

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

AEROTEK ENERGY,

Plaintiff/Counterclaim Defendant,

v.

Civil Action No. 16-C-77-2

ELECTRICAL SYSTEMS, INC.

Defendant/Counterclaim Plaintiff.

**MEMORANDUM OF LAW IN SUPPORT OF AEROTEK ENERGY'S
MOTION TO DISMISS ELECTRICAL SYSTEMS, INC.'S COUNTERCLAIM**

Plaintiff/Counter-Defendant Aerotek Energy, ("Aerotek") through counsel, submits this Memorandum in Support of Its Motion to Dismiss Defendant/Counter-Plaintiff Electrical Systems, Inc. ("Electrical")'s Counterclaim pursuant to W. Va. R. Civ. P. 12(b)(6).

STATEMENT OF FACTS

The Parties entered into a written services agreement on or about February 5, 2015 (the "Contract"). A true and correct copy of the Contract is attached hereto as Exhibit A. According to the terms of the Contract, Aerotek agreed to provide temporary contract labor ("Contract Employees") to Electrical to engage in work "under [Electrical's] management and supervision at a facility or in an environment controlled by [Electrical]." Exhibit A, ¶ 2.1. Aerotek agreed to submit weekly invoices to Electrical for the services rendered by the Contract Employees and Electrical agreed to pay the invoices within fifteen days. Exhibit A, ¶¶ 4, 5. Aerotek provided several Contract Employees to Electrical and sent invoices to Electrical for the work performed by the Contract Employees. However, Electrical did not pay the invoices and owes Aerotek an outstanding balance of \$114,250.12.

Aerotek filed suit against Electrical to recover the balance owed. Electrical then filed a counterclaim, alleging that Aerotek breached the Contract by "fail[ing] to provide competent and

qualified electricians to perform contract labor.” A true and correct copy of the counterclaim is attached hereto as Exhibit B. The counterclaim fails to state a claim upon which relief can be granted under Civil Rule 12(b)(6) because it is barred by the contract terms and is insufficiently pled.

STANDARD OF REVIEW

“The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the sufficiency of the complaint.” *Cantley v. Lincoln County Comm’n*, 221 W. Va. 468, 470 (2007). A court’s consideration begins, therefore, with the proposition that “[f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to [the] plaintiff, and its allegations are to be taken as true.” *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605 (1978). A pleader is required to set forth sufficient information to outline the elements of its claim or to permit inferences to be drawn that these elements exist. *Id.* A complaint should be dismissed when the facts as alleged in the pleading, even if proven true, would not entitle the pleader to relief. *Cantley*, 221 W. Va. at 470.

ARGUMENT

Electrical’s counterclaim fails to state a claim upon which relief can be granted. The counterclaim should be dismissed in its entirety under Civil Rule 12(b)(6) for two reasons: (1) Electrical’s breach of contract counterclaim is barred by the Contract’s unambiguous limitation of liability provision and (2) Electrical’s breach of contract counterclaim is insufficiently pled.

I. Electrical’s Breach of Contract Claim is Barred by the Contract Terms

In its counterclaim, Electrical alleges that the Contract Employees performed work on a project which general contractor was Bilfinger Westcon, Inc. (“Bilfinger”). Exhibit B, ¶ 3. Bilfinger “refused payment for services rendered by [Electrical] and its subcontractors” due to

“faulty workmanship provided on the project.” Exhibit B, ¶¶ 4, 5. Electrical further alleges that Aerotek “failed to provide competent and qualified electricians to perform contract labor,” in violation of the Contract. Exhibit B, ¶¶ 8, 9. To the extent that Electrical is attempting to allege that Bilfinger refused payment as a result of the quality of the Contract Employees’ workmanship, Electrical’s claim is barred by the Contract’s limitation of liability provision. The Contract’s limitation of liability provision specifically states the following:

AEROTEK does not warrant or guarantee that the Contract Employee(s) placed pursuant to this Agreement will produce any particular result or any solution to [Electrical’s] particular needs, or perform services in any particular manner. Accordingly, [Electrical] acknowledges and agrees that AEROTEK is not responsible for any aspects of the Contract Employees[’] work or [Electrical’s] project, including, without limitation, any deadlines or work product. Because AEROTEK is providing supplemental staffing services only, and [Electrical] is directing and supervising the Contract Employees who render these services, AEROTEK shall not be liable (i) for any claims, costs, expenses, damages, obligations or losses arising from or in connection with the acts or omission of any Contract Employee . . . or (ii) for any indirect, special or consequential damages (including, but not limited to, loss of profits, interest, earnings or use) whether arising in contract, tort or otherwise.

Exhibit A, ¶ 12.

Where the terms of a contract are clear and unambiguous, they must be applied and not construed. *Perrine v. E. I. du Pont de Nemours & Co.*, 225 W. Va. 482, 507 (2010). It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them. *Id.* at 507 – 08. Therefore, when an express limitation of liability agreement is freely and fairly made between parties who are in an equal bargaining position, and there is no public interest with which the agreement interferes, it generally will be upheld. *Kyriazis v. University of West Virginia*, 192 W. Va. 60 (1994). *See also Pingley v. Perfection Plus Turbo-Dry, LLC*, 231 W. Va. 553, 563 (2013) (contract between homeowner and sewage removal

company disclaiming liability for damages caused by mold was enforceable and did not violate public policy). A contractual limitation of liability provision may be invalidated as contrary to public policy if it: (1) absolves a party of liability for failure to conform to a statutorily imposed standard of conduct or (2) exempts a tortfeasor from liability to a person who is a member of a protected class, which protection is designed to insulate the protected class members from the tortfeasor's misconduct. *Finch v. Inspectech, LLC*, 229 W. Va. 147, 156 (2012).

Neither exception applies in this case. The Contract's limitation of liability clause does not implicate any statutorily imposed standards of conduct or impact any protected class members. *See Pingley*, 231 W. Va. at 562. Rather, the purpose of the limitation of liability clause is explicitly set forth in the contract: "[b]ecause AEROTEK is providing supplemental staffing services only, and [Electrical] is directing and supervising the Contract Employees who render these services," Electrical agreed to bear the risk of loss associated with the Contract Employees' performance. Exhibit A, ¶ 12. Aerotek and Electrical are sophisticated business entities and negotiated the Contract terms from equal bargaining positions. Electrical was free to reject the Contract terms and obtain services from any number of other staffing agencies. Most significantly, Electrical concedes that the Contract is enforceable and has not disputed any of its terms, including the limitation of liability provision. Exhibit B, ¶ 3. Therefore, the Contract's limitation of liability clause is enforceable and Electrical is barred from recovery any damages from Aerotek alleged caused by the Contract Employees' "faulty workmanship."

II. Electrical Has Not Pled the Elements of a Breach of Contract Claim

Electrical's breach of contract counterclaim is barred by the Contract's express terms; however, it is also insufficiently pled as a matter of law. In order to state a claim for breach of contract, a party must allege the following elements: (1) the existence of a valid, enforceable

contract, (2) the plaintiff's performance under the contract, (3) a breach or violation by the defendant of its duties or obligations under the contract, and (4) damages to the plaintiff resulting from the defendant's breach. *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 688, 693 (N.D. W. Va. 2010).

a. Electrical Failed to Plead Its Own Performance Under the Contract

Electrical has not pled that it performed its own obligations under the Contract. In fact, Electrical cannot do so because it has undisputedly failed to perform its contractual obligation to timely pay the invoices submitted by Aerotek. Exhibit A, ¶ 5. Because Electrical concededly failed to perform its contractual obligations, it is barred from asserting a breach of contract claim against Aerotek. *Compare to Bennett v. Skyline Corp.*, 52 F. Supp. 3d 796, 809 (N.D. W. Va. 2014) (plaintiff homeowners were able to maintain their breach of contract claim against defendant home builder because plaintiffs "performed their end of the bargain" by paying for defendant's services before filing suit).

b. Electrical Failed to Assert a Breach of the Contract Terms by Aerotek

Additionally, in order to maintain a breach of contract claim against Aerotek, Electrical must plead a breach by Aerotek of its duties or obligations under the Contract. *Wince*, 681 F. Supp. 2d at 693. In its counterclaim, Electrical alleges that Aerotek breached the Contract by "fail[ing] to provide competent and qualified electricians to perform contract labor at the Caditz, OH, project location." Exhibit B, ¶ 6. However, the Contract does not oblige Aerotek to provide "competent and qualified electricians to perform contract labor at the Caditz, OH, project location." Electrical has not – and cannot – point to any contractual language requiring Aerotek to provide "competent and qualified" contract labor. To the contrary, the Contract unambiguously states that "AEROTEK does not warrant or guarantee that the Contract

Employee(s) placed pursuant to [the Contract] will produce any particular result or any solution to [Electrical's] particular needs, **or perform services in any particular manner.**" Exhibit A, ¶ 12 (emphasis added). Unlike a tool or piece of machinery, the Contract Employees are human beings with free will and thus Aerotek could not (and did not) warrant the quality of their performance. Additionally, parties agreed that the Contract Employees operated under the supervision, direction, and control of Electrical. Exhibit A, ¶¶ 2.1, 2.2, 12. Accordingly, Aerotek did not even have the right to attempt to control or modify the Contract Employee's performance. Even if this Court accepts Electrical's counterclaim allegations as true, Electrical failed to allege that Aerotek breached any of its contractual obligations. Therefore, Electrical's breach of contract claim fails as a matter of law.

c. Electrical Failed to Allege that Aerotek's Breach Caused Electrical's Damages

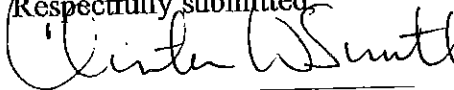
In order to maintain its breach of contract claim against Aerotek, Electrical must also state that it suffered damages resulting from Aerotek's breach. *Wince*, 681 F. Supp. 2d at 693 (dismissing a plaintiff's breach of contract claim because, although the plaintiff alleged "deceptive, misleading, and unfair" conduct by the defendant, he did not allege that he had been injured or harmed in any tangible way by the defendant's purported actions). As set forth above, Electrical has not properly alleged any breach by Aerotek because Aerotek was not contractually obligated to "provide competent and qualified electricians to perform contract labor at the Caditz, OH, project location." Exhibit B, ¶ 6. However, even if Aerotek did agree to provide competent and qualified electricians, Electrical's counterclaim does not allege that Aerotek's failure caused its damages – as is required to adequately establish a breach of contract claim. *Wince*, 681 F. Supp. 2d at 69. In its counterclaim, Electrical alleges that Bilfinger "advised [Electrical] that payment was being refused due to faulty workmanship provided on the project in

Caditz, OH." Exhibit B, ¶ 5. However, Electrical has not alleged that Aerotek's "breach" caused Bilfinger to refuse payment to Electrical (or caused Electrical to suffer any other damages). Bilfinger may have refused to pay Electrical as a result of Electrical's performance or the performance of Electrical's subcontractors or temporary employees obtained from staffing agencies other than Aerotek. A court "should not dismiss a complaint where sufficient facts have been alleged that, if proven, would entitle the plaintiff to relief." *Cantley*, 221 W.Va. at 470. However, even if proven, Electrical's counterclaim does not contain sufficient facts that would entitle it to relief. Therefore, Electrical's breach of contract claim against Aerotek should be dismissed pursuant to Civil Rule 12(b)(6).

CONCLUSION

Electrical's counterclaim fails to state a claim upon which relief can be granted. Electrical's breach of contract claim is barred by the Contract's unambiguous and enforceable limitation of liability provision. Additionally, Electrical's breach of contract claim is insufficiently pled because Electrical has not asserted: (1) its own performance of the contract; (2) that Aerotek breached a term of the Contract; or (3) that it suffered damages resulting from Aerotek's breach. For the foregoing reasons, Aerotek respectfully requests that the Court dismiss Electrical's counterclaim in its entirety pursuant to Civil Rule 12(B)(6).

Respectfully submitted,



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FILED IN 15TH
CIRCUIT COURT

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EXHIBIT A



SERVICES AGREEMENT

THIS SERVICES AGREEMENT ("Agreement") is made this 5th day of February, 2015, by and between AEROTEK, INC., a Maryland corporation, ("AEROTEK"), and Electrical Systems, Inc. ("Client").

BACKGROUND

AEROTEK is engaged in the supplemental staffing services business providing contract personnel to customers with staffing needs. Client desires to engage AEROTEK to provide supplemental staffing services and AEROTEK desires to be engaged by Client, all on the terms and conditions of this Agreement. As used herein, the term "Contract Employee" means an AEROTEK employee temporarily placed with the Client pursuant to this Agreement.

NOW, THEREFORE, in consideration of the premises and mutual promises contained herein, the parties agree as follows:

1. TERM: This Agreement shall commence on the date this Agreement is executed by all parties, and continue for an initial term of one (1) year, and shall continue thereafter on a month-to-month basis unless earlier terminated as provided herein. This Agreement may be terminated by either party upon thirty (30) days prior written notice.

2. CONTRACT EMPLOYEES:

2.1. SERVICES: AEROTEK shall provide to Client one or more Contract Employees as requested by Client from time to time. Such Contract Employees shall provide services under Client's management and supervision at a facility or in an environment controlled by Client. Attached hereto as Exhibit A, is a list of the names of the Contract Employee(s) to be placed initially with Client, standard and overtime hourly billing rates for each Contract Employee, and the starting date for each Contract Employee. Unless otherwise agreed by the parties, this Agreement shall apply to additional Contract Employees provided by AEROTEK as requested by Client hereunder from time to time. Should Client request additional services subsequent to the execution of this Agreement, and such services are not listed on Exhibit A attached hereto, or should either Client or AEROTEK request changes to hourly billing rates or other terms for any Contract Employee working under the terms of this Agreement, any such additions or changes will be mutually agreed to in writing by both parties. Such agreed upon terms shall become a part of this Agreement, as amended.

2.2. DUTIES: It shall be the Client's responsibility to control, manage and supervise the work of the Contract Employees assigned to Client pursuant to this Agreement. The Contract Employees shall perform only the duties and functions of the specific jobs set forth opposite the Contract Employee's name on Exhibit A or on the job description attached to this Agreement. In no event shall any Contract Employee be assigned or permitted to perform any other duties or functions other than those specified in Exhibit A for Client without the express written consent of AEROTEK. Should Client assign the Contract Employee to perform the duties or functions of a position not listed in Exhibit A or within the job description attached hereto, AEROTEK may, in its sole and absolute discretion, deem this Agreement breached by Client and take whatever action it deems necessary or appropriate. In this event, Client shall be liable to AEROTEK, and indemnify AEROTEK for all claims, damages, losses or expenses relating to such breach, as well as all hours worked by the Contract Employees.

Client agrees that it will not permit any Contract Employee to (i) handle cash, negotiable instruments or other valuables without AEROTEK's written consent (and then only under Client's direct supervision), or (ii) transport or convey money, securities or negotiable instruments for Client (including, but not limited to, delivering bank deposits to a bank or other institution).

3. INDEPENDENT CONTRACTOR STATUS: With respect to the services provided by AEROTEK, AEROTEK shall be an independent contractor. AEROTEK shall provide any salary or other benefits to such Contract Employees; will make all appropriate tax, social security, Medicare and other withholding deductions and payments; will provide worker's compensation insurance coverage for its Contract Employees; and will make all appropriate unemployment tax payments.

4. INVOICES: AEROTEK shall submit weekly invoices to Client for services rendered by Contract Employee(s) for the number of hours worked by Contract Employee(s) the previous week. Overtime will be billed at the rates listed on Exhibit A, or as otherwise agreed by both parties, for hours worked by Contract Employee(s) in excess of forty (40) hours per week, or as otherwise required by law. For weeks that have one (1) National or client observed holiday, overtime rates shall be billed for hours worked in excess of thirty-two (32) hours per week. The number of hours billed by AEROTEK shall be supported by a time card or other time record approved by a representative of Client. Invoices submitted by AEROTEK to Client are presumed to be accurate and fully payable on the terms contained therein unless disputed by Client within five (5) business days of Client's receipt of the invoice.

5. PAYMENT DEFAULT: Payment in full for invoices via check or EFT shall be due within fifteen (15) days from invoice date, at AEROTEK, 3689 Collection Ctr. Dr., Chicago, Illinois 60693. Invoices that are more than seven (7) days past due are subject to a late charge of one percent (1%) per month on the amount of the past due balance. Late charges shall be calculated using the U.S. Method, therefore interest will not be compounded on the past due balance. If the Client's account is past due or Client has exceeded AEROTEK's established credit limit, AEROTEK shall notify Client verbally or in writing of such occurrence. Upon such notice, AEROTEK may, without additional notice, immediately cease providing any and all further Contract Employee services without any liability to Client for interruption or stoppage of pending work. In addition, the parties agree that in the ordinary course of business AEROTEK may, in its sole discretion, apply payments made by Client to any outstanding Client invoice, notwithstanding any direction by Client regarding application of the payment.

6. EXPENSES: Client shall reimburse AEROTEK for all ordinary, necessary, and reasonable travel expenses incurred by Contract Employee(s) while performing services on behalf of Client that require Contract Employee to travel away from Client's primary job site. Client agrees to accept legible copies of receipts (or electronic copies, if billed electronically) as the supporting documentation needed to pay the expense amount on the invoice.

7. COLLECTION: If the Client's account, after default, is referred to an attorney or collection agency for collection, Client shall pay all of AEROTEK's expenses incurred in such collection efforts including, but not limited to, collection agency fees, court costs and reasonable attorneys' fees. Notwithstanding the terms of Section 15.10 of this Agreement AEROTEK may institute proceedings to seek a default judgment in any court of competent jurisdiction in the United States.

AEROTEK

8. TIME RECORDS: AEROTEK Time and Expense shall be the official time record for purposes of payment under Sections 4 and 5 herein.

9. PURCHASE ORDERS: Payment of AEROTEK Invoices shall not be dependent upon a Client generated purchase order. If a purchase order is required pursuant to this Section, Client shall deliver to AEROTEK a written purchase order [days/hours] before the first Contract Employee start date identified on Exhibit A. As stated in Section 15.7 herein, this Agreement and Exhibit A constitute the entire agreement between the parties. If there is any inconsistency or conflicting terms between this Agreement and a client purchase order, this Agreement shall prevail. If a purchase order is required pursuant to this paragraph, failure by Client to deliver said purchase order shall not release Client of its obligations contained in this Agreement.

10. RESTRICTIVE COVENANT:

10.1 RESTRICTIVE COVENANT - CONVERSION: AEROTEK is not an employment agency. Its services are provided at great expense to AEROTEK. In consideration thereof, during the term of this Agreement and for the twelve (12) month period immediately following the period for which a Contract Employee last performed services for the Client under this Agreement, Client shall not, directly or indirectly, for itself, or on behalf of any other person, firm, corporation or other entity, whether as principal, agent, employee, stockholder, partner, member, officer, director, sole proprietor, or otherwise, solicit, participate in or promote the solicitation of such Contract Employee to leave the employ of AEROTEK, or hire or engage such Contract Employee. If any Contract Employee provided by AEROTEK to Client is engaged by Client to perform services, either directly or indirectly, within twelve (12) months of that Contract Employee's last day of work at Client through AEROTEK, the Client will pay AEROTEK, as liquidated damages, an amount equal to 30% of the Contract Employee's first year salary, including bonuses, with Client.

10.2 RESTRICTIVE COVENANT - RIGHT TO HIRE: Notwithstanding, the above Section 10.1, if Contract Employee has completed the minimum assignment duration at Client for AEROTEK, pursuant to Exhibit A, there will be no fee for directly hiring the Contract Employee.

10.3. ACCOUNT STATUS: If Client exercises its right to hire a Contract Employee at a time when Client is in breach of Section 5 of this Agreement or Client's account is otherwise not current or in good standing, Client agrees to pay the fee of 30% of the Contract Employee's first year salary, including bonuses with Client, even though the Contract Employee has completed the assignment duration outlined in the attached Exhibit A.

10.4. SUBMITTALS - RIGHT TO HIRE: Resumes submitted to Client are confidential and for Client use only. Client agrees that AEROTEK is the exclusive representative of all candidates for which resumes are submitted to Client by AEROTEK in response to Client requests. Accordingly, Client agrees that if any candidate submitted to Client by AEROTEK is engaged to perform services, either directly or indirectly, by Client within twelve (12) months of receipt of the resume, Client agrees to pay to AEROTEK as liquidated damages an amount equal to 30% of the employee's first year annual salary, including bonuses.

11. CONTRACT EMPLOYEE PERFORMANCE: Within the initial employment guarantee period as detailed in the attached Exhibit A from any Contract Employee(s) starting date, Client shall review the Contract Employee's performance and decide whether to continue the engagement of such Contract Employee. If Client is

dissatisfied with the performance of the Contract Employee, and Client wishes AEROTEK to terminate its engagement of such Contract Employee, Client must notify AEROTEK within the initial period, specifying the reasons for its dissatisfaction, and Client shall not be required to pay for the hours worked by that Contract Employee during the initial period, provided its reasons for termination are not unlawful and are bona fide in AEROTEK reasonable judgment. If Client becomes dissatisfied with the performance of a Contract Employee after the initial period, Client may request that AEROTEK terminate the engagement of that Contract Employee upon written notice to AEROTEK, but Client shall pay for all hours worked by the terminated Contract Employee from the first hour of work up to and including the date of termination.

12. LIMITATION OF LIABILITY: AEROTEK does not warrant or guarantee that the Contract Employee(s) placed pursuant to this Agreement will produce any particular result or any solution to Client's particular needs, or perform services in any particular manner. Accordingly, Client acknowledges and agrees that AEROTEK is not responsible for any aspects of the Contract Employees work or the Client's project, including, without limitation, any deadlines or work product. Because AEROTEK is providing supplemental staffing services only, and Client is directing and supervising the Contract Employees who render these services, AEROTEK shall not be liable (i) for any claims, costs, expenses, damages, obligations or losses arising from or in connection with the acts or omission of any Contract Employee, including, but not limited to, work on engineering or design concepts or calculations or related drawings, software programs, designs or documentation, or (ii) for any indirect, special or consequential damages (including, but not limited to, loss of profits, interest, earnings or use) whether arising in contract, tort or otherwise. Client shall indemnify AEROTEK and hold it harmless against and from any such claims made or brought by third parties, including any and all costs incurred in connection with such claims.

13. CLIENT PROPERTY:

13.1. WORK PRODUCT: All work product of every kind performed by any Contract Employee on behalf of Client shall be the sole and exclusive property of Client.

13.2. DAMAGES: AEROTEK does not provide insurance coverage for any real or personal property of Client, including but not limited to machinery, equipment, computers, tools, vehicles or other real or personal property which is owned or leased by client. Accordingly, Client agrees that in the event it supplies, provides or otherwise allows Contract Employees to use or have access to any property of Client, (including but not limited to cell phones, laptop computers, tools, etc.), Client shall be solely responsible for any damage, theft, repair or loss associated with this property, and Client shall indemnify, hold harmless and defend AEROTEK against and from such claims made or brought for any damaged, stolen, or lost property of Client.

13.3. CONFIDENTIALITY: AEROTEK recognizes that while performing its duties under this Agreement, AEROTEK and its Contract Employees may be granted access to certain proprietary and confidential information regarding Client's business, customers, and employees. AEROTEK agrees to keep such information confidential and the obligations of this paragraph will survive the termination of this Agreement. This paragraph does not apply to information that was previously known or information that is available in the public domain.

14. NOTICES:

AEROTEK

14.1. MANNER: Any notice or other communication ("Notice") required or permitted under this Agreement shall be in writing and either delivered personally or sent by facsimile, overnight delivery, express mail, or certified or registered mail, postage prepaid, return receipt requested.

14.2. ADDRESSEE: A Notice shall be addressed, in the case of AEROTEK, to Assistant Controller-Mid-Atlantic Region at: 7301 Parkway Dr. Hanover, MD 21076 or, in the case of Client, to _____ at _____. If sent by facsimile, a Notice shall be sent to AEROTEK at (410) 579-3106 or to Client at (_____) _____.

14.3. DELIVERY: A Notice delivered personally shall be deemed given only if acknowledged in writing by the person to whom it is given. A Notice sent by facsimile shall be deemed given when transmitted; provided that the sender obtains written confirmation that the transmission was sent. A Notice sent by overnight delivery or express mail shall be deemed given twenty-four (24) hours after having been sent. A Notice that is sent by certified mail or registered mail shall be deemed given forty-eight (48) hours after it is mailed. If any time period in this Agreement commences upon the delivery of Notice to any one or more parties, the time period shall commence only when all of the required Notices have been deemed given.

14.4. CHANGES: Either party may designate, by Notice to the other, substitute addressees, addresses or facsimile numbers for Notices, and thereafter, Notices are to be directed to those substitute addresses, or facsimile numbers.

15. MISCELLANEOUS:

15.1. GOVERNING LAW: The laws of the State of Maryland shall govern the validity and construction of this Agreement and any dispute arising out of or relating to this Agreement, without regard to the principles of conflict of laws.

15.2. SEVERABILITY: A ruling by any court that one or more of the provisions contained in this Agreement is invalid, illegal or unenforceable in any respect shall not affect any other provision of this Agreement so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to any party. Thereafter, this Agreement shall be construed as if the invalid, illegal, or unenforceable provision had been amended as originally contemplated by this Agreement to the greatest extent possible.

15.3. COUNTERPARTS: This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original. In that event, in providing this Agreement it shall not be necessary to produce or account for the counterpart signed by the party against whom the proof is being presented.

15.4. HEADINGS: The section and subsection headings have been included for convenience only, are not part of this Agreement and shall not be taken as an interpretation of any provision of this Agreement.

15.5. BINDING EFFECT: This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective heirs, legatees, personal representatives and other legal representatives, successors and permitted assigns. Except as otherwise specifically provided, this Agreement is not intended and shall not be construed to confer upon or to give any person other than the parties any rights or remedies.

15.6. AMENDMENTS AND MODIFICATIONS: Except for modifications to Exhibit A pursuant to Section 2 herein, this Agreement may be amended, waived, changed, modified or discharged only by an agreement in writing signed by all of the parties.

15.7. ENTIRE AGREEMENT: This Agreement and Exhibit A hereto constitutes the entire agreement between the parties, and there are no representations, warranties, covenants or obligations except as set forth in this Agreement. This Agreement supersedes all prior and contemporaneous agreements, understandings, negotiations and discussions, written or oral, of the parties, relating to any transaction contemplated by this Agreement.

15.8. WAIVER: Failure to insist upon strict compliance with any of the terms, covenants or conditions of this Agreement shall not be deemed a waiver of that term, covenant or condition or of any other term, covenant or condition of this Agreement. Any waiver or relinquishment of any right or power hereunder at any one or more times shall not be deemed a waiver or relinquishment of that right or power at any other time.

15.9. REMEDIES CUMULATIVE: The remedies set forth in this Agreement are cumulative and are in addition to any other remedies allowed at law or in equity. Resort to one form of remedy shall not constitute a waiver of alternate remedies.

15.10. ARBITRATION: Except as provided in Section 7 of this Agreement, all disputes, controversies or differences arising in connection with the validity, execution, performance, breach, non-renewal or termination of this Agreement shall be finally settled in an arbitration proceeding under the Rules of the American Arbitration Association by three arbitrators in accordance with the Commercial Arbitration Rules then in effect of the American Arbitration Association. Selection of the arbitrators shall be as follows: each party shall appoint one arbitrator within twenty (20) days after the parties have agreed to go to arbitration, and those two arbitrators shall appoint a third arbitrator who shall act as chairman, within a twenty (20) day period thereafter. If the parties fail to appoint the chairman within said period, the parties will apply to the American Arbitration Association for appointment of the third arbitrator. The parties agree to be bound by the findings of the arbitration. Notwithstanding the foregoing, the courts shall have jurisdiction over injunctive or provisional relief pending arbitration. The arbitrators shall not be empowered to award punitive damages to any party. The non-prevailing party to the arbitration shall pay all the prevailing party's expenses of the arbitration, including reasonable attorneys' fees and other costs and expenses incurred in connection with the prosecution or defense of such arbitration.

15.11. BACKGROUND SECTION: The Background section above is a part of this Agreement.

15.12. ASSIGNMENT: No party shall transfer or assign any or all of its rights or interests under this Agreement or delegate any of its obligations without the prior written consent of the other party; provided, however, that AEROTEK may transfer or assign its rights or interests, or delegate its obligations, under this Agreement to any parent, subsidiary or affiliate without the prior written consent of Client.

15.13. MOTOR VEHICLES: Contract Employee(s) are not authorized to operate a motor vehicle without AEROTEK's prior written permission. Client shall not request or require Contract Employee(s) to perform tasks which require driving a motor vehicle without AEROTEK expressed written permission.

AEROTEK

15.14. COMPLIANCE: Client agrees that it will comply with applicable federal, state, and local laws in connection with the services provided by AEROTEK hereunder, including but not limited to the following:

15.14.1. EQUAL OPPORTUNITY: AEROTEK is an equal opportunity employer and refers Contract Employees regardless of race, sex, color, religion, creed, ancestry, national origin, disability, age, marital status or other protected class status pursuant to applicable law. Client agrees and warrants that it will not reject Contract Employees, or otherwise deem Contract Employees unacceptable, or take any other action for any reason prohibited by federal, state or local laws including, but not limited to, laws pertaining to employment discrimination or employee safety. Client will indemnify and defend AEROTEK with respect to any and all claims that Client took action in violation of federal, state, and/or local laws, including costs of suit, settlement and attorneys' fees.

15.14.2. GOVERNMENT CONTRACTING - NOTIFICATION AND WAGE DETERMINATION: Client represents and warrants that the services to be provided by Contract Employees are not (i) supporting a contract for the United States, State or Local Government; or (ii) subject to any federal, state, or local prevailing wage determination, including but not limited to, the Service Contract Act of 1965, Davis-Bacon Act, or Walsh-Healey Public Contract Act. Client acknowledges and agrees that Client is responsible for (i) prior notification to AEROTEK of any and all projects that support a contract with the United States, State or Local Government, and (ii) the accuracy of any applicable prevailing wage determinations and flow down provisions. If it is later determined that such services provide by Contract Employees were in support of a United States, State or Local Government contract, Client agrees to indemnify AEROTEK for any claims, costs or fees which (i) AEROTEK may incur from any misclassification related to such determination; and (ii) result from any inaccuracy of the Client provided wage determination including, but not limited to, the failure to notify AEROTEK that the services provided by Contract Employees are or were required to be paid at a prevailing wage. Should Client fail to notify AEROTEK of an applicable prevailing wage or provide accurate wage determinations, AEROTEK reserves the right to bill Client the difference in the rate for all hours worked plus any statutory or regulatory costs associated with such rate difference. Further, AEROTEK will charge a ten percent (10%) fee, as liquidated damages for Client's failure to notify AEROTEK that a prevailing wage applies, which will be calculated based on the total difference in the rate for all hours worked.

15.14.3. AVIATION REGULATIONS: Client represents that none of the services to be performed by any Contract Employee will be FAA-regulated as a "SAFETY-SENSITIVE FUNCTION". Client agrees to be solely responsible for making such determination(s), and Client agrees to indemnify AEROTEK and hold AEROTEK harmless for any claims, costs or damages which may result from the Client's breach of its obligations contained herein.

15.14.4. HEALTH AND SAFETY: Client shall provide a safe, clean work environment that complies with all applicable local, state and federal laws. Client agrees to train, certify, evaluate and orient all Contract Employees in all applicable safety (IIPP), hazardous communication (MSDS information, etc.) and operational instructions in the same manner as Client employees and as required by policy or by law, including but not limited to, all federal OSHA and equivalent state agency requirements, guidelines and standards. To the extent a Contract Employee is obligated to meet site-specific training requirements in order for Client to comply with

applicable site-specific legal requirements, the Client shall provide the Contract Employee with all necessary training before placing the Contract Employee into the work environment and before allowing the Contract Employee to commence the specific assignment. Client shall provide and require all AEROTEK Contract Employees to wear all appropriate safety equipment. Client will notify AEROTEK immediately in the event of an accident or medical treatment of any Contract Employee, and will provide a completed supervisor's report of injury. In the event of an accident or other incident involving a Contract Employee, AEROTEK shall have the right to conduct an onsite investigation. Client shall cooperate with AEROTEK in the conduct of its investigation. Client will be responsible for all OSHA recordkeeping responsibilities required by law in the performance and execution of the terms of this agreement. Client shall indemnify AEROTEK and hold it harmless against and from any claims made or brought as a result of Client's breach of its obligations contained in this paragraph.

15.14.5. INTERNATIONAL TRAVEL: Contract Employee(s) are not authorized to travel internationally without AEROTEK's prior written permission. Client shall not request or require Contract Employee(s) to perform tasks which require international travel without AEROTEK's prior written permission.

15.14.6. OTHER REQUIREMENTS: Client acknowledges and agrees that it shall be responsible for notifying AEROTEK of any other industry-specific law or regulation applicable to the services provided by AEROTEK prior to any AEROTEK employee providing any services.

15.15. ANNUAL INFLATION ADJUSTMENT: Within the first sixty (60) days of every calendar year, AEROTEK reserves the right to adjust established bill rates with Client by up to 3% to cover specific direct cost increases. This bill rate adjustment will include any statutory, employee benefit, or Contract Employee compensation increases. AEROTEK will submit a revised Exhibit A reflecting the bill rate adjustment at the effective date of change to the Client for documentation purposes. If direct cost increases are greater than 3% then AEROTEK will secure a revised Exhibit A with Client documenting the new agreed upon rates. Any rate adjustment will be applicable on a go forward basis only.

15.16. DRUG & BACKGROUND SCREENING: If Client requires AEROTEK to perform certain drug and/or background screenings on its candidate(s) and/or Contract Employee(s), the Exhibit B Addendum should be completed and signed by both Client and AEROTEK. These screenings will be performed at Client's sole expense unless otherwise agreed to in writing by both parties.

WE, the undersigned have executed this Agreement the day and year first above written.

AEROTEK, INC.

By: Ed Polhorsky

Name: Ed Polhorsky

Title: Account Manager

Date: 2/5/15

Client: Electrical Systems, Inc.

By: Jerome H. Karr

Name: Jerome H. Karr

AEROTEK

Title: VP

Date: 2/5/2015

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

AEROTEK ENERGY,

Plaintiff/Counterclaim Defendant,

v.

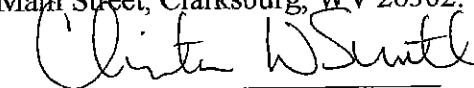
Civil Action No. 16-C-77-2

ELECTRICAL SYSTEMS, INC.

Defendant/Counterclaim Plaintiff.

CERTIFICATE OF SERVICE

I certify that on the 5th day of May, 2016, a true and correct copy of the foregoing
**MEMORANDUM OF LAW IN SUPPORT OF AEROTEK ENERGY'S MOTION TO
DISMISS ELECTRICAL SYSTEMS, INC.'S COUNTERCLAIM** was sent via U.S. mail,
postage paid to Sam. H. Harrold, III, 400 West Main Street, Clarksburg, WV 26302.



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*Counsel for Plaintiff/Counter-Defendant
Aeroteck Energy*