprietary Technology notwithstanding the probable termination of the Agreement by Bowlin and Endeco as a remedy after the effective date of the rejection. If this is the case, Bowlin and Endeco may be entitled to monetary damages and/or non-monetary relief for the improper use of Licensor’s Proprietary Technology which may have begun prior to confirmation and continued afterward.

9. Section X of the Plan contains broad release, discharge and injunction provisions which would deny Bowlin and Endeco their ability to enforce their intellectual property rights, confidentiality provisions, and non-monetary default remedies under the Agreement. These provisions would put Bowlin and Endeco in an untenable position of having no remedies against any mischief perpetrated by Hi-Crush, its employees, agents and representatives. These releases

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<sup>3</sup> The Sell-Off Period is a thirty (30) business-days period after the termination of the Agreement in which Hi-Crush was provided the right to complete the manufacture of all Licensed Products provided that Hi-Crush acted in accordance with the applicable terms of the Agreement, including payment of royalties and reporting obligations. Given the proposed rejection of the Agreement, Hi-Crush may not be allowed to complete such construction.

(including third-party releases), discharge provisions and injunctions would completely strip away the ability of Bowlin and Endeco to terminate the Agreement in the fashion agreed upon by the parties after a default and to protect the other rights afforded to them by the Agreement. These provisions fly in the face of the aforementioned authority regarding the rights of counterparties to rejected contracts.

10. Because of the timing and nature of the proposed rejection, neither Bowlin or Endeco received a ballot, nor do they appear to be eligible to cast a vote against the Plan or opt out of any third-party release provisions through a ballot. **Nevertheless, Bowlin and Endeco object to the broad releases, as depriving them of their contractual rights to enforce the Agreement and to seek appropriate relief in the face of the expected rejection of the Agreement; and exercise their right to opt out of Third-Party Releases contained in Article X.B.2 of the Plan.**

11. In order to remedy this overreaching, Bowlin and Endeco request that provisions be included in the confirmation order exempting them from the effect of the releases, discharges and injunction provisions of the Plan so that they may exercise their rights to properly terminate the Agreement and to enforce their non-monetary remedies against Debtors, Reorganized Debtors, and present and former agents, employees and representatives of Debtors; and so that they may rely on the requirements of the Agreement (and applicable non-bankruptcy law) that survive termination including those dealing with any misuse of Licensor's Proprietary Technology.

12. In addition, Bowlin and Endeco request provisions in the confirmation order allowing them to seek monetary damages and other relief against the Reorganized Debtors if it is discovered that the Debtors or the Reorganized Debtors are violating the provisions of the

Agreement by using Licensor's Proprietary Technology to build Plants notwithstanding the rejection of the Agreement.

13. Bowlin and Endeco reserve all rights under the Agreement as well as all rights and remedies accorded to them under State and Federal statutory and common law.

Wherefore, Bowlin Enterprises, LLC and Endeco Engineers, Inc. request that their objections to the Plan be sustained and that they receive the relief requested herein as well as such further relief to which they may be entitled under law and equity,

Respectfully submitted,

KESSLER & COLLINS  
A Professional Corporation

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*ATTORNEYS FOR CREDITORS AND  
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ENGINEERING, INC AND BOWLIN  
ENTERPRISES, LLC*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on September 18, 2020, a true and correct copy of the foregoing Limited Objection and Reservation of Rights was served by electronic submission through the Court's automated Case management and Electronic Docketing System for the U.S. Bankruptcy Court of the Southern District of Texas, Houston Division on all parties who have entered an appearance through that system and upon the parties appearing on the attached service list.

/s/ Howard C. Rubin

Howard C. Rubin

## SERVICE LIST

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## **EXHIBIT A**

**EXHIBIT A**

## LICENSE AGREEMENT

This License Agreement ("**Agreement**"), dated as of January 23, 2020 (the "**Effective Date**"), is by and among BOWLIN ENTERPRISES, LLC, a Louisiana limited liability company, represented herein by its duly authorized Manager, Jon M. Bowlin, with offices located at 9475 Linwood Avenue, Shreveport, Louisiana 71106 ("**Licensor**"), ENDECO ENGINEERS, INC., a Louisiana corporation, represented herein by its duly authorized President, Jon M. Bowlin, with offices located at 9475 Linwood Avenue, Shreveport, Louisiana 71106 ("**Endeco**"), and HI-CRUSH, INC., a Delaware corporation, represented herein by its duly authorized Chief Executive Officer, Robert Rasmus, with offices located at 1330 Post Oak Boulevard, Suite 600, Houston, Texas 77056 ("**Licensee**") (collectively, the "**Parties**," or each, individually, a "**Party**").

WHEREAS, Licensor owns the entire right, title, and interest in, and has the right to license to Licensee, Licensor's Proprietary Technology (as defined below);

WHEREAS, Licensee wishes to utilize Licensor's Proprietary Technology to make Plants (as defined below) to be used in the Field of Use (as defined below) in the Territory (as defined below), and Licensor is willing to grant to Licensee a license to utilize Licensor's Proprietary Technology for the aforementioned purposes on the terms and conditions set out in this Agreement; and

WHEREAS, Endeco is an Affiliate of Licensor, and is in the business of professional engineering, design and facility planning services, which shall be provided to Licensee as set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants, terms, and conditions set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Definitions.** For purposes of this Agreement, the following terms have the following meanings:

"**Affiliate**" of a Person means any other Person that, at any time during the Term, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. The term "control" for purposes of this Agreement means the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise, or, the direct or indirect ownership of more than fifty percent (50.00%) of the voting securities of a Person, and "controlled by" and "under common control with" have correlative meanings.

"**Agreement**" has the meaning set forth in the preamble.

"**Auditor**" has the meaning set forth in Section 8.2(a).

"**Business Day**" means a day other than a Saturday, Sunday, or other day on which commercial banks in Shreveport, Louisiana are authorized or required by Law to be closed for business.

**“Confidential Information”** means all non-public, confidential, or proprietary information of Licensor or its Affiliates, whether in oral, written, electronic, or other form or media, whether or not such information is marked, designated, or otherwise identified as “confidential” and includes any information that, due to the nature of its subject matter or circumstances surrounding its disclosure, would reasonably be understood to be confidential or proprietary, including, specifically: (a) the Licensed Know-How; (b) Licensor's other unpatented inventions, ideas, methods, discoveries, know-how, trade secrets, unpublished patent applications, invention disclosures, invention summaries, and other confidential intellectual property; and (c) all notes, analyses, compilations, reports, forecasts, studies, samples, data, statistics, summaries, interpretations, and other materials prepared by or for Licensee or its Affiliates that contain, are based on, or otherwise reflect or are derived from any of the foregoing in whole or in part. Confidential Information does not include information that Licensee can demonstrate by documentation: (w) was already known to Licensee or its Affiliates without restriction on use or disclosure prior to the Effective Date; (x) was or becomes generally known by the public other than by breach of this Agreement by, or other wrongful act of, Licensee or its Affiliates; or (y) was received by Licensee or its Affiliates from a third party who was not, at the time, under any obligation to Licensor or any other Person to maintain the confidentiality of such information.

**“Competitor”** has the meaning set forth in Section 18.9.

**“Effective Date”** has the meaning set forth in the preamble.

**“Field of Use”** means the fields listed in Schedule 1.

**“First Extended Term”** has the meaning set forth in Section 17.1.

**“Governmental Authority”** means any federal, state, national, supranational, local, or other government, whether domestic or foreign, including any subdivision, department, agency, instrumentality, authority (including any regulatory authority), commission, board, or bureau thereof, or any court, tribunal, or arbitrator.

**“Improvement”** means any modification of or improvement or enhancement to any of Licensor's Proprietary Technology.

**“Initial Term”** has the meaning set forth in Section 17.1.

**“Law”** means any statute, law, ordinance, regulation, rule, code, order, constitution, treaty, common law, judgment, decree, other requirement or rule of law of any federal, state, local, or foreign government or political subdivision thereof, or any arbitrator, court, or tribunal of competent jurisdiction.

**“Licensed Know-How”** means any and all confidential, non-public technical information, trade secrets, formulas, prototypes, specifications, directions, instructions, test protocols, procedures, results, studies, analyses, raw material sources, data, manufacturing data, formulation or production technology, conceptions, ideas, innovations, discoveries, inventions, processes, methods, materials, machines, devices, formulae, equipment, enhancements, modifications, technological developments, techniques, systems, tools,



designs, drawings, plans, software, documentation, data, programs, and other knowledge, information, skills, and materials owned or controlled by Licensor solely pertaining to the Licensed Patents and necessary in the manufacture, sale, or use of the Licensed Products.

**"Licensed Patent(s)"** means the patents and/or patent applications listed in Schedule 2 together with all patents that issue therefrom, and all patents and patent applications worldwide that directly or indirectly claim priority thereto, and all continuations, continuations-in-part, divisionals, extensions, substitutions, reissues, re-examinations, and renewals of any of the foregoing.

**"Licensed Patent Challenge"** has the meaning set forth in Section 10.

**"Licensed Product(s)"** a Plant.

**"Licensee"** has the meaning set forth in the preamble, but shall also include such entity's Affiliates.

**"Licensee Action"** has the meaning set forth in Section 16.1.

**"Licensor"** has the meaning set forth in the preamble.

**"Licensor Action"** has the meaning set forth in Section 16.2.

**"Licensor's Proprietary Technology"** means, collectively, the Licensed Know-How, Licensed Patent(s), and the Licensed Products.

**"Losses"** means all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including reasonable attorneys' fees and the cost of enforcing any right to indemnification hereunder, and the cost of pursuing any insurance providers.

**"Manufacturer"** means a third-party manufacturer that is not an Affiliate of Licensee.

**"Minimum Royalty"** means, for each Minimum Royalty Period during the Term, \$3,000,000.00.

**"Minimum Royalty Period"** means each period of twelve (12) consecutive calendar months during the Term, beginning on the Effective Date.

**"Paid-Up Plant"** has the meaning set forth in Section 17.1.

**"Party"** has the meaning set forth in the preamble.

**"Person(s)"** means an individual, corporation, partnership, joint venture, limited liability company, governmental authority, unincorporated organization, trust, association, or other entity.

**"Plant"** means a portable sand drying system that incorporates any part of Licensors' Proprietary Technology.

**"Representatives"** means a Party's and its Affiliates' employees, officers, directors, consultants, and legal advisors.

**"Royalty"** has the meaning set forth in Section 7.1.

**"Royalty Accrual Date"** means the dates that installments of Royalty payments are due which are set forth on Schedule 3.

**"Second Extended Term"** has the meaning set forth in Section 17.1.

**"Sell-Off Period"** has the meaning set forth in Section 17.3(b).

**"Subsidiary"** of a Person means a corporation, partnership, limited liability company, or other business entity that is controlled by such Person, and "control" has the meaning given to it in the definition of "Affiliate."

**"Term"** has the meaning set forth in Section 17.1.

**"Testing"** means the testing set forth on Schedule 4.

**"Territory"** means those countries identified in Schedule 5.

**"Valid Claim"** means a claim of an unexpired issued or granted Licensed Patent as long as the claim has not been admitted by Licensors or otherwise caused to be invalid or unenforceable through reissue, disclaimer, or otherwise, or held invalid or unenforceable by a Governmental Authority of competent jurisdiction from whose judgment no appeal is allowed or timely taken.

## 2. Grant.

2.1 Patent and Know-How License. Subject to the terms and conditions of this Agreement, Licensors hereby grants to Licensee and its Affiliates during the Term a nontransferable, nonsublicensable, except as expressly permitted under this Section 2 or Section 5, exclusive right and license under the Licensed Patents and Licensed Know-How to make, have made, sell, license and use a Licensed Product in the Field of Use in the Territory. For the avoidance of doubt, Licensee and its Affiliates have no right to permit any third party to make any Licensed Products except as expressly permitted under this Section 2 or Section 5.

2.2 No Laundering. The right and license granted to Licensee and its Affiliates hereunder are intended to cover both products or services of Licensee and its Affiliates and any activity of or arrangement with any third party for the purpose of extending rights under Licensors' Proprietary Technology to such third party or to cover such third party's products. Subject to the terms, conditions, and limitations in this Agreement, Licensee may "have made" any Licensed Products for sale or resale to or on behalf of such third party.



2.3 Licensor Reservation of Rights. Licensor reserves the right to make, use, offer to sell, sell, and import Licensor's Proprietary Technology in the Field of Use in the Territory for research and development purposes only. Nothing herein shall limit the right of Licensor or any of its Affiliates to make, use, offer to sell, sell, import and export any of Licensor's Proprietary Technology outside of the Territory, or anywhere in the world outside of the Field of Use; provided that the only exclusivity with regard to the rights granted to Licensee herein shall extend to the Field of Use in the Territory; and further provided that, as to that part of the Territory that is in Argentina, such exclusivity shall only apply to the extent that Licensor shall not grant to the Chevron Corporation any rights that are granted to Licensee herein.

2.4 Limited Grant. Except for the rights and licenses granted by Licensor under this Section 2, this Agreement does not grant to Licensee or any of its Affiliates or any other Person any right, title, or interest by implication, estoppel, or otherwise. Without limiting the foregoing, nothing in this Agreement grants by implication, estoppel, or otherwise, any right, title, or interest in, to, or under any patents owned or controlled by Licensor or any of its Affiliates other than Licensor's Proprietary Technology. All rights, titles, and interests not specifically and expressly granted by Licensor hereunder are hereby reserved.

3. Transfer of Licensed Know-How. Promptly after the Effective Date, Licensor shall disclose the Licensed Know-How to Licensee in such form and media as may be reasonably requested by Licensee. For the avoidance of doubt, all Licensed Know-How disclosed to Licensee hereunder is the Confidential Information of Licensor and subject to the confidentiality and non-disclosure obligations under Section 13, and Licensee's use of any documentation, materials, or other information concerning the Licensed Know-How provided under this Section 3 is subject to the terms and conditions of this Agreement, including the scope of the license granted under Section 2.

4. Assistance by Endeco. Upon Licensee's reasonable request during the Term, Endeco shall make available one or more of its technical personnel to handle the engineering aspects required for the design of a Licensed Product as required under this Agreement. These duties primarily include the generation of process flow diagrams, general arrangement drawings of processes, the submission of information to Manufacturers to do the design work of actual equipment components, with the Manufacturer issuing approval drawings of specific equipment. Endeco will review and markup such designs and drawings accordingly, approve the same, and return to the Manufacturer for procurement of necessary equipment. In addition, Endeco shall act as the primary contact and liaison with the Manufacturer in connection with the manufacturing of the Licensed Product, to assist with the commissioning and Testing of the initial two Licensed Products, and to otherwise provide Licensee with reasonable technical assistance concerning the Licensor's Proprietary Technology within the Field of Use, including without limitation providing designs for the Plants to be manufactured for Licensee and for which a Royalty is payable to Licensee. Licensee shall reimburse Licensor for reasonable travel and other reasonable out-of-pocket travel expenses incurred by Licensor's technical personnel in providing such technical assistance, but only if Licensor's technical personnel are required to travel outside of the lower forty-eight (48) states of the United States.

5. Have Made Rights.



5.1 Subject to this Section, the rights granted herein include the right of Licensee and its Affiliates to have any Licensed Products made by or on behalf of Licensee or its Affiliates by one or more Manufacturers solely for subsequent use by Licensee, its Affiliates or any third party to which Licensee has sold or leased a Licensed Product, in each case, in its Field of Use.

5.2 Scope of Have Made Rights. Licensee shall require all Manufacturers to agree in writing that: (a) such Manufacturer shall be bound by the terms and conditions of Sections 6, 8, and 13 of this Agreement; (b) acknowledge Licensor's right to enforce its rights in Licensor's Proprietary Technology; (c) provide that the right of the Manufacturer to make any Licensed Products, or use any of Licensor's Proprietary Technology, may not extend beyond the Term; and (d) indicate that Licensor and Endeco are each third party beneficiaries and entitled to enforce the terms and conditions of any agreement between Licensee or its Affiliates with such Manufacturer. To the extent Licensee uses a Manufacturer that Licensor has not otherwise previously consented to in writing, Licensee shall enforce all terms and conditions in this Section 4 at its sole cost and shall be responsible for the acts and omissions of such Manufacturer described in this Section. In the event of the termination or expiration of this Agreement, all rights of a Manufacturer entitled to make Licensed Products pursuant to this Section will terminate effective as of the termination or expiration of this Agreement.

5.3 Licensee Liability. Notwithstanding any other provision of this Agreement, Licensee shall remain primarily liable to Licensor for all of Licensee's duties and obligations contained in this Agreement, including the payment of all Royalties due pursuant to Section 6 and export compliance pursuant to Section 12.3. To the extent Licensee uses a Manufacturer that Licensor has not otherwise previously consented to in writing, any act or omission of such Manufacturer that would be a breach of this Agreement if committed or omitted by Licensee will be a breach by Licensee. Each agreement with any Manufacturer must contain a right of termination by Licensee for the Manufacturer's: (a) breach of any payment or reporting obligations affecting Licensor; (b) violation of any U.S. export control Laws in connection with any Licensed Product; and (c) breach of any other terms or conditions of the agreement with such Manufacturer that is also set forth, in substance, in this Agreement, which breach would constitute a breach of this Agreement if Licensee failed to comply therewith. In the event of a breach of these obligations by any Manufacturer, and if after a reasonable cure period provided in the agreement with such Manufacturer, not to exceed twenty (20) Business Days, such Manufacturer fails to cure the breach, then Licensee shall terminate the agreement authorizing the Manufacturer of any Licensed Products with such Manufacturer by written notice to the Manufacturer within two (2) Business Days thereafter and concurrently provide a copy of such notice to Licensor.

5.4 Notice of Agreement. Licensee shall deliver to Licensor a true, complete, and correct copy of each agreement with a Manufacturer entered into by Licensee, and any modification or termination thereof, within ten (10) Business Days following the applicable execution, modification, or termination of the sublicense agreement.

6. Licensee Improvements. Licensee shall disclose in writing promptly and fully all Improvements, inventions, works, and property related to any of Licensor's Proprietary Technology, that are developed, written, contributed to or prepared by Licensee during a period in



which obligations exist regarding any of Licensor's Proprietary Technology, or which result from or are suggested by any work Licensee may do in connection with Licensor. In the event that Licensee fails to disclose in writing any Improvements, inventions, works, and property related to any of Licensor's Proprietary Technology, Licensor shall nevertheless retain complete right, title, and interest in such Improvements, inventions, works, and property. All Improvements, inventions, works, and property related to any of Licensor's Proprietary Technology made by Licensee and all rights associated therewith shall belong entirely and exclusively to Licensor without any further obligation to Licensee. Licensee agrees on behalf of its staff, employees, owners, agents, and consultants to grant and assign, and hereby does grant and assign to Licensor, and its successors and assigns, all rights whatsoever that Licensee or Licensee's staff, employees, owners, agents, and consultants have in any such Improvements, inventions, works, and property related to any of Licensor's Proprietary Technology, and Licensor may make any use or nonuse of such Inventions, Works, and Property without any further obligation to Licensee. Licensee shall promptly cause to be executed, acknowledged, and delivered at Licensor's cost and expense all applications, oaths, declarations, and further documents and will provide such additional assistance as Licensor or its representatives may deem necessary or desirable to evidence Licensor's ownership of any such Improvements, inventions, works, and property related to any Licensed Patent, Licensed Product or Licensed Know-How; provided that Licensee shall not be required to pursue or participate in any legal action of protection of such Improvements, inventions, works, and property.

## 7. Royalties.

7.1 Royalty. In consideration of the rights granted to Licensee under this Agreement, Licensee shall pay to Licensor, on each Royalty Accrual Date, a payment, per Licensed Product, of ONE MILLION AND NO/100 U.S. DOLLARS (\$1,000,000.00) (the "Royalty") by check. Royalty payments shall be made in installments pursuant to the schedule set forth on Schedule 3.

### 7.2 Minimum Royalty.

(a) If the amount of Royalty paid for any Minimum Royalty Period is less than the Minimum Royalty, Licensee shall pay Licensor an amount equal to the difference between the Minimum Royalty for such Minimum Royalty Period and the Royalty paid during such Minimum Royalty Period. If Licensee fails to pay any shortfall in the Minimum Royalty when such Minimum Royalty is due, and in addition to any other remedy or right available to Licensor under this Agreement or by Law, Licensor may convert the license granted pursuant to Section 2.1 to a non-exclusive license on ten (10) Business Days prior written notice.

(b) The Minimum Royalty is not payable with regard to a Minimum Royalty Period if Licensee orders a Plant during such Minimum Royalty Period and (I) Endeco fails to provide the services required of it under this Agreement for the manufacture and delivery of such Plant ordered during the Minimum Royalty Period, and (II) the first two (2) Plants ordered under the License Agreement do not pass Testing and such failure to pass Testing is due to the fault or error of Licensor or Endeco, or the services or



designs required to be provided by either, and not due to any other party, including without limitation the Manufacturer.

7.3 Taxes. Royalties and other sums payable under this Agreement are exclusive of taxes. Licensee will be responsible for all sales, use, excise, and value added taxes, and any other similar taxes, duties, and charges of any kind imposed by any federal, state, or local Governmental Authority on any amounts payable by Licensee hereunder, other than any taxes imposed on, or with respect to, Licensor's income, revenues, gross receipts, personnel, or real or personal property, or other assets, and shall pay all such royalties and other sums payable hereunder free and clear of all deductions and withholdings whatsoever, unless the deduction or withholding is required by law. If any deduction or withholding is required by law, Licensee shall pay to Licensor such sum as will, after the deduction or withholding has been made, leave Licensor with the same amount as it would have been entitled to receive without any such requirement to make a deduction or withholding.

7.4 Payment Terms and Royalty Statements.

(a) All Royalty Payments, including Minimum Royalty Payments, shall be due and payable thirty (30) days from receipt from Licensor of an invoice for each such payment after the due date. No other consideration payable under this Agreement, including without limitation the Minimum Royalty, shall be subject to any withholding, except as otherwise provided on Schedule 3. Notwithstanding any of the foregoing, with regard to any payment for a particular Plant that is conditioned on Testing, such condition shall be deemed fulfilled if the applicable Testing is not completed by the sixtieth (60th) day following delivery of such Plant to Licensor or one of Licensor's Affiliates; provided that, the foregoing shall not apply to the extent the Testing is not successfully completed due to fault or error Licensor or Endeco or the services or designs required to be provided by Licensor or Endeco.

(b) Licensee shall make all payments in US dollars by check. Simultaneously with each payment described herein, Licensee shall provide a statement describing, in detail, the applicable activities relating to the applicable payment.

(c) If payments are not received by Licensor within five days of receiving written notice from Licensor of such failure after becoming due, Licensee shall pay to Licensor interest on the overdue payment from the date such payment was due to the date of actual payment at a rate of one and 50/100 percent (1.5%) per month, compounded monthly, or if lower, the maximum amount permitted under applicable Law.

8. Records and Audit.

8.1 Records. Licensee shall keep complete and accurate records of its purchases, assembly, orders, manufacture, transfers, and other uses of Licensor's Proprietary Technology necessary for the calculation of payments to be made to Licensor hereunder and for the enforcement of Licensor's rights herein. Licensee shall maintain such records for two (2) years following expiration or termination of this Agreement.

8.2 Audit.

(a) Licensors, at its own expense, may at any time within two (2) years after the end of the Term, nominate an independent certified public accountant ("**Auditor**") whom Licensee shall permit to have access to Licensee's records during Licensee's normal business hours related to and for the purpose of verifying all payments made under this Agreement.

(b) Licensors shall provide to Licensee a copy of the Auditor's audit report within ten (10) Business Days of Licensors' receipt of the report. If the report shows that payments made by Licensee are deficient, Licensee shall pay Licensors the deficient amount within thirty (30) days after Licensee's receipt of the audit report and an invoice for the deficient amount, if any.

9. Patent Prosecution and Maintenance. For each patent and patent application included within the Licensed Patents, Licensors will be solely responsible for, and make all decisions concerning, the preparation, filing, prosecution, and maintenance thereof. At Licensee's request, Licensors shall consult with Licensee as to the preparation, filing, prosecution, and maintenance of the Licensed Patents. Licensors retains sole discretion in paying any fees and filing any documents with the USPTO and any other patent office or similar commission in any jurisdiction where Licensors maintains or is applying for patent protection in connection with any Licensed Patent.

10. Challenges to Licensed Patents. During the Term, neither Licensee nor any of its Affiliates shall institute or actively participate as an adverse party in, or otherwise voluntarily provide material support to, any legal action or administrative proceeding in the Territory to invalidate or limit the scope of any Licensed Patent claim or obtain a ruling that any Licensed Patent claim is unenforceable or not patentable or that any Licensed Product does not infringe one or more claims of any Licensed Patent ("**Licensed Patent Challenge**"). In addition to any other rights and remedies available to Licensors herein or at law, if Licensee or any of its Affiliates violates this section, the Royalty due Licensors under this Agreement will increase fifty percent (50.00%), with such increase occurring automatically as of the date of such Licensed Patent Challenge.

11. Enforcement: Third-Party Infringement Claims.

11.1 Notice of Infringement or Third-Party Claims. If (a) either Party believes that any of Licensors' Proprietary Technology is being infringed or misappropriated by a third party in the Field of Use in the Territory, or (b) if a third party alleges that any Licensed Patent is invalid or unenforceable, or claims that any of Licensors' Proprietary Technology, or its use, development, manufacture, or sale infringes such third party's intellectual property rights in the Field of Use in the Territory, the Party possessing such belief or awareness of such claims shall promptly provide written notice to the other Party and provide it with all details of such infringement or claim, as applicable, that are known by such Party.

11.2 Right to Bring Action or Defend.

(a) Licensors shall take reasonable steps to stop any infringement or misappropriation of Licensors' Proprietary Technology, including, as reasonable, to



bring an infringement or misappropriation action concerning any of Licensor's Proprietary Technology, defend any declaratory judgment action concerning any of Licensor's Proprietary Technology, and take any other lawful action reasonably necessary to protect, enforce, or defend any of Licensor's Proprietary Technology, and control the conduct thereof and attempt to resolve any claims relating to any of Licensor's Proprietary Technology, including by (a) prosecuting or defending any *inter partes* review, post-grant review, covered business method patent review, opposition, derivation, interference, declaratory judgment, federal district court, US Patent and Trademark Office, US International Trade Commission, or other proceeding of any kind, and (b) taking any other lawful action that Licensor, in its sole discretion, believes is reasonably necessary to protect, enforce, or defend any of Licensor's Proprietary Technology has the right to prosecute or defend any such proceeding in Licensor's own name or, if required by applicable Law or otherwise necessary or desirable for such purposes, in the name of Licensee and may join Licensee as a party. Licensor shall bear its own costs and expenses in all such proceedings and have the right to control the conduct thereof and be represented by counsel of its own choice therein.

(b) If Licensor fails to take reasonable steps to stop any infringement or misappropriation of Licensor's Proprietary Technology, and Licensee decides to take steps to stop such infringement or misappropriation at Licensee's cost, Licensor shall cooperate with Licensee in the conduct thereof, and assist in all reasonable ways. Licensor, at its option, will have the right to intervene and take over Licensee's suit, action, proceeding or other steps to stop such infringement or misappropriating at Licensor's own expense.

11.3 Recovery and Settlement. If Licensor undertakes the enforcement or defense of any Licensed Patent:

(a) any recovery, damages, or settlement derived from such suit, action, or other proceeding will be retained in its entirety by Licensor; and

(b) Licensor may settle any such suit, action, or other proceeding, whether by consent order, settlement, or other voluntary final disposition, without the prior written approval of Licensee; provided that, Licensor shall not settle any such suit, action, or other proceeding in a manner that adversely affects the rights of Licensee concerning the Licensed Patents and Licensed Know-How without Licensee's prior written consent, which consent may not be unreasonably withheld, conditioned, or delayed.

11.4 If any suit, action, or other proceeding alleging invalidity or non-infringement of any Licensed Patent is brought against Licensee, Licensor, at its option, will have the right to intervene and take over the sole defense of the suit, action, or other proceeding at its own expense.

12. Compliance with Laws.

12.1 Patent Marking. Licensee shall comply with the patent marking provisions of 35 USC § 287(a) by marking all Licensed Products with the word "patent" or the abbreviation "pat." And either the numbers of the relevant Licensed Patents or a web address that is freely accessible to the public and that associates the Licensed Products with the relevant Licensed Patents. Licensee shall also comply with the patent marking Laws of the relevant countries in the Territory.

12.2 Recordation of License. If recordation of this Agreement or any part of it with a national or supranational Governmental Authority is necessary for Licensee or Licensor to fully enjoy the rights, privileges, and benefits of this Agreement, Licensee shall, at its own expense, record this Agreement or all such parts of this Agreement and information concerning the license granted hereunder with each such appropriate national or supranational Governmental Authority. Licensee shall (a) provide to Licensor for Licensor's review and approval all documents or information it proposes to record at least five (5) Business Days prior to the recordation thereof, and (b) promptly notify Licensor with verification of Licensee's recordation or any related agency ruling. In making any such disclosures, Licensee shall maintain, to the fullest extent permitted by Law, the confidentiality of this Agreement, the terms and conditions of this Agreement, and any other Licensor Confidential Information.

12.3 Export Compliance. Licensee shall not, directly or indirectly, export or re-export the Licensed Products (including any associated products, items, articles, computer software, media, services, technical data, and other information) in violation of any applicable Laws.

### 13. Confidentiality.

13.1 Confidentiality Obligations. Each Party (the "**Receiving Party**") acknowledges that in connection with this Agreement it will gain access to Confidential Information of the other Party (the "**Disclosing Party**"). As a condition to being provided with Confidential Information, the Receiving Party shall, during the Term and for two (2) years thereafter:

(a) not use the Disclosing Party's Confidential Information other than as strictly necessary to exercise its rights and perform its obligations under this Agreement; and

(b) maintain the Disclosing Party's Confidential Information in strict confidence and, subject to Section 13.2, not disclose the Disclosing Party's Confidential Information without the Disclosing Party's prior written consent, provided, however, the Receiving Party may disclose the Confidential Information to its Representatives who:

(i) have a need to know the Confidential Information for purposes of the Receiving Party's performance, or exercise of its rights concerning the Confidential Information, under this Agreement;

(ii) have been apprised of this restriction; and

(iii) are themselves bound by written nondisclosure agreements at least as restrictive as those set forth in this Section 13.1, provided further that



the Receiving Party will be responsible for ensuring its Representatives' compliance with, and will be liable for any breach by its Representatives of, this Section 13.1.

The Receiving Party shall use reasonable care, at least as protective as the efforts it uses for its own confidential information, to safeguard the Disclosing Party's Confidential Information from use or disclosure other than as permitted hereby.

13.2 Exceptions. If the Receiving Party becomes legally compelled to disclose any Confidential Information, the Receiving Party shall:

(a) provide prompt written notice to the Disclosing Party so that the Disclosing Party may seek a protective order or other appropriate remedy or waive its rights under Section 13; and

(b) disclose only the portion of Confidential Information that it is legally required to furnish.

If a protective order or other remedy is not obtained, or the Disclosing Party waives compliance under Section 13, the Receiving Party shall, at the Disclosing Party's expense, use reasonable efforts to obtain assurance that confidential treatment will be afforded the Confidential Information.

#### 14. Representations and Warranties.

14.1 Mutual Representations and Warranties. Each Party represents and warrants to the other party that as of the Effective Date:

(a) it is duly organized, validly existing, and in good standing as a corporation or other entity as represented herein under the laws and regulations of its jurisdiction of incorporation, organization, or chartering;

(b) it has the full right, power, and authority to enter into this Agreement and to perform its obligations hereunder;

(c) the execution of this Agreement by its representative whose signature is set forth at the end hereof has been duly authorized by all necessary corporate or organizational action of the Party; and

(d) when executed and delivered by such Party, this Agreement will constitute the legal, valid, and binding obligation of that Party, enforceable against that Party in accordance with its terms.

14.2 Licensee Representation and Warranties. Licensee represents and warrants that it has not received any written notice or threat of any claim, suit, action, or proceeding, and has no actual knowledge of any information, that could: (a) invalidate or render unenforceable any claim of any Licensed Patent; (b) prove that the Licensed Products are not covered by any

claim of any Licensed Patent; or (c) cause any claim of any Licensed Patent to fail to issue or be materially limited or restricted as compared with its currently pending scope.

14.3 Licensor Representations and Warranties. Licensor represents and warrants that: (a) Licensor is the owner of the entire right, title, and interest in and to the Licensed Patents; (b) Licensor has not granted to any third party any licenses or other rights under the Licensed Patents and Licensed Know-How that are in conflict with the terms and conditions of this Agreement and (c) to the Licensor's knowledge, the Licensed Proprietary Technology does not infringe the intellectual property rights of any other Person entity in the Territory. For purposes of this Section, "Licensor's knowledge" means the good faith understanding of the facts and information in the possession of Licensor's officers as of the Effective Date, but without any duty to conduct any investigation with respect to such facts and information

14.4 Disclaimer. EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, LICENSOR DISCLAIMS ALL REPRESENTATIONS AND WARRANTIES, WHETHER WRITTEN, ORAL, EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE, CONCERNING THE VALIDITY, ENFORCEABILITY, AND SCOPE OF THE LICENSED PATENTS, THE ACCURACY, COMPLETENESS, SAFETY, USEFULNESS FOR ANY PURPOSE, OR LIKELIHOOD OF SUCCESS (COMMERCIAL, REGULATORY OR OTHER) OF THE LICENSED PRODUCTS, LICENSED KNOW-HOW, AND ANY OTHER TECHNICAL INFORMATION, TECHNIQUES, MATERIALS, METHODS, PRODUCTS, PROCESSES, OR PRACTICES AT ANY TIME MADE AVAILABLE BY LICENSOR, INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY, QUALITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, AND WARRANTIES ARISING FROM A COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE, OR TRADE PRACTICE. WITHOUT LIMITATION TO THE FOREGOING AND EXCEPT AS CONTEMPLATED BY THIS AGREEMENT OR FOR ANY BREACH THEREOF, LICENSOR WILL HAVE NO LIABILITY WHATSOEVER TO LICENSEE OR ANY OTHER PERSON FOR OR ON ACCOUNT OF ANY INJURY, LOSS, OR DAMAGE, OF ANY KIND OR NATURE, SUSTAINED BY, OR ANY DAMAGE ASSESSED OR ASSERTED AGAINST, OR ANY OTHER LIABILITY INCURRED BY OR IMPOSED ON LICENSEE OR ANY OTHER PERSON, ARISING OUT OF OR IN CONNECTION WITH OR RESULTING FROM (A) THE MANUFACTURE, USE, OFFER FOR SALE, SALE, OR IMPORT OF A LICENSED PRODUCT, OR THE PRACTICE OF THE LICENSED PATENTS; (B) THE USE OF OR ANY ERRORS OF OMISSIONS IN ANY KNOW-HOW, TECHNICAL INFORMATION, TECHNIQUES, OR PRACTICES DISCLOSED BY LICENSOR; OR (C) ANY ADVERTISING OR OTHER PROMOTIONAL ACTIVITIES CONCERNING ANY OF THE FOREGOING.

15. Exclusion of Consequential and Other Indirect Damages. TO THE FULLEST EXTENT PERMITTED BY LAW, NEITHER LICENSOR NOR LICENSEE WILL BE LIABLE TO THE OTHER PARTY OR ANY OTHER PERSON FOR ANY INJURY TO OR LOSS OF GOODWILL, REPUTATION, BUSINESS, PRODUCTION, REVENUES, PROFITS, ANTICIPATED PROFITS, CONTRACTS, OR OPPORTUNITIES (REGARDLESS OF HOW THESE ARE CLASSIFIED AS DAMAGES), OR FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, PUNITIVE, OR ENHANCED



DAMAGES WHETHER ARISING OUT OF BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, PRODUCT LIABILITY, OR OTHERWISE (INCLUDING THE ENTRY INTO, PERFORMANCE, OR BREACH OF THIS AGREEMENT), REGARDLESS OF WHETHER SUCH LOSS OR DAMAGE WAS FORESEEABLE OR THE PARTY AGAINST WHOM SUCH LIABILITY IS CLAIMED HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.

16. Indemnification.

16.1 Licensee Indemnification. Licensee shall indemnify, defend, and hold harmless Licensor and its Affiliates, and each of Licensor's and its Affiliates' respective members, managers, officers, directors, employees, agents, successors, and assigns against all Losses arising out of or resulting from any third party claim, suit, action, or other proceeding (a "Claim") related to or arising out of or resulting from (a) Licensee's breach of any representation, warranty, covenant, or obligation under this Agreement, or (b), excluding any Claim arising from infringement of any third-party's intellectual property rights, use by Licensee of Licensed Patents or Licensed Know-How, or (c) any use, sale, transfer, or other disposition by Licensee of Licensed Products or any other products made by use of Licensed Patents or Licensed Know-How (each an "Licensee Action").

16.2 Licensor Indemnification. Licensor shall indemnify, defend, and hold harmless Licensee and its Affiliates, and each of Licensee's and its Affiliates' respective members, managers, officers, directors, employees, agents, successors, and assigns against all Losses arising out of or resulting from any claim, suit, action, or other proceeding related to or arising out of or resulting from (a) Licensor's breach of any representation, warranty, covenant, or obligation under this Agreement, or (b) infringement of any third-party's intellectual property rights in connection with the use by Licensee of the Licensed Proprietary Technology (each an "Licensor Action").

16.3 Indemnification Procedure. Licensor shall notify Licensee in writing of any Licensee Action and cooperate with Licensee at Licensee's sole cost and expense. Subject to Section 11, Licensee shall immediately take control of the defense and investigation of the Licensee Action and shall employ counsel reasonably acceptable to Licensor to handle and defend the Licensee Action, at Licensee's sole cost and expense. Licensee shall not settle any Licensee Action in a manner that adversely affects the rights of Licensor or its Affiliates without Licensor's or its Affiliates' prior written consent, which consent may not be unreasonably withheld, conditioned, or delayed. Licensor's or its Affiliates' failure to perform any obligations under this Section 16.3 will not relieve Licensee of its obligation under Section 16 except to the extent Licensee can demonstrate that it has been materially prejudiced as a result of the failure. Licensor and its Affiliates may participate in and observe the proceedings at their own cost and expense with counsel of their own choosing. This Section 16.3 shall not apply *mutatis mutandis* to Licensor with respect to any Licensor Action.

17. Term and Termination.

17.1 Term.



(a) This Agreement is effective as of the Effective Date and, unless terminated earlier in accordance with Section 17.2, will continue in full force and effect for each Licensed Product and country in the Territory on a Licensed Product-by-Licensed Product and country-by-country basis for a period of two (2) years beginning on the Effective Date (the “**Initial Term**”). In the event, Licensee acquires at least (i) eight (8) Paid-Up Plants (as defined below) or more during the Initial Term, the term of this Agreement shall automatically extend for an additional 12-month period after the Initial Term (the “**First Extended Term**”), and (ii) six (6) Paid-Up Plants during the First Extended Term, the term of this Agreement shall automatically extend for an additional 12-month period after the First Extended Term (the “**Second Extended Term**” and together with the Initial Term and the First Extended Term, if any, the “**Term**”). In the event Licensee acquires more than eight (8) Paid-Up Plants during the Initial Term or more than six (6) Paid-Up Plants during the First Extended Term, such number of acquired Paid-Up Plants in excess of eight (8) during the Initial Term or six (6) during the First Extended Term shall be credited toward the number of Paid-Up Plants required to be purchased by Licensee to extend exclusivity into the Second Extended Term and for purposes of calculating the Minimum Royalty, if any, during the First Extended Term and the Second Extended Term pursuant to Section 7.2(a).

(b) At the end of the Term, Licensee shall not be permitted to make any items, including Plants, using the Licensed Patents or Licensed Know-How, other than those items that are needed to continue to operate any Plants ordered and timely paid for as of the expiration of the Term and repair of such Plants (each such plant a “**Paid-Up Plant**”). Licensee and any third party to which Licensee has licensed or sold a Paid-Up Plant in accordance with Section 2 or Section 5 will have a perpetual, unrestricted, fully paid, and transferrable license to the Licensed Patents and Licensed Know-How during and after the end of the Term as necessary to operate and repair such Paid-Up Plant. Notwithstanding the foregoing, Licensee may after the term continue to order and purchase Plants from Licensor on terms and conditions mutually agreeable to the parties at that time and Section 6.

17.2 Termination for Cause. Licensor may terminate this Agreement immediately by giving written notice to Licensee if:

(a) Licensee fails to cure a failure to pay any amount due under this Agreement on the due date for payment and within five (5) days of Licensee receiving written notice of such non-payment from Licensor;

(b) Licensee breaches this Agreement (other than through a failure to pay any amounts due under this Agreement) and, if such breach is curable, fails to cure such breach within ten (10) Business Days of Licensor’s written notice of such breach; or

(c) Licensee: (i) is dissolved or liquidated or takes any corporate action for such purpose; (ii) becomes insolvent or is generally unable to pay, or fails to pay, its debts as they become due; (iii) files or has filed against it a petition for voluntary or involuntary bankruptcy or otherwise becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency law; (iv) makes



or seeks to make a general assignment for the benefit of creditors; or (v) applies for or has a receiver, trustee, custodian, or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business.

### 17.3 Effect of Termination.

(a) Within ten (10) Business Days after termination or expiration of this Agreement, Licensee shall: (i) submit a Payment Statement to Licensor, and any payments due Licensor will become immediately payable within 30 days of submission of the final Payment Statement; (ii) immediately cease all activities concerning, including all practice and use of, the Licensed Patents and Licensed Know-How, except as expressly permitted under Section 17.1 or 17.3(b); and (iii) within ten (10) Business Days after termination or expiration: (A) return to Licensor or destroy all documents and tangible materials (and any copies) containing, reflecting, incorporating, or based on Licensor's Confidential Information, except as needed for the post-termination or expiration activities expressly permitted under Section 17.1 or 17.3(b); and (B) certify in writing to Licensor that it has complied with the requirements of this Section 17.3(a).

(b) For a period of thirty (30) Business Days after the effective date of the expiration or earlier termination of this Agreement (the "Sell-Off Period"), Licensee will have the right to complete the manufacture of all Licensed Products in the course of manufacture as of the effective date of such expiration or termination. Licensee shall ensure that all sales of Licensed Products during the Sell-Off Period are in accordance with the applicable terms and conditions of this Agreement, including the Royalty and reporting obligations under Section 7.

17.4 Survival. The rights and obligations of the Parties set forth in this Section 17.4 and Section 1 (Definitions), Section 7 (Royalties), Section 13 (Confidentiality), Section 14 (Representations and Warranties), Section 16 (Indemnification), Section 17.1 (Term), Section 17.3 (Effect of Termination), and Section 18 (Miscellaneous), but excluding Section 18.9 (Assignment), and any right, obligation, or required performance of the Parties in this Agreement which, by its express terms or nature and context is intended to survive termination or expiration of this Agreement, will survive any such termination or expiration.

### 18. Miscellaneous.

18.1 Force Majeure. Licensor will not be in default by reason of any failure or delay in the performance of its obligations hereunder where such failure or delay is due to any circumstance or cause beyond its reasonable control, including strikes, labor disputes, civil disturbances, riot, rebellion, invasion, epidemic, hostilities, war, terrorist attack, embargo, natural disaster, acts of God, flood, fire, sabotage, fluctuations or non-availability of electrical power, heat, light, air conditioning.

18.2 Further Assurances. Each Party shall, and shall cause their respective Affiliates to, upon the reasonable request, and at the sole cost and expense, of the other party, promptly

execute such documents and take such further actions as may be necessary to give full effect to the terms of this Agreement.

18.3 Independent Contractors. The relationship between the Parties is that of independent contractors. Nothing contained in this Agreement creates any agency, partnership, joint venture, or other form of joint enterprise, employment, or fiduciary relationship between the parties, and neither Party has authority to contract for nor bind the other party in any manner whatsoever.

18.4 No Public Statements. During the Term, neither Party may issue or release any announcement, statement, press release, or other publicity or marketing materials relating to the other Party, or the other Party's trademarks, service marks, trade names, logos, domain names, or other indicia of source, association, or sponsorship, in each case, without the prior written consent of the other Party, which may not be unreasonably withheld or delayed; provided, that the foregoing limitation shall not apply to the extent such release, announcement, statement or press release or other publicity is required under applicable law or regulatory rules or regulations.

18.5 Notices. All notices, requests, consents, claims, demands, waivers, and other communications hereunder (other than routine communications having no legal effect) must be in writing and sent to the respective Party at the addresses indicated below (or at such other address for a Party as may be specified in a notice given in accordance with this Section):

If to Licensor:

9475 Linwood Avenue  
Shreveport, Louisiana 71106  
Email: jbowlin@endeco.net  
Attention: Jon Bowlin, Manager

If to Licensee:

1330 Post Oak Boulevard, Suite 600  
Houston, Texas 77056  
Email: legal@hi-crush.com  
Attention: General Counsel

Notices sent in accordance with this Section 18.5 will be deemed effective: (a) when received, if delivered by hand (with written confirmation of receipt); (b) when received, if sent by a nationally recognized overnight courier (receipt requested); (c) on the date sent by facsimile or email (in each case, with confirmation of transmission), if sent during normal business hours of the recipient, and on the next Business Day if sent after normal business hours of the recipient; or (d) on the third (3<sup>rd</sup>) Business Day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid.

18.6 Interpretation. For purposes of this Agreement: (a) the words "include," "includes," and "including" will be deemed to be followed by the words "without limitation"; (b) the word "or" is not exclusive; and (c) the words "herein," "hereof," "hereby," "hereto," and "hereunder" refer to this Agreement as a whole. Unless the context otherwise requires, references herein: (x) to Sections and Schedules refer to the Sections of and Schedules attached to this Agreement; (y) to an agreement, instrument, or other document means such agreement, instrument or other document as amended, supplemented, and modified from time



to time to the extent permitted by the provisions thereof; and (z) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulations promulgated thereunder. This Agreement will be construed without regard to any presumption or rule requiring construction or interpretation against the Party drafting an instrument or causing any instrument to be drafted.

18.7 Headings. The headings in this Agreement are for reference only and do not affect the interpretation of this Agreement.

18.8 Entire Agreement. This Agreement, together with all Schedules and any other documents incorporated herein by reference, constitutes the sole and entire agreement of the Parties with respect to the subject matter contained herein, and supersedes all prior and contemporaneous understandings and agreements, both written and oral, with respect to such subject matter. In the event of any conflict between the terms and provisions of this Agreement and those of any Schedule or other document, the following order of precedence will govern: (a) first, this Agreement, excluding its Schedules; and (b) second, the Schedules to this Agreement as of the Effective Date; and (c) third, any other documents incorporated herein by reference.

18.9 Assignment. During the Term, Licensee shall not assign or otherwise assign any of its rights, or delegate or otherwise assign any of its obligations or performance, under this Agreement, in each case whether voluntarily, involuntarily, by operation of law, or otherwise, without Licensor's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed; provided, however, that such consent shall not be required where the transaction giving rise to such assignment or delegation does not result in Licensee being held by an insolvent company or a non-operating shell company with no other assets other than cash or this Agreement. For purposes of the preceding sentence, and without limiting its generality, any merger, consolidation, or reorganization involving Licensee (regardless of whether Licensee is a surviving or disappearing entity) will be deemed to be a transfer of rights, obligations, or performance under this Agreement for which Licensor's prior written consent is required. No delegation or other transfer will relieve Licensee of any of its obligations or performance under this Agreement. Any purported assignment, delegation, or transfer in violation of this Section 18.9 is void. Licensor may freely assign or otherwise transfer all or any of its rights, or delegate or otherwise transfer all or any of its obligations or performance, under this Agreement without Licensee's consent; provided, however, that if such assignment or transfer, in each case whether voluntarily, involuntarily, by operation of law, or otherwise, is during the Term and to a Competitor (as defined below) of Licensee, Licensee shall have a right of first refusal to purchase the Licensor's Proprietary Technology prior to such assignment or transfer in accordance with the terms of Schedule 6. This Agreement is binding upon and inures to the benefit of the Parties and their respective permitted successors and assigns. For purposes of this Agreement, a "Competitor" means any Person that is engaged in the mining, manufacturing, distributing or selling of sand for use in the oil and gas industry or engaged in the last mile logistics of such sand for use in the oil and gas industry. By way of example and not limitation, the following Persons would be a Competitor: U.S. Silica Holdings Inc., Covia Holdings Corporation, Atlas Sand Company, LLC, Solaris Oilfield Infrastructure, Inc., and Arrows Up, LLC.



18.10 No Third Party Beneficiaries. This Agreement is for the sole benefit of the Parties and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or will confer upon any other Person any legal or equitable right, benefit, or remedy of any nature whatsoever, under or by reason of this Agreement.

18.11 Amendment; Modification; Waiver. This Agreement may only be amended, modified, or supplemented by an agreement in writing signed and delivered by each Party. No waiver by any Party of any of the provisions hereof will be effective unless explicitly set forth in writing and signed by the waiving Party. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any rights, remedy, power, or privilege arising from this Agreement will operate or be construed as a waiver thereof; nor will any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.

18.12 Severability. If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability will not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon a determination that any term or other provision is invalid, illegal, or unenforceable, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

18.13 Governing Law; Submission to Jurisdiction.

(a) This Agreement and all related documents, and all matters arising out of or relating to this Agreement, are governed by, and construed in accordance with, the laws of the State of Texas, United States of America, without regard to the conflict of laws provisions thereof.

(b) Any action, suit, or other proceeding arising out of or related to this Agreement, the licenses granted hereunder, or the validity or enforceability or scope of any Licensed Patent claim, or whether a Licensed Product infringes a Valid Claim, including any Licensed Patent Challenge, or Licensee's obligations concerning the Licensed Know-How must be instituted exclusively in the federal courts of the United States or the courts of the State of Texas in each case located in the city of Marshall and County of Harrison, and each Party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action, or proceeding. Service of process, summons, notice, or other document by mail to such Party's address set forth herein will be effective service of process for any action, suit, or other proceeding brought in any such court.

18.14 Waiver of Jury Trial. Each Party irrevocably and unconditionally waives any right it may have to a trial by jury for any legal action arising out of or relating to this Agreement or the transactions contemplated hereby.

18.15 Equitable Relief. Each Party acknowledges that a breach by the other Party of this Agreement may cause the non-breaching Party irreparable harm, for which an award of

damages would not be adequate compensation and, in the event of such a breach or threatened breach, the non-breaching Party will be entitled to seek equitable relief, including in the form of a restraining order, orders for preliminary or permanent injunction, specific performance, and any other relief that may be available from any court, and the Parties hereby waive any requirement for the securing or posting of any bond or the showing of actual monetary damages in connection with such relief. These remedies are not exclusive but are in addition to all other remedies available under this Agreement at law or in equity, subject to any express exclusions or limitations in this Agreement to the contrary.

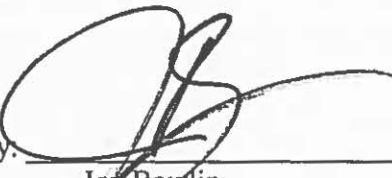
18.16 Attorneys' Fees. In the event that any action, suit, or other legal or administrative proceeding is instituted or commenced by either Party against the other Party arising out of or related to this Agreement, the prevailing Party will be entitled to recover its reasonable attorneys' fees and court costs from the non-prevailing Party.

18.17 Counterparts. This Agreement may be executed in counterparts, each of which will be deemed an original, but all of which together will be deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, email, or other means of electronic transmission (to which assigned PDF copy is attached) will be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.


***/REST OF PAGE INTENTIONALLY LEFT BLANK; SIGNATURE PAGE FOLLOWS/***

IN WITNESS WHEREOF, the Licensor and Endeco have caused this Agreement to be executed as of the date first written above by its respective officers or managers thereunto duly authorized.

BOWLIN ENTERPRISES, LLC

By:   
Jon Bowlin  
Title: Manager

ENDECO ENGINEERS, INC.

By:   
Jon Bowlin  
Title: President

IN WITNESS WHEREOF, the Licensee has caused this Agreement to be executed as of the date first written above by its respective officers or managers thereunto duly authorized.

HI-CRUSH, INC.

By: Robert E. Rasmus  
Robert Rasmus

Title: Chief Executive Officer  
\_\_\_\_\_

## **SCHEDULE 1**

### **FIELD OF USE**

The provision of proppant and logistics solutions to the petroleum industry in the United States of America and Argentina, including without limitation, the provision of mine-to-wellsite logistics services that optimize proppant supply to customers in in the United States, and ownership and operation of frac sand mining facilities and in-basin terminals.



**SCHEDULE 2**  
**LICENSED PATENTS**

1. Provisional Patent Application Number: 62901848; Title of Invention: Portable Sand Drying System and Method

### **SCHEDULE 3**

#### **MINIMUM ROYALTY**

During the Term, Royalty Payments, other than Minimum Royalty Payments, shall be paid by Licensee to Licensor as follows:

(a) With regard to the first and second Plants:

(i) 20% shall be due and payable upon issuance of the purchase order for the Plant;

(ii) 35% shall be due and payable upon completion of 50% of the fabrication of the Plant;

(iii) 30% shall be due and payable upon delivery of the Plant to Licensee; and

(iv) 15% shall be due and payable upon successful completion of the Testing, or upon failure of such Plant to complete Testing if such failure to pass is due to the fault or error of a party other than Licensor or Endeco or the services or designs required to be provided by Licensor or Endeco.

(b) With regard to any Plant after the initial two Plants:

(i) 40% shall be due and payable upon issuance of the purchase order for the Plant;

(ii) 40% shall be due and payable upon completion of 50% of the fabrication of the Plant; and

(iii) 20% shall be due and payable upon delivery of the Plant to Licensee.

#### **SCHEDULE 4**

##### **TESTING AND COMMISSIONING OF PLANTS**

- Licensee will use commercially reasonable efforts to test each Plant in “real world” conditions following delivery of the Plant to verify that the Plant meets the requirements set forth herein. Licensee will provide Licensor reasonable advanced notice to the locations, dates and times that Licensee will conduct the Testing, and Licensor will be invited to observe and participate in the Testing.
- Each Plant must be capable of producing frac sand, achieving > 100 stph input, at 6% moisture; provided that, if the applicable regulatory requirements have different production requirements, then the applicable Plant must be capable of producing frac sand at the maximum regulatory requirement, even if such regulatory requirement is equal to, or less than, 100 stph input, at 6% moisture. The Plant must also meet applicable regulatory emissions requirements and other applicable regulatory requirements. The preceding performance requirements are contingent on the appropriate tonnage rate and feed distribution being fed to the Plant, to be determined mutually by the parties.
- The diagrams for the initial Plant are attached. If required, these diagrams will be updated upon mutual agreement for each additional Plant depending upon any design or changes for each additional Plant.

**SCHEDULE 5**

**TERRITORY**

1. The United States of America
2. Argentina

## **SCHEDULE 6**

### **RIGHT OF FIRST REFUSAL**

Licensor shall first give written notice to Licensee of Licensor's intent to assign or transfer, in each case whether voluntarily, involuntarily, by operation of law, or otherwise, the Licensor's Proprietary Technology to a Competitor with which Licensor has a signed written agreement and the terms of such assignment or transfer (a "**ROFR Notice**"). Licensee will have a period of 30 days to review such ROFR Notice and to provide Licensee written notice of Licensee's determination to acquire the Licensor's Proprietary Technology on the terms set forth in such ROFR Notice (such notice "**Election to Purchase Notice**"). In the event Licensee fails to timely deliver the Election to Purchase Notice, Licensee will be treated as waiving any rights to purchase the Licensor's Proprietary Technology with respect to such ROFR Notice provided by Licensor. If Licensee delivers timely the Election to Purchase Notice, Licensor shall sell the Licensor's Proprietary Technology to Licensee on the terms set forth in such ROFR Notice, which purchase shall occur within 45 days of the delivery of the Election to Purchase Notice. If Licensor fails to close the sale of the Licensor's Proprietary Technology within 45 days of the expiration of the 30-day period following delivery of such ROFR Notice, then Licensor's right of first refusal shall apply to any future potential sales of the Licensor's Proprietary Technology.