

FABRICATION FACILITIES ACCESS PROGRAM AGREEMENT 4X

This Agreement is entered into effective as of the ___ day of July, 20___ (the “Effective Date”) by and between the Massachusetts Institute of Technology (MIT), a Massachusetts non-profit corporation, which operates the Microsystems Technology Laboratories (MTL), and _____ (Company), a _____ corporation. “Party” as used in this Agreement refers to either Company or MIT, as the context dictates, and “Parties” refers to Company and MIT jointly.

BACKGROUND

- A. MTL has established the Fabrication Facilities Access (FFA) Program, which enables trained personnel from participating companies to use MTL’s cleanroom fabrication facilities (<http://mtlweb.mit.edu/services/fabrication/facilities.html>) (the “MTL Facilities”).
- B. Company desires to participate in the FFA Program on the terms and conditions set forth in this Agreement.

Therefore, the Parties hereby agree as follows:

1. FFA Program Participation.

1.1. Membership. Company will become a member of the FFA Program. As a member, Company will be entitled to reasonable access to the MTL Facilities on the terms and conditions set forth in this Agreement.

1.2. Company Liaison. Company will designate one employee to serve as the single point of contact through whom Company’s exercise of its rights under this Agreement will be administered. Company may change the designated liaison from time to time by notice to MIT.

1.3. Process Engineers.

1.3.1. Company may appoint one of its employees to be its Process Engineer and may change the appointed employee from time to time by notice to MIT. The Process Engineer must satisfactorily complete MIT training relating to MTL Facilities procedures, safety and equipment operation as indicated at the following URL http://mtlweb.mit.edu/services/fabrication/become_user.html.

1.3.2. Company may appoint additional employees as Process Engineers by providing notice to MIT

1.3.3. The employees appointed as Process Engineers are the only persons authorized to use the MTL Facilities on Company’s behalf.

1.3.4. Each Process Engineer will be subject to, and required to comply with, MIT’s rules, regulations, policies and procedures governing health, safety and personal conduct. A Process Engineer’s access to MTL Facilities is a privilege and may be revoked at any time by MIT.

1.3.5. Process Engineers’ activities must be limited to activities conducted on behalf of Company. Process Engineers may not participate in any MIT activities, including without limitation, MIT research programs, without the prior written consent of (a) the Director of MTL, (b) Company and (c) MIT’s Office of Sponsored Programs.

1.4. Facilities Use.

1.4.1. MTL Facilities may only be used for research and development purposes. Fabrication of devices or materials for sale is prohibited.

1.4.2. When Company desires to use the MTL Facilities, its company liaison shall contact the MTL

Fabrication Facilities Manager to review the planned use. The MTL Fabrication Facilities Manager will determine whether MTL has the capabilities to support the planned use.

- 1.4.3. Company's planned use of the MTL Facilities will be subject to review by the MTL Process Technology Committee and will be required to comply with the same standards as projects conducted by MIT personnel and MIT's then current health, safety and process protocols.
- 1.4.4. Scheduling of use of the MTL Facilities is done on a first come/first served basis, though the CORAL fab management system.

2. FFA Program Fees. In consideration of the membership in the FFA Program, Company will pay MIT the following fees:

2.1. Membership Fee. There are no FFA membership fees as of July1, 2015.

2.2. FFA Fab Fees. Company shall pay MIT fees based on the use each of its engineers makes of the MTL Facilities. Such fees will depend on the nature of the use and will be equal to four times (4x) the current internal fees, until that engineer's fees reach \$12,500 (at internal rates); after that point all subsequent FFA fabfees for that person will be equal to three times (3x) the internal rates. The initial 4x rate will be applied only once during the tenure of each FFA engineer (not on an annual basis). The accrued fees (from FY15 onwards) for current FFA members will count towards the \$12,500 cross-over point (from 4x to 3x).The fees charged to internal users for each tool are currently published at the following URL:

http://mtlweb.mit.edu/services/fabrication/machine_charges.html

Fab fees will be billed monthly and will be due and payable within 45 days following the date of invoice.

2.3. All fees payable hereunder shall be paid in U.S. dollars, excluding taxes or impost of any kind.

3. Term. Unless terminated in accordance with the terms of this Agreement, this Agreement will be in effect until MIT or the Company notify each other.

4. Intellectual Property Rights.

4.1. Definition. For purposes of this Agreement, "Intellectual Property" means inventions, whether or not patentable, and copyrightable materials, including, without limitation, software and databases.

4.2. Ownership.

4.2.1. Intellectual Property conceived, first reduced to practice, developed, produced or composed solely by Company personnel in the course of using MTL Facilities under the FFA Program will be owned by Company ("Company FFA Intellectual Property").

4.2.2. Inventions, whether or not patentable, conceived, first reduced to practice or developed jointly by Company personnel and MIT personnel or students in connection with Company's participation in the FFA Program will be owned jointly by MIT and Company ("Joint Inventions").

4.2.3. Copyrightable materials produced or composed jointly by Company personnel and MIT personnel or students in connection with Company's participation in the FFA Program will be owned jointly by MIT and Company ("Joint Copyrightable Materials" and together with Joint Inventions, "Joint Intellectual Property").

4.2.4. Unless otherwise provided in a separate agreement, Intellectual Property conceived, first

reduced to practice, developed, produced or composed by Company personnel, whether alone or with others, with significant use of funds or facilities administered by MIT, other than in the course of using MTL Facilities under the FFA Program, will be owned by MIT ("MIT Intellectual Property").

4.3. Joint Intellectual Property.

4.3.1. Each Party will have the independent, unrestricted right to use, practice and dispose of its interest in Joint Intellectual Property in such manner as it deems appropriate without accounting to the other Party.

4.3.2. MIT will have the first right to file a patent application on a Joint Invention in the names of both Parties. All expenses incurred in obtaining and maintaining any patent on such Joint Invention will be shared equally, except that, if one Party declines to share in such expenses, the other Party may take over the prosecution and maintenance thereof, at its own expense, provided that title to the patent application or patent remains in the names of both Parties.

4.4. MIT License Rights. In the course of its use of the MTL Facilities, Company may be exposed to, and may benefit from, existing Intellectual Property of MIT. In recognition of that fact, to the extent that any Company FFA Intellectual Property constitutes an improvement to, or derivative of, existing Intellectual Property of MIT, Company hereby grants MIT a paid-up, royalty-free, nonexclusive, non-sublicensable right to use such Company FFA Intellectual Property for research and education purposes.

4.5. Recordkeeping. Company shall cause its Process Engineers to maintain, and deliver to MIT, adequate written research records and to execute all necessary papers and otherwise provide proper assistance, promptly upon MIT's request and at MIT's expense, during and subsequent to the period of this Agreement, to enable MIT to obtain, maintain and enforce for itself or its nominees, patents, copyrights or other legal protection for all MIT Intellectual Property and Joint Intellectual Property.

5. Disclaimer of Warranties. MIT MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND CONCERNING MTL FACILITIES OR THEIR AVAILABILITY AND HEREBY DISCLAIMS ALL REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS AND THE ABSENCE OF LATENT OR OTHER DEFECTS, WHETHER OR NOT DISCOVERABLE.

6. Limitation of Liability. IN NO EVENT WILL MIT, ITS TRUSTEES, DIRECTORS, OFFICERS, EMPLOYEES, STUDENTS OR AFFILIATES BE LIABLE FOR INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES OF ANY KIND, INCLUDING, WITHOUT LIMITATION, ECONOMIC DAMAGES OR LOST PROFITS, REGARDLESS OF WHETHER MIT WAS ADVISED, HAD OTHER REASON TO KNOW OR IN FACT KNEW OF THE POSSIBILITY OF THE FOREGOING.

7. Indemnity. Company shall indemnify, defend and hold harmless MIT, its members, trustees, officers, employees, students and affiliates and their respective successors and heirs from and against any and all claims, liabilities, actions, losses, damages, costs and expenses of whatever nature or kind, which may arise, directly or indirectly, from Company's use of the MTL Facilities (ordinary wear and tear excepted), including but not limited to property damage, personal injury or death, other than damages and liabilities arising out of the gross negligence of MIT's employees and students.

8. Insurance. Company shall maintain during the entire term of this Agreement, including any extension periods, (a) Worker's Compensation, and (b) Commercial General Liability Insurance in the amount of One Million Dollars (\$1,000,000), naming MIT as an additional insured, and shall provide MIT with an insurance certificate and policy endorsement evidencing such coverage concurrent with execution of this Agreement.

In the event that any policy referred to in the certificate expires during the course of the term of this Agreement, Company shall provide MIT with a new insurance certificate and policy endorsement showing then current coverage. Company will provide MIT with at least 30 days' advance notice of any change to the coverage contemplated hereby. Company shall include in any of its insurance policies covering loss, damage, or destruction covered by "all risk" insurance a waiver of the insurer's right of subrogation against MIT, or if such waiver is unobtainable or unenforceable, (i) an express agreement by such insurance company that such policy will not be invalidated if the insured waives or has waived before the casualty or liability the right of recovery against any party responsible for a casualty or liability, or (ii) any other form of permission by such insurance company for the release of MIT. While the foregoing waiver of right of recovery is in effect, Company shall look solely to the proceeds of its insurance policies to compensate Company for any insured loss occasioned by fire, theft, vandalism, terrorism and malicious mischief or other insured casualty occurring to its property or personnel while Company personnel or contractors are at MIT or using the MTL Facilities.

9. Termination. Either Party may terminate this Agreement by providing notice to the other if the other materially breaches this Agreement and does not remedy the breach within 30 days following notice thereof or if circumstances beyond its reasonable control preclude continuation of this Agreement. Sections 4, 5, 6, 7, 11, 12 and 13 and any party's obligation to pay the other any accrued, but unpaid amount will survive termination of this Agreement.

10. Use of Name. Company shall not use the name of the Massachusetts Institute of Technology or any abbreviation, variation or adaptation thereof, or the name of any of MIT's members, trustees, officers, employees, students or affiliates or any trademark owned by MIT in any written material or for any promotional purpose or other public announcement or disclosure without the consent of MIT's Technology Licensing Office.

11. Notice. Any notices given under this Agreement must be in writing and be addressed to the Parties at the addresses shown below. Notices must be delivered by certified or registered first class mail (air mail if not domestic) or by commercial courier service and will be deemed to have been given or made as of the date received.

12. Mediation. If a dispute arises between the Parties, either Party may notify the other of its desire to mediate the dispute, and the dispute will be mediated.

- 12.1. The mediation will be conducted by a single mediator. The Party requesting mediation will designate two or more nominees for mediator in its notice. The other Party may accept one of the nominees or may designate its own nominees by notice addressed to the American Arbitration Association (AAA) and copied to the requesting Party. If within, thirty days following the request for mediation, the Parties have not selected a mutually acceptable mediator, a mediator will be appointed by the AAA according to the Commercial Mediation Rules.
- 12.2. The mediator will attempt to facilitate a negotiated settlement of the dispute, but will have no authority to impose any settlement terms on the Parties. The expenses of the mediation will be borne equally by the Parties, but each Party will be responsible for its own counsel fees and expenses.
- 12.3. If the dispute is not resolved by mediation within 45 days after commencement of mediation, each Party will be entitled to pursue any right or other legal remedy the Party may otherwise have.

13. Miscellaneous

- 13.1. **Binding Effect; Assignment.** This Agreement will be binding upon and inure to the benefit of the Parties hereto and their respective successors and permitted assigns. Neither Party may assign this Agreement without the prior written consent of the other Party. Any attempted assignment in violation of this Section is void.

- 13.2. Severability.** If any provision of this Agreement becomes or is declared illegal, invalid or unenforceable, such provision will be divisible from this Agreement and will be deemed to be deleted from this Agreement. If such deletion substantially alters the basis of this Agreement, the Parties will negotiate in good faith to amend the provisions of this Agreement to give effect to the original intent of the Parties.
- 13.3. Independent Parties.** MIT and Company are independent contractors, and neither is an agent, joint venturer or partner of the other.
- 13.4. Third Party Beneficiaries.** There are no third party beneficiaries of this Agreement.
- 13.5. Governing Law.** The validity and interpretation of this Agreement and the legal relationship of the Parties to it will be governed by the laws of the Commonwealth of Massachusetts and applicable U.S. Federal law.
- 13.6. Force Majeure.** Neither Party will be liable to the other for failure to perform any of its respective obligations imposed by this Agreement if such failure is occasioned by fire, flood, explosion, lightning, windstorm, earthquake, subsidence of soil, governmental interference, civil commotion, riot, war, terrorism, strikes, labor disturbance or any other cause beyond its reasonable control.
- 13.7. Export Controls.** Each Party covenants and warrants that it will not disclose to the other any information that contains information, technology or data identified on any U.S. export control list, including the Commerce Control List at 15 CFR 774 and the U.S. Munitions List at 22 CFR 121, unless and until it obtains the written consent of the other party. Company further covenants and warrants that it will not bring any export-controlled goods, software or technology to MIT without MIT's prior written consent. In the case of MIT, any such consent must be executed by MIT's Export Control Officer.
- 13.8. Amendments.** Amendments or changes to this Agreement must be in writing and signed by duly authorized representatives of the Parties.
- 13.9. Counterparts.** This Agreement and any amendment hereto may be executed in counterparts and all such counterparts taken together will be deemed to constitute one and the same instrument. If this Agreement is executed in counterparts, no signatory hereto will be bound until all the Parties named below have duly executed a counterpart of this Agreement.

ACCEPTED AND AGREED TO:

MASSACHUSETTS INSTITUTE OF TECHNOLOGY [INSERT COMPANY NAME]

By: _____

Michelle D. Christy
Director
Office of Sponsored Programs

By: _____

Name:
Its:

Acknowledged and agreed to:

Process Engineer:

Names of additional Process Engineers of Company, if any, are to be appended to this document.