The In-House Counsel’s Essential Toolkit
Committee on Corporate Counsel
General Business Contracts
Volumes Excluded:

Corporate Compliance and Ethics

Corporate Governance

Employment Law

Intellectual Property

Litigation

Training Outside Counsel
Kandace Patton Watson  
*Kilpatrick Townsend & Stockton*

**Law School**  
University of Texas at Austin

**Major Cases**  
Often nicknamed the “Closer,” Watson has led the successful completion of many international transactions, including most recently chemical patent license, product development, manufacturing and distribution agreements adverse to Hitachi Chemical Company; an EOR cross patent license adverse to Chevron USA and consumer goods product supply, distribution, patent and software license agreements adverse to Reckitt Benckiser.

Watson represented YP, the largest local search, media and advertising company in North America, to sell its Earn Per Call business, advising on IP transactional issues and negotiating license agreements. She also represented a Fortune 100 health care services company in multiple JVs and software licenses.

**Professional Background**  
Watson heads Kilpatrick Townsend’s Mergers, Acquisition, Securities and Corporate Team in the Southwestern U.S. She has extensive experience representing companies in numerous industries, with an emphasis on biotechnology, pharmaceutical, health care, chemicals, technology, and food and beverage companies.

Companies seek Watson’s leadership to structure complex transactions, comply with securities regulations and expand operations globally. She advises boards and executives regarding corporate governance, strategic planning, and ongoing operations. Structuring JVs between majority and minority-owned businesses is among her specialties. Watson has successfully secured patent license and purchase agreements, as well as developed non-licensing strategies, against Non-Practicing Entities.

**Professional Affiliations**  
Watson is an Arbitrator for the American Arbitration Association and was selected as an AAA 2010 Higginbotham Fellow. She is a Leadership Council of Legal Diversity Fellow and a Lifetime Member of the National Bar Association. Watson served as a Board of Director for San Diego and Arizona NBA Affiliate Chapters and was an Ambassador of the American Bar Association’s Business Law Section.

**Personal Background**  
Watson is committed to Pro Bono efforts. She has provided hundreds of pro bono service hours, including Casa Cornelia and the Zahn Innovation Center, an incubator that supports San Diego State University entrepreneurs — to name just a few.

Watson also serves as an Advisory Board Member of UC San Diego’s Innovation Advisory Board.

**Fun facts:**
- I cruised the Nile River and explored the pyramids, temples and tombs of pharaohs in Egypt.
- I swam with sharks in Tahiti.
- I was photographed with a stingray on my stomach.
- I stood atop Mayan temples and saw the blood stains left from their human sacrifices.
- I swam with sea turtles and touched the tentacles of an octopus in Hawaii.
- I walked to the top of the Eiffel Tower in Paris with my mother, because it was her dream.
C. U.S. DISTRIBUTION AGREEMENT

1. Introduction

U.S. manufacturers and distributors are constantly seeking to develop new business channels in which to sell their products in the U.S. marketplace. A distribution agreement is necessary to document the sale of products from a manufacturer to a wholesaler or retailer, as well as their resale to end user customers. A distribution arrangement can represent a significant portion of one party’s business and, as such, actions taken with respect to the agreement can have a considerable impact on a party’s business potential, including its overall viability. Therefore, you should take care when drafting a distribution agreement because of a higher likelihood of disputes arising from such an agreement than in other contracts. You should write the agreement in plain English and be clear regarding each party’s obligations and requirements.

The form distribution agreement that follows is intended for a U.S. manufacturer and a U.S. distributor. International distribution arrangements are highly complex and beyond the scope of the form. If you are contemplating an international distribution channel, you should consult expert outside counsel that can advise you regarding governing law, export compliance, and the like.

2. Form: U.S. Distribution Agreement

This DISTRIBUTION AGREEMENT (hereinafter referred to as this “Agreement”) is made and entered into as of ________________, 20__, by and between ______________________, a _______________ (corporation/limited liability company/partnership), having its principal place of business located at _____________________________ (“Manufacturer”) and ________________, a _______________ (corporation/limited liability company/partnership), having its principal place of business located at _________________________ (“Distributor”).

RECITALS

WHEREAS, Manufacturer designs, manufactures, or sells ___________________ (“Products”); and

WHEREAS, Distributor desires to obtain such Products from Manufacturer for resale to end-user customers, and Manufacturer desires to sell such Products to Distributor, upon the terms and conditions provided in this Agreement.

NOW, THEREFORE, in consideration of the mutual promises contained in this Agreement, the parties hereby agree as follows:

1. Definitions.

1.1 “Agreement” means this agreement, together with all attachments hereto now or hereafter signed by Distributor and Manufacturer (all of which are herein incorporated by reference), as the same may be modified, amended, or supplemented in writing from time to time.
1.2 “End User” means a person or entity that purchases Products for its internal business use within the Territory (as defined below) and not for resale, sublease, or sublicense.

1.3 “Hardware” means the Manufacturer’s machine or components.

1.4 “Licensed Trademarks” means Manufacturer’s trademarks, insignia, logos, and symbols that are associated with the Products owned by Manufacturer.

1.5 “Product(s)” means any Hardware, [Software], documentation, including, but not limited to, operating manuals, user instructions, technical literature, and other written materials ordinarily provided by Manufacturer with Product, or any part thereof, that Distributor is authorized to purchase and resell under this Agreement, as identified and set forth in Attachment 1.

1.6 [OPTIONAL: “Software” means machine-readable object code, whether incorporated in the Hardware or delivered separately, [and includes new production versions of the Software].]

1.7 “Territory” means the [geographic location within the United States] [business market] assigned by Manufacturer as specified in Attachment 2.

**NOTE:** You should be very clear when describing the distributor’s territory, so there are no ambiguities. Territories can be based on geography or business markets, such as type of customer, specific industry, national accounts, etc. You should recheck already-existing distributor agreements to make sure you do not inadvertently create conflicting territories.

2. **Authorization.**

2.1 **Authorization as a Distributor.** Subject to the terms and conditions in this Agreement, Manufacturer hereby authorizes Distributor as [an exclusive] [a nonexclusive] Distributor to purchase [license] Products from Manufacturer and resell [ sublicense] such Products to End Users in the “territory”. Distributor must not market or sell [ sublicense] Products outside of Distributor’s Territory. [In addition, Distributor has no right to authorize others to resell, sublicense, or market Products and Services, and any such authorization or attempted authorization will be void and without effect.] [Manufacturer agrees not to appoint, prior to the termination of this Agreement, another authorized distributor in the Territory for the sale of Products. All orders or direct inquiries received by Manufacturer respecting the sale of Products in the Territory will be referred by Manufacturer to Distributor.]

**NOTE:** You should be very clear as to any conditions of authorization and the level of control over the distributor’s rights in and out of the territory. For antitrust reasons, you should avoid arrangements that require extensive monitoring by the manufacturer. In addition, you should be very clear whether the products will be sold or licensed, with (or without) rights to sublicense. See the intellectual property volume of this Toolkit for additional information on licensing.
2.2 **[OPTIONAL: Nonexclusivity.** Manufacturer expressly reserves the right to engage directly, or to contract with others, to market, sell, sublicense, or service the Products and Services in the Territory.]

**NOTE:** You should be careful in the description of exclusivity to avoid potential disputes. A closed exclusive arrangement, whereby the distributor cannot sell outside the territory, and the manufacturer and other distributors cannot sell within the territory, may be perceived as anticompetitive.

2.3 **Independent Contractor.** The relationship established by this Agreement between Manufacturer and Distributor is that of independent contractors. Distributor has no expressed or implied authorization to incur any obligation or commitment on behalf of Manufacturer, unless specifically approved in writing by an authorized Manufacturer official. Distributor will employ its own personnel and will be responsible for them and their acts. Manufacturer will in no way be liable to Distributor, its employees, or third parties, for any losses, injuries, damages, or the like occasioned by Distributor’s activities in connection with this Agreement, except as expressly provided for herein. [Distributor may appoint subdistributors or agents for the Products in the Territory in such numbers and at such locations as it may deem appropriate in its sole and absolute discretion. Distributor will be entirely responsible for the performance of its subdistributors and agents, and nothing in this Section will be deemed to create the relationship of principal and agent or distributor, or any similar relationship, between Manufacturer and such subdistributor or agent.]

**NOTE:** The parties must be clear regarding the independent nature of their relationship. You will need to document the parties’ intent regarding the potential use of subdistributors or agents. Again, you should avoid arrangements that require extensive monitoring by the manufacturer.

2.4 **Resale to U.S. Government.** Distributor must not market or sell Products or any other Manufacturer products or services to any office, department, agency, or defense installation of the United States government, unless expressly approved in writing by Manufacturer. Any such approval must be in accordance with additional Manufacturer terms associated with Manufacturer’s Federal Government Resell Program. Manufacturer reserves the right to modify the terms of its Federal Government Resell Program and related terms at any time.

**NOTE:** Selling products to the federal government entails compliance with various government procurement laws and regulations, such as the Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulations Supplement (DPARS). The manufacturer also may have its products listed on a General Services Administration (GSA) schedule that may dictate how such products are to be sold to the federal government. Therefore, unless the parties intend to allow the distributor to resell directly to the federal government, and applicable provisions are incorporated into the distribution agreement, the agreement should be clear in its restriction of such markets.
3. **Initial and Successive Terms of Agreement.**

This Agreement is effective on _______________ (“Effective Date”), and will terminate on _______________ (“Term”).

[OPTIONAL: Auto renewal: Unless terminated early in accordance with the provisions of Article 10 herein, this Agreement will automatically renew from year to year thereafter subject at all times to the same rights of termination as hereinafter provided.]

**NOTE:** We recommend the use of a fixed term, rather than an evergreen clause. This will allow the parties to review their relationship periodically, to focus on specific goals and requirements.

4. **Terms and Conditions of Sale.**

   4.1 **Standard Terms.** All sales of Products to Distributor by Manufacturer will be subject to the terms and conditions of this Agreement in effect at the time of such sales. The terms and conditions of this Agreement replace, in their entirety, any and all of the preprinted purchase order terms and conditions appearing on Distributor’s “Purchase Order” forms, irrespective of whether this Agreement is referenced by Distributor’s Purchase Orders. Manufacturer hereby expressly rejects any additional terms and conditions contained in Distributor’s Purchase Order, regardless of any language contained in Distributor’s Purchase Order stating Manufacturer’s acceptance of the order constitutes Manufacturer’s acceptance of the inclusion of such additional terms and conditions.

   **NOTE:** In order to avoid a “battle of the forms” issue, you should be clear as to the governing terms of the agreement. For more information on the battle of the forms, see the Introduction to the Master Purchase Order later in this volume.

   4.2 **Purchase Orders.** During the Term of this Agreement, Manufacturer will sell Products to Distributor, and Distributor will purchase Products from Manufacturer, by means of individual Purchase Orders and amendments that are issued from time to time by Distributor. Each Purchase Order must specify the quantity, part number, description of Products to be purchased, requested delivery date, and location to which Products are to be shipped. Purchase Orders for Products will be considered accepted upon written acknowledgment by Manufacturer; provided, however, that (a) Manufacturer may revoke or alter its acknowledgment and acceptance at any time within [five (5) days] after Manufacturer’s acknowledgment; or (b) Manufacturer may withhold shipment of Products to Distributor at any time, if Distributor has failed to make timely payment for any previous Manufacturer invoice for Products.

   **NOTE:** You should be clear as to how product orders are to be issued by the distributor and accepted by the manufacturer, as well as what information is required for order processing. You should keep in mind that in all likelihood nonlawyers will be administering this agreement, and business people will be enforcing it.
4.3 Packaging, Delivery, Title, Risk of Loss, and Security Interest.

4.3.1 Packaging. All Products must be packaged for shipment, so as to protect the Products from loss or damage in conformance with good commercial practice, Distributor’s specifications, government regulations, and other applicable standards.

4.3.2 Delivery and Title. Deliveries for Products ordered by Distributor shall be made [F.O.B. Manufacturer’s facility]. Title, risk of loss, damage, or destruction will pass from Manufacturer to Distributor upon Manufacturer’s Delivery of the Product to the common carrier specified by Distributor. If no instructions are given, Manufacturer will select a reasonable carrier. Distributor will be responsible for assertion of claims against carriers for loss or damage to Products; such loss or damage will not relieve Distributor of its obligation to pay Manufacturer for the Products.

NOTE: The manufacturer may have a “drop ship” policy or practices whereby it agrees to ship products directly to an end-user. However, based on potential market changes, you should avoid documenting a specific drop ship policy in the distribution agreement. Under F.O.B. (Free on Board), a commonly used trade term, the manufacturer will have satisfied its delivery obligations when the products have passed over the ship’s rail; from that point forward, risk of loss/damage shifts to the distributor. Terms other than F.O.B. may be appropriate depending on your business. You should review Incoterms, published by the International Chamber of Commerce, before agreeing to negotiate the delivery terms. See www.iccwbo.org/incoterms/id3045/index.html

4.3.3 Security Interest. In order to secure payment of Distributor’s payment obligations under this Agreement, Distributor hereby grants Manufacturer a security interest in the Products that Distributor purchases from Manufacturer. If Distributor defaults in its payment obligations to Manufacturer, Manufacturer may, in its discretion, declare all such payment obligations immediately due and payable, and in such event, Manufacturer will have all rights and remedies of a secured party under the Uniform Commercial Code (“UCC”). Also, in such event, Distributor must cooperate fully with Manufacturer’s exercise of its rights under this Section, including but not limited to, the turnover of all information required by Manufacturer to enforce its security interests under this Agreement, including all accounts receivable and customer records, and the notification of customers directing that payments on accounts receivable be sent directly to Manufacturer or its designee. Distributor agrees promptly to sign and return to Manufacturer all documents that are deemed by Manufacturer to be necessary or prudent to perfect or otherwise protect the priority, validity, and continuity of the security interest granted by Distributor to Manufacturer as set forth in this Agreement.
NOTE: It is in the manufacturer’s best interest to maintain a security interest in its products until title effectively passes to the distributor. The above provision obligates the distributor to cooperate and assist the manufacturer in perfecting its security interest in the products.

4.4 Inspection and Acceptance.

4.4.1 Inspection. All Products ordered pursuant to this Agreement will be subject to inspection by Distributor after delivery to determine their conformity with the identification of material set forth in Distributor’s Purchase Order. If the Products delivered are not listed on such Purchase Order, Distributor will have the right to reject such Products. Distributor will have a period of [twenty (20) days] following placement of the Products within possession of the carrier within which to inspect the Products for conformity with Distributor’s Purchase Order and to provide Manufacturer with written notice of acceptance or rejection. Unless such written rejection is communicated to Manufacturer within such time period, Distributor will be deemed to have accepted the Products. In the event written notice of rejection is given, Manufacturer promptly will undertake to remedy the delivery in a manner deemed by Manufacturer to be appropriate under the circumstances. No Products may be returned to Manufacturer without its consent.

NOTE: This is a standard provision that establishes a mechanism for the distributor to inspect, reject, or accept the products. You should document clear inspection and acceptance criteria.

4.4.2 [OPTIONAL: Loss or damage to Products that occurred during delivery of Products will not be a permissible basis upon which to reject the Products; the provision of Section 4.3.2 above will be applicable.]

4.5 Increase, Rescheduling, Product Discontinuance, Cancellations, and Returns.

4.5.1 Increase. Distributor may increase the quantity of any Product specified in a Purchase Order by delivery to Manufacturer by mail, facsimile, or e-mail of a written “Change Order.” Such Change Order will not become effective until and unless it is actually received and accepted by an authorized representative of Manufacturer. Manufacturer reserves the right to ship the increased quantities separately from the original order quantities.

NOTE: You should be cognizant of the fact that many product orders are changed for a variety of business reasons, and that clear procedures established to provide for such events, including specific time frames, can greatly reduce the likelihood of a dispute.

4.5.2 [OPTIONAL: Reschedule. Distributor may issue a written Change Order to reschedule delivery up to [fifteen (15) days] prior to delivery, with an additional one-time charge of $_______] [without additional charges.]]
4.5.3 **Product Discontinuance.** Manufacturer will give Distributor at least [six (6) months’] prior written notice of intent to discontinue manufacture, sale, or support of any Product listed on Attachment 1. All Distributor Purchase Orders submitted during the notice period will be accepted and performed by Manufacturer.

**NOTE:** You should be aware that manufacturers update their product lines based on a number of factors, and such events may occur during the term of the distribution agreement. The distributor should have a reasonable time to inform its customer base of such an event.

4.5.4 **Cancellation.** Distributor will be responsible for any and all material and labor commitments incurred by Manufacturer in the event of Distributor’s cancellation of an accepted Purchase Order, unless such materials can be used by Manufacturer to manufacture other products within [180 days] subsequent to Distributor’s cancellation.

**NOTE:** You should include a reasonable cancellation procedure so that the parties prospectively understand the financial impact of order cancellation, greatly reducing the likelihood of a dispute. The parties also can consider specific cancellation charges if the order is cancelled a specified number of days before the scheduled delivery.

4.5.5 **Returns.** Distributor may, upon order cancellation from the End User and within [sixty (60) days] of delivery, return to Manufacturer new, unused, and current Products in their original unopened cartons for full credit, less a [ten percent (10%)] restocking fee. “Current” means a revision level currently offered for sale by Manufacturer.

**NOTE:** You should include a reasonable return policy so that the parties understand the financial impact of a restocking fee, greatly reducing the likelihood of a dispute.

4.6 **Price and Payment.** Product purchase prices will be those listed in Attachment 1. Manufacturer may invoice Distributor for Products no earlier than the date Products are delivered. Payments for Products delivered to Distributor are due [thirty (30) days] from [date of invoice] [receipt of invoice] by Distributor. Payments will be made to Manufacturer at the address stated on each invoice. Payments must be in U.S. dollars. [Payments on undisputed amounts received by Manufacturer after their due dates will be subject to a monthly service charge, which service charge will accrue against the sum of all late payments for such month, plus outstanding amounts due from previous months (if applicable). The monthly rate at which the service charge will be computed will be _____ percent (___%) of the amount due, or the highest interest rate permitted by applicable law, whichever is less. Manufacturer may, from time to time, apply all or part of any outstanding credits to Distributor against any indebtedness (whether due or to become due) owed by Distributor to Manufacturer as the same shall become due.]
NOTE: You should be clear and concise regarding payment terms and late fee charges, if applicable. One percent (1%) to two percent (2%) of the amount due is customary, but the actual percentage adopted should be based on the capabilities of the individual Manufacturer’s billing system.

4.6.1 Manufacturer will have the right to change its Product offerings or prices at any time, and to modify Attachment 1 accordingly, provided that Manufacturer must give Distributor [ninety (90) days’] written notice before such changes become effective. Announcement of such changes will not relieve Manufacturer from obligations to furnish Products at prenotification prices, provided orders are received by Manufacturer prior to the effective date of the change, and further provided that such orders are scheduled for shipment within [ninety (90) days] from the notification date.

NOTE: Depending on the term of the agreement, you might consider including language that gives the distributor a reasonable amount of time to inform its end users of price changes and lock in prices for a set period of time. Such a provision will help protect the distributor from adverse impacts due to unexpected price increases.

4.6.2 [OPTIONAL: Payments may be made via selected credit cards. However, Distributor may be subject to a service charge in an amount equal to the actual processing fees charged to Manufacturer by the credit card issuer.]

4.6.3 [OPTIONAL: Payments may be made via electronic transfer or automated clearinghouse at the option of Distributor, subject to prior approval by Manufacturer. Distributor will be subject to a service charge in an amount equal to the actual charges for the electronic transfer or automated clearinghouse service imposed on Manufacturer by its lending institution, if any.]

4.6.4 Any payment by Distributor that is less than the sum of all amounts owed by Distributor to Manufacturer for the purchase of Products, plus the total of all outstanding service charges, may be applied by Manufacturer within its sole and absolute discretion, to Distributor’s account chronologically, by invoice date. For each such invoice, payment may be applied first to the relevant service charge and then to the principal amount of the invoice itself, regardless of contrary instructions received from Distributor. Service charges are due and payable upon Manufacturer’s issuance of a service charge invoice.

4.6.5 [OPTIONAL: Use with Section 5.3: For each Product for which Distributor provides delivery service that it is at the time obligated to perform pursuant to Section 5.3 hereof, Manufacturer will, upon the completion of such service in a manner satisfactory to Manufacturer, credit to Distributor’s account the applicable delivery service credit.
offered to Distributor by Manufacturer at the time. Manufacturer may, from time to time in its sole and absolute discretion, credit all or any part of the applicable delivery service credit to Distributor’s account before Distributor has so completed such service. Distributor hereby promises to repay to Manufacturer, from time to time on demand, the aggregate amount of all such credits to which Distributor has not become entitled by the terms of this Agreement prior to such demand.]

4.7 Taxes. Taxes applicable to Distributor Purchase Orders will be stated separately on each invoice. Distributor must pay all license fees, sales, use, service use, occupation, [retailer’s] occupation, service occupation, personal property, and excise taxes, and any other fees, assessments, or taxes that may be assessed or levied by any national, state, or local government, and any departments and subdivisions thereof, against any of the Products ordered by Distributor and under Distributor’s direct or indirect control. Distributor will provide Manufacturer with an applicable tax exemption certificate when Distributor is exempt from the imposition of any tax.

4.8 [OPTIONAL: Software License. Manufacturer grants Distributor a limited, nonexclusive, nontransferable license to use the Software internally and to distribute and sublicense the Software to its End Users solely for use in connection with the Products in accordance with the terms of this Agreement and the software license as set forth in Attachment 3 (“End User Software license”), subject to the following conditions: (i) Distributor must communicate to End Users the license applicable to the Products ordered by the End User; (ii) Distributor must obtain the End User’s written agreement to the license terms in Attachment 3 prior to, or upon Distributor’s acceptance of, an order from End User; (iii) Distributor must not agree to any contractual limitations on the End User’s liability for violations of Manufacturer’s intellectual property rights, including breaches of a software license or reverse engineering; and (iv) Distributor must maintain a copy of each such End User license agreement and Manufacturer will have the right to obtain a copy of such upon request. With respect to third-party software and Software licensed under any Manufacturer or third-party “shrink wrap” or “click” licenses, Distributor agrees that such licenses will govern the use of such Software, and Distributor will obtain agreement that End Users comply with such licenses. Upon termination of this Agreement for any reason, Distributor’s right to distribute and sublicense the Software will terminate, and Distributor agrees to return all remaining Software in its inventory to Manufacturer. Manufacturer expressly reserves the right to modify its license agreements, and any modification will apply to all Software transactions occurring after the effective date of such modification.]

NOTE: In the event the product includes software, you should address the licensing requirements of such software. You must address whether the manufacturer’s software license is provided to the distributor or directly to the end user.
5. **Responsibilities of Distributor.**

5.1 **Distributor’s Services.** Manufacturer’s appointment of Distributor was, and will continue to be, predicated upon Distributor’s commitment to provide promotional, sales support, installation, maintenance, repair, and customer training services in accordance with the highest industry standards. As a minimum requirement to meet the above commitment, Distributor agrees to:

a. Employ a competent and aggressive sales and technical support organization, and provide appropriate facilities, tools, and equipment to resell the Products;

b. [Install and support the Products as specified by Manufacturer, or as may be agreed to by the parties;]

c. Perform or comply with the terms and conditions specified in any Manufacturer discount or promotional program, or as may otherwise be specified in writing by Manufacturer;

d. Meet any specific eligibility requirements that Manufacturer may establish for a designated Product;

e. Meet or exceed minimum sales commitments;

**NOTE:** The parties may wish to establish minimum sales requirements. We recommend objective and easily measurable standards within a specified time period be used to reduce the likelihood of disputes.

f. Comply with and meet or exceed all applicable industry standards for sales and support of the Products distributed by Distributor under this Agreement;

**NOTE:** At a minimum, the distributor should be held to applicable industry standards for sales and support. You may seek greater standards of sales and support, including minimum sales targets, depending on the nature of the agreement and the extent of the “exclusivity” of the sales relationship.

g. Distribute the Products in accordance with the terms and conditions of this Agreement [and install and maintain the Products in the Territory] in a manner that will neither damage the quality or functionality of the Products, nor require extraordinary technical support from Manufacturer;

h. [Be responsible for addressing all warranty issues with End Users and for that portion of any warranty that exceeds, whether in time or scope, the warranty provided for the applicable Product to Distributor by Manufacturer;]
NOTE: There should be a thorough discussion between the parties addressing their individual obligations regarding end user warranty issues and their resolution.

i. Be responsible for customer satisfaction for all Distributor activities with its End Users;

j. Be responsible for sending Distributor employees or sub-contractor employees to required training and, if applicable, paying for such training;

NOTE: Parties need to address the issue of distributor employee training, e.g., sales, product installation, or repair training.

k. Provide a rolling, nonbinding forecast of Product orders, from time to time, as requested by Manufacturer [or at specific dates during the year, e.g., end of each financial quarter, etc.];

l. [Purchase all its requirements of the Hardware [and Software] solely from Manufacturer. The purchase of Products from any other source is strictly prohibited.]

NOTE: This language presumes an exclusive arrangement between the manufacturer and distributor for the manufacturer’s products in the territory. This provision assists a manufacturer that seeks to prohibit its distributor from obtaining the manufacturer’s products on the “Gray Market,” thus keeping greater control over the quantity and quality of its products in the territory.

5.2 Record Keeping and Reporting. Distributor must maintain true and accurate records, in accordance with generally accepted accounting principles and industry standards, of all Products sold by Distributor. By the [tenth (10th) day] of each month, Distributor must prepare and forward to Manufacturer reports reasonably required by Manufacturer, including, but not limited to, a point-of-sale report in accordance with Manufacturer’s requirements. The point-of-sale report must, at a minimum, specify Distributor’s end-of-month Product inventory, Product sales by End User name and address, Manufacturer product code, quantity, and sale date. In addition, Distributor must track all Hardware by serial number [and End User, and maintain copies of all Manufacturer Software Licenses executed by each End User to which Software is licensed.] Upon request, Distributor must provide Manufacturer with End User name, the location of any such Hardware [or Software], and any applicable serial numbers. Manufacturer will have a right, upon reasonable notice, to examine all such records. The obligation to maintain and make such information available to Manufacturer will survive for a period of [five (5) years] following the expiration or termination of this Agreement.

5.3 [OPTIONAL: Distributor Performance of Delivery and/or Warranty Services. Distributor hereby agrees that, to the extent that Manufacturer requests Distributor in writing to perform delivery and/or warranty services on any Product, Distributor will provide such services for each such Product sold by it, and for
each such Product located in the Territory, whether or not sold by Distributor. Manufacturer will compensate the Distributor as set forth in Section 4.6 hereof for services that the Distributor becomes obligated to perform under the preceding sentence. Delivery and warranty services will include, but not be limited to, giving operating and maintenance instructions, installing Products (other than spare and replacement parts), performing all service necessary at the time of delivery, servicing all warranty claims, and making installation inspection and necessary adjustments at the time of delivery and at such subsequent times as may be necessary to ensure proper and efficient operation (according to standard practices and policies of Manufacturer as in effect from time to time). In performing delivery and warranty services, Distributor agrees to comply with service policies issued by Manufacturer from time to time, and to make and furnish to Manufacturer such delivery and service reports as Manufacturer may require. Distributor will employ, for the installation and service of Products, expert service personnel who have received all necessary and appropriate training. Distributor will use its best efforts to handle satisfactorily all matters relating to the servicing of Products that it becomes obligated to service. Distributor will report promptly to Manufacturer each complaint received by Distributor from End User relating to Products that Distributor cannot remedy, giving the name and address of the End User.

5.4 **Manufacturer Service Obligation.** If the Distributor’s service obligations under this Article 5 are not discharged properly by Distributor, Manufacturer, in its sole and absolute discretion, may discharge such obligations directly or through third parties, and Distributor agrees to reimburse Manufacturer, upon demand, for all [reasonable] costs and expenses incurred by Manufacturer in connection therewith.

6. **Trademarks and Advertising.**

Distributor is permitted to use Licensed Trademarks, as may be specifically approved by Manufacturer, at Manufacturer’s sole and absolute discretion, in support of the sale of Products as contemplated under this Agreement, only in the Territory authorized under this Agreement, only in association with the Products Distributor is approved to market and distribute, only in accordance with [the guidelines provided by Manufacturer,] and in such a manner as not to jeopardize the validity of the Licensed Trademarks or to damage or detract from Manufacturer’s goodwill or interest in the Licensed Trademarks. Distributor must not use the Licensed Trademarks in association with any other trademark, so as to create a composite mark of any kind. Distributor must submit to Manufacturer, for prior approval, all advertising and other material on which the Licensed Trademarks appear or are intended to be used. Distributor must send to Manufacturer a soft copy of completed material, along with a description of the proposed use and placement, a minimum of [two (2) business days] prior to the intended date of production. Manufacturer reserves the right to withhold any such approval, at its sole discretion, and any such approval by Manufacturer does not constitute an endorsement or approval of the advertisement’s content. Distributor agrees that the Licensed Trademarks will not be modified in any way, and further agrees to promptly modify any advertising...
or promotional materials that do not comply with [Manufacturer’s guidelines]. Any complaints regarding the use of any Licensed Trademarks promptly must be forwarded to Manufacturer. Distributor’s right to use the Licensed Trademarks will end when this Agreement ends. Distributor acknowledges that the Licensed Trademarks and all goodwill associated therewith are, and will remain, the sole property of Manufacturer.

**NOTE:** *A provision addressing the proper use of the manufacturer’s trademarks allows the distributor to use the trademarks in its sole efforts. The manufacturer should give the distributor comprehensive guidelines for the use of the trademarks, including advertising.*

7. **Patent and Copyright Indemnification.**

If a third party claims that Manufacturer’s Product provided to Distributor under this Agreement infringes upon that party’s patent or copyright, Manufacturer will defend Distributor against that claim, at Manufacturer’s expense, and pay all costs and damages that a court finally awards or are agreed upon in settlement, provided that Distributor (a) promptly notifies Manufacturer in writing of the claim, and (b) allows Manufacturer to control, and cooperates with Manufacturer in the defense of such claim and any related settlement negotiations. If such a claim is made or appears likely to be made, Manufacturer agrees to use commercially reasonable efforts to secure the right for Distributor or Distributor’s End User to continue to use the Product, or to modify it, or to replace it with one that is equivalent. In the event that none of the alternatives is reasonably available, Distributor agrees to return the Product and require that Distributor’s End Users agree to return the Product to Manufacturer. Manufacturer will give Distributor a refund based on the amount of monies paid for the Product by Distributor, so that such funds can be used to secure cover. This represents Manufacturer’s entire obligation to Distributor regarding any claim of infringement.

Manufacturer has no obligation regarding any claim of infringement which is based upon: (i) a claim covering any combination of equipment and/or software in which the Product is solely an element and such element by itself does not form a basis for the claim; (ii) a claim arising from any item furnished by Distributor, including, but not limited to, systems, or any portions thereof, manufactured by a third party other than Manufacturer; (iii) a claim arising from use of components manufactured, developed, or programmed at Distributor’s request to Distributor’s product specifications; (iv) a claim arising from use of the components in a manner or for a purpose not contemplated by this Agreement; (v) a claim arising from those portions of the Product that are modified after shipment by any party other than Manufacturer, if the alleged infringement relates to such modification, or directly or indirectly combined with any non-Manufacturer equipment, products, processes, or materials where the alleged infringement relates to such combination; or (vi) a claim where the alleged infringing activity continues after Manufacturer has notified Distributor thereof or after Manufacturer has informed Distributor of modifications that would have avoided the alleged infringement.

**NOTE:** *This is a standard provision. You will need to tailor this product indemnity to the manufacturer’s insurance coverages.*
8. **Limitation of Liability.**

EXCEPT FOR CLAIMS FOR A BREACH OF CONFIDENTIALITY [OR A BREACH OF THE SOFTWARE LICENSE,] NEITHER PARTY WILL BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS OR REVENUE, LOSS OF USE OF THE PRODUCTS [OR SOFTWARE] OR COST OF SUBSTITUTED PRODUCTS, [SOFTWARE,] OR SERVICES WHICH ARISE OUT OF PERFORMANCE OR FAILURE TO PERFORM ANY OBLIGATION CONTAINED WITHIN THIS AGREEMENT OR OUT OF NEGLIGENCE IN THE COURSE OF SUCH PERFORMANCE, WHETHER THE CLAIM FOR DAMAGES IS BASED IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, OR OTHERWISE.

EXCEPT FOR CLAIMS FOR PERSONAL INJURY OR FOR DAMAGE TO REAL OR TANGIBLE PERSONAL PROPERTY, TO THE EXTENT CAUSED BY SELLER’S NEGLIGENCE, MANUFACTURER’S MAXIMUM LIABILITY TO DISTRIBUTOR FOR ANY CLAIM FOR DAMAGES RELATING TO MANUFACTURER’S PERFORMANCE OR NONPERFORMANCE UNDER THIS AGREEMENT WILL BE LIMITED TO [$__________].

**NOTE:** *We recommend the use of a liability cap so the parties understand their contractual damages exposure going into the agreement. The use of a liability cap greatly increases the likelihood of dispute resolution without resort to costly litigation.*

9. **Warranties.**

9.1 **Manufacturer Warranty.** Manufacturer warrants to Distributor that Products are free from [substantial] defect in material and workmanship under normal use, given proper installation and maintenance, for a period of [one (1) year] from the date of delivery by Manufacturer. Distributor will promptly notify Manufacturer of any defect in the Product. Manufacturer or its agent will have the right to inspect the Product or workmanship on Distributor’s premises or End User’s premises. Manufacturer has the option to (a) repair, replace, or service, at its factory or on the premises, the Product or workmanship found to be defective or (b) credit Distributor for the Product. Only newly manufactured Product will be used to repair or replace defective Product. Products returned to Manufacturer for repair, replacement, or service will be shipped prepaid by Distributor. Correction of defects by repair, replacement, or service will be at Manufacturer’s option and constitute fulfillment of all warranty obligations to Distributor for breach of warranty.

**NOTE:** *You will need to take care in the warranty section to address a number of items, such as: (a) whether the warranty is provided only to the distributor, or if the distributor is required or permitted to pass it through to the end user; (b) duration of the warranty; (c) the Manufacturer’s obligations for repair and/or replacement; (d) the distributor’s obligations for repair; and (e) payment obligations for shipment of defective and repaired/replaced product.*
9.1 Manufacturer Warranty. Manufacturer will keep Distributor informed of Manufacturer’s warranty or warranties applicable to Products, as in effect from time to time (such warranty or warranties, as the case may be, being herein called the “Warranty”), and Manufacturer will extend the appropriate Warranty to each End User who purchases Product from Distributor upon the purchase of that Product by such End User. Distributor will include the Warranty, in the form and content specified by Manufacturer, in each agreement for the sale of Products by Distributor, and will furnish a copy of the Warranty to the End User upon delivery of that Product.

9.2 OPTIONAL: see Section 5.3: Distributor Performance of Warranty Services. Distributor agrees to furnish all warranty services required under the Warranty for all Products. Distributor agrees to supply free of charge to End Users to whom such Products have been sold replacement parts that are required to be so supplied under the Warranty. Manufacturer agrees to replace such parts as are thereby supplied by Distributor. For each Product for which Distributor provides warranty service, Manufacturer shall, upon the completion of such service in a manner satisfactory to Manufacturer, credit to Distributor’s account an amount determined in accordance with Manufacturer’s distributor warranty reimbursement credit policy as in effect for Distributor when warranty services covered thereby are performed.

9.3 Warranty Exclusions. THE WARRANTIES IN THIS AGREEMENT REPLACE ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, AND ALL OTHER OBLIGATIONS OR LIABILITIES OF SELLER, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. ALL OTHER WARRANTIES ARE DISCLAIMED AND EXCLUDED BY MANUFACTURER. THE REMEDIES CONTAINED IN THIS AGREEMENT WILL BE THE SOLE AND EXCLUSIVE REMEDIES, WHETHER IN CONTRACT, TORT, OR OTHERWISE. THIS LIMITATION APPLIES TO ALL PRODUCTS, SERVICES, AND SOFTWARE DURING AND AFTER THE WARRANTY PERIOD. MANUFACTURER SHALL NOT BE RESPONSIBLE FOR ANY DEFECT CAUSED BY PRODUCT MISUSE. IN NO EVENT WILL MANUFACTURER BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS OR REVENUE, LOSS OF USE OF THE PRODUCTS [OR SOFTWARE], OR COST OF SUBSTITUTED PRODUCTS [SOFTWARE] OR SERVICES WHICH ARISE OUT OF PERFORMANCE OR FAILURE TO PERFORM ANY OBLIGATION CONTAINED WITHIN THIS AGREEMENT, OR OUT OF NEGLIGENCE IN THE COURSE OF SUCH PERFORMANCE, WHETHER THE CLAIM FOR DAMAGES IS BASED IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, OR OTHERWISE. ANY ACTION FOR AN ALLEGED BREACH OF ANY CONTRACT OF SALE OR OF THE ABOVE-STATED WARRANTY WITH
RESPECT TO PRODUCTS SOLD BY MANUFACTURER TO DISTRIBUTOR MUST BE COMMENCED WITHIN [ONE (1) YEAR] AFTER THE CAUSE OF ACTION ACCRUES.

NOTE: Standard warranty exclusion provision. The purpose is to exclude all warranties not specifically contemplated by the parties and set forth in the agreement. Recommend the enumeration of a specific time frame after which causes of action are no longer permitted.

9.4 Distributor Warranty Exclusions. Neither Distributor nor any representative of Distributor is authorized to make any warranties on behalf of Manufacturer, or to assume for Manufacturer any other liability in connection with any of Manufacturer’s Products, [Software,] or services.

ALTERNATIVE ARTICLE 9 (Sections 9.1 thru 9.5 below):

[9.1 Manufacturer Warranty. Manufacturer grants to Distributor, and only to Distributor, the warranty attached hereto as Attachment 4 (“Warranty”). DISTRIBUTOR EXPRESSLY ACKNOWLEDGES THAT SUCH WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. Manufacturer’s obligation with respect to such warranty will be limited to its obligations to Distributor as provided in Section 9.2, and such obligation shall be in lieu of any other remedy on the part of Distributor [subdistributors] [resellers].]

[9.2 Distributor Warranty Service Obligations. Distributor agrees to handle, adjust, and pay all Warranty claims with respect to Products purchased hereunder and sold in the Territory. Claims that are presented to Distributor must be presented to Manufacturer for reimbursement in accordance with the Warranty, and Manufacturer agrees to review promptly such claims and to make payment with respect thereto by crediting Distributor’s account with Manufacturer within [forty-five (45) days] of the presentation of the claims to Manufacturer. To the extent the Warranty does not cover spare parts, components, or accessories, Manufacturer agrees to cooperate fully with Distributor as to any warranty claims against the Manufacturer of such spare parts, components, or accessories. Manufacturer will have the right either to audit the records of Distributor relating to Warranty claims presented for payment in accordance with this Section 9.2 or have one of its representatives participate in the administration of Warranty claims at Distributor’s offices. Distributor agrees to utilize any compensation received pursuant to this Section 9.2 to discharge its warranty obligations [to subdistributor’s] [dealer’s] [reseller’s] [warranty obligations] to the End User.]

[9.3 Distributor Warranty to Resellers. Distributor must grant to its [subdistributors] [dealers] [resellers], upon the sale by Distributor to such [subdistributors] [dealers] [resellers] of Products, a warranty at least equivalent in scope and effect to the Warranty granted by Manufacturer to Distributor, and such warranty must
specify that the only remedy or recourse of [subdistributors] [dealers] [resellers] under such warranty will be against Distributor.]

[9.4 Distributor Warranty to End User. Distributor must grant to End Users, upon the sale of Products covered by this Agreement, a warranty at least equivalent in scope and effect to the Warranty granted by Manufacturer to Distributor and such warranty must specify that the only remedy or recourse of ultimate consumers under such warranty will be against Distributor.]

[9.5 Warranty Notification. Manufacturer may require amendments to the form of warranty used by Distributor from time to time. Distributor must promptly notify in writing its [End Users] [dealers] [resellers] of any amendments to the form of warranty required by Manufacturer, but no such amendment will be effective as to sales made to End Users until so required by Manufacturer.]

10. Termination

10.1 Termination Without Cause. Either party may terminate the Agreement at any time without cause by giving the other party ninety (90) days’ written notice of the termination. With regard to any Products purchased directly from Manufacturer during such ninety-day (90-day) period, Manufacturer will complete any pending Purchase Orders for Products upon receipt of prepayment from Distributor for any such Purchase Orders, unless the parties agree otherwise.

NOTE: The inclusion of the above clause will help refute a party’s claim that one party was coerced by the other to take a specific action. We recommend a minimum of ninety (90) days’ notice be provided so that the agreement comports with a number of state franchise and business opportunity laws that require at least ninety (90) days for termination or nonrenewal.

10.2 Termination for Breach. Either party may terminate this Agreement for material breach or default of any term or condition of this Agreement if such breach or default is not cured within thirty (30) days of written notice of such breach or default from the nonbreaching party. In the event of termination for Distributor’s breach, Manufacturer may cancel any pending Purchase Orders from Distributor to Manufacturer.

NOTE: Section 10.2 is a standard termination for default provision with a reasonable cure period provided.

10.3 Manufacturer Termination for Certain Significant Events. Manufacturer may terminate this Agreement immediately upon written notice, and cancel any pending Purchase Orders, upon the occurrence of any of the following events:

a. Distributor violates any provision in Section 2.1 (Authorization as a Distributor), Section 2.4 (Resale to U.S. Government), [Section 4.8 (Software License),] or Article 9 (Warranties);
b. Distributor sells Products manufactured by others under the Manufacturer’s brand or Licensed Trademark;

c. Distributor switches End Users’ orders from the Manufacturer’s Products to that of a competitor;

d. Distributor becomes a manufacturer of competing products, or acquires an interest in a competitor, where such interest adversely affects its ability to promote the sale of Manufacturer’s Products; or

e. there is a change in control of Distributor, including a transfer of ownership of more than fifty percent (50%) of the voting shares, membership units, or other securities in Distributor (excluding a change of ownership of the shares of a publicly traded company).

NOTE: The manufacturer should reserve the right to terminate the distributor immediately, or on short notice, if the distributor takes actions that are fundamentally inconsistent with the purpose of the agreement. Also, rather than contractually prohibiting such actions, the manufacturer should consider reserving its rights to terminate in the event the distributor takes such actions. You should be aware that a specific contractual prohibition could create a greater risk of allegations of anti-competitive behavior, increasing the likelihood of antitrust litigation.

10.4 Effects of Termination. Upon the termination or expiration of the Agreement, Distributor shall:

a. immediately pay all pending invoices and amounts owed Manufacturer, which shall become immediately due and payable;

b. discontinue all use of the Licensed Trademarks, except Distributor may continue using such Licensed Trademarks as authorized in the Agreement for an additional ninety (90) days, exclusively in connection with Distributor’s efforts to sell remaining inventory;

c. cease holding itself out in any manner as an authorized Distributor of Manufacturer and notify and arrange for all persons who may identify, list, or publish Distributor’s name as a Manufacturer-authorized Distributor to discontinue such designation; and

d. return to Manufacturer, at Distributor’s expense, all Products, Confidential Information (as defined below), promotional materials, price lists, maintenance manuals, parts and service policy manuals, service bulletins, parts cross-reference manuals, sales aids, and other publications of Manufacturer relating to Products or parts that Distributor has on hand.

NOTE: You should be clear as to the parties’ responsibilities and obligations in a post-termination environment.
10.5 [OPTIONAL: Following Termination or Expiration.] Unless otherwise expressly agreed in writing, to ensure continuity of [installation and service calls and] warranty service to End Users following the termination or expiration of this Agreement, Distributor will relinquish and assign, and does hereby relinquish and assign, effective on the termination or expiration date, to Manufacturer, all rights to [perform installation and make service calls and] perform warranty service in respect of all Products. In consideration of such relinquishment and assignment of such rights, Distributor agrees to pay to Manufacturer, or at Manufacturer’s option, permit Manufacturer to retain or charge Distributor’s account therefor, an amount equal to [____ percent (____%)]] of the net sales price of each new Product delivered to Distributor or to Distributor’s End User on or after the date of termination or expiration. Distributor shall furnish to Manufacturer on the termination or expiration date a list of all End Users to whom Products were delivered at any time within such [six (6) month] period or who have ordered such Products and are awaiting delivery, giving correct names and addresses, identification of item purchased and a statement of the [installation service call] work already performed by Distributor in respect of each such Product and of any warranty work which the End User has requested but which has not yet been performed. Upon complying with the foregoing provisions of this Article, Distributor will be relieved of its outstanding obligations to Manufacturer to further [install, make service calls, or perform warranty service in respect of such Products.]

11. Miscellaneous.

11.1 General.

a. Entire Agreement. This Agreement and its attachments constitute the entire agreement between the parties regarding the contemplated transactions and supersede all prior agreements and understandings between the parties relating thereto.

b. Descriptive Headings. The descriptive headings and sections of this Agreement are inserted for convenience only, and shall not control or affect the meaning or construction of any of the provisions hereof.

c. Interpretation. Should any provision of this Agreement require judicial interpretation, it is agreed that the court interpreting or construing the same will not apply a presumption that the terms hereof will be more strictly construed against one party by reason of the rule of construction that a document is to be construed more strictly against the party who itself or through its agent prepared the same, it being agreed that all parties, directly or through their agents, have participated in the preparation or negotiation hereof.

d. Severability. In case any one or more of the provisions contained in this Agreement is for any reason held to be invalid, illegal, or unenforceable in
any respect, except in those instances where removal or elimination of such invalid, illegal, or unenforceable provision or provisions would result in a failure of consideration under this Agreement, such provision will be severed, and its invalidity, illegality, or unenforceability will not affect any other provision hereof, and this Agreement will be construed as if such invalid, illegal, or unenforceable provision had never been contained herein. The parties may agree to renegotiate the terms of such severed provisions to negate the invalidity, illegality, or unenforceability of same.

e. **Amendments.** No modification, termination, extension, or renewal of any provision of this Agreement will be binding upon either party unless made in writing and signed by an authorized representative of each of the parties. [Neither electronic mail nor instant messaging will be considered a “writing” sufficient to change, modify, extend, or otherwise affect the terms of the Agreement or any amendment thereto. Any supposed oral amendment shall be null and void.]

| NOTE: Recent court holdings have found that e-mail and instant messaging can be considered writings between the parties. However, if electronic mail notices and modifications by authorized agents are desirable, then modify/delete the above-bracketed language and also add electronic modification to subsection (g) below. |

f. **Waiver.** No waiver of any breach of any provision of this Agreement shall constitute a waiver of any prior, concurrent, or subsequent breach of the same or any other provisions hereof, nor shall it constitute a course of dealing, and no waiver shall be effective unless made in writing.

g. **Notice.** All notices that either party hereto is required to or may desire to give to the other party, shall be in writing and shall be given by sending such notice to the party signing this Agreement at the address set forth on the signature page of this Agreement, or to such replacement address as such party may supply in accordance with this notification provision. All notices shall be deemed given, upon receipt of the notice by an authorized representative of the opposite party (with a copy to the General Counsel for each party), and shall be made by: (a) personal delivery, (b) recognized overnight delivery service, or (c) depositing such notice in the U.S. Mail, properly addressed with postage prepaid for Certified Mail delivery, Return Receipt Requested.

h. **Force Majeure.** Performance of this Agreement shall be pursued with due diligence. However, neither party will be liable to the other for nonperformance or delay in performance due to causes not reasonably within its control, including, but not limited to, acts of civil or military authority, acts of God, war, riot, or insurrection, blockades, embargoes, sabotage, epidemics, fires, floods, strikes, lockouts, labor difficulties, or Manufacturer, through no fault of its own, being placed on allocation by any component supplier. In the event of any Force Majeure occurrence,
the disabled party shall use reasonable commercial efforts to meet its obligations as set forth in this Agreement. Manufacturer, if placed on allocation through no fault of its own by any component supplier, must notify Distributor in writing within [three (3) days] of such placement, of Manufacturer’s inability to perform. For all other Force Majeure events, the disabled party must promptly and in writing advise the other party if it is unable to perform. The notice given by the disabled party shall include the expected duration of such inability to perform, and any developments that appear likely to affect the ability of that party to perform any of its obligations hereunder in whole or in part. Upon receipt of such notice, all obligations under this Agreement shall be suspended immediately. If the period of nonperformance exceeds [sixty (60) days] from the receipt of the notice of the Force Majeure occurrence, the party whose ability to perform has not been so affected may suspend or terminate this Agreement by giving written notice to the disabled party.

i. Third-Party Beneficiary. This Agreement is intended for the benefit of the parties and their permitted assigns, and no other persons will be entitled to rely upon this Agreement or be entitled to any benefits under this Agreement.

j. Assignment. Distributor must not assign the Agreement, or assign or delegate any right or obligation under the Agreement, without the prior written consent of Manufacturer. Any such assignment without Manufacturer’s consent will be void. Manufacturer is entitled to assign the Agreement, in whole or in part, without Distributor’s consent, to any Manufacturer-affiliated company or to any entity to which Manufacturer may sell, transfer, convey, assign, or lease all or substantially all of its rights and assets with respect to the development, production, marketing, or sale of Products and Services.

NOTE: This is a standard provision in that manufacturers will generally not agree to allow unknown and unapproved distributors to sell their products.

k. Confidential Information. Any documentation, technical information, software, business information, or other materials that either party may disclose to the other party in the course of performing this Agreement shall be considered proprietary information (“Confidential Information”) of the disclosing party, provided such Confidential Information is disclosed in written or other tangible form and the disclosing party prominently marks such Confidential Information as being confidential to it. Any Confidential Information disclosed verbally must be identified as confidential at the time of disclosure. Each party agrees to hold in strictest confidence, and not to disclose to any person or use in any way for that party’s own or another’s benefit any of the other party’s Confidential Information. Nothing in this provision will apply to any information (i) which enters or has entered the public domain otherwise than by breach of
this Agreement or of any other duty; (ii) which was publicly available at the time it was transmitted to the receiving party; (iii) which was properly provided to the receiving party by a third party without restriction; (iv) which is required to be disclosed by law or by any governmental agency having jurisdiction pursuant to an order to produce or in the course of a legal proceeding pursuant to a lawful request for discovery; provided, however, that if the receiving party is so ordered or required to disclose the information, it shall promptly notify the disclosing party of the order or request and permit the disclosing party (at its expense) to seek an appropriate protective order; or (v) which was independently developed by the receiving party without recourse to the Confidential Information. The parties agree that any violation of these provisions regarding confidentiality will result in irreparable injury to the other party and agree that each has the right to seek a restraining order, injunction, or any other remedies available at law or in equity. The parties agree to waive any bond requirement for enforcement of this provision. The confidentiality obligations of each party under the Agreement will survive for a period of [two (2) years] following any expiration or termination of the Agreement.

1. **Compliance with Laws.** Each of the parties must comply with all federal, state, local, and foreign laws, rules, and regulations applicable to its obligations under this Agreement or to the Product supplied hereunder.

11.2 **Applicable Law.** This Agreement will be governed and construed in accordance with the laws of the [Commonwealth or State of __________] excluding (i) its conflict of laws rules; [and] (ii) the United Nations Convention on Contracts for the International Sale of Goods; and (iii) the Uniform Computer Information Transaction Act (“UCITA”) to the extent modified and adopted.] [Each of the parties waives trial by jury and the right to trial by jury in any and all actions or proceedings in any court between them or to which they may be parties, whether arising out of, under, or by reason of this Agreement.]

11.3 **[OPTIONAL: Dispute Resolution.**

a. **Nonbinding Mediation.** Subject to Section 11.3c. (Injunctive Relief) below, no court action or arbitration with respect to any disputes may be commenced until the matter has been submitted to the [American Arbitration Association (“AAA”)] for mediation in __________ [agreed upon location] in accordance with the [AAA Commercial Mediation Rules], or as mutually agreed. Either party may commence mediation by providing to the AAA and the other party a written request for mediation, setting forth the subject of the dispute and the relief requested. The parties agree to participate in the mediation in good faith, and to share equally in the costs of mediation. Neither party may commence arbitration with respect to the matters submitted to mediation until the completion of the initial mediation session, or [forty-five (45) days] after the date of filing the written request for mediation, whichever occurs first.
NOTE: It is recommended that the parties agree to the parameters and procedures of dispute resolution prior to a dispute. Many parties see a benefit to mediation while others do not.

b. **Binding Arbitration.** Subject to Section 11.3a (Nonbinding Mediation) and Section 11.3c. (Injunctive Relief), any dispute arising out of or related to this Agreement, which cannot be resolved by mediation, must be settled by binding arbitration. If not thus resolved, the dispute must be referred to a [sole arbitrator or an affirmation panel] selected by the parties within [fifteen (15) days] of the notice of arbitration or, in the absence of such selection, to the American Arbitration Association (“AAA”), which will be governed by the United States Arbitration Act, and judgment on the award may be entered in any court having jurisdiction. The proceedings will be conducted in ___________ [agreed-upon location] pursuant to such rules. The costs of arbitration, including the fees and expenses of the arbitrator, will be shared equally by the parties, unless the arbitration award provides otherwise. The arbitrator may determine issues of arbitrability, but may not award punitive damages or limit, expand, or otherwise modify the terms of this Agreement. The arbitrator’s decision must follow the plain meaning of the relevant documents, and is binding. The arbitrator must render a written and reasoned opinion setting forth both findings of fact and conclusions of law. The parties, their representatives, other participants, and the arbitrator must hold the existence, content, and result of arbitration in confidence, except as such disclosure may be necessary for the purpose of recording or otherwise acting upon the arbitrator’s award. [Notwithstanding the foregoing, the parties will not be required to arbitrate the following categories of disputes: (i) claims for damages of more than $100,000; (ii) claims alleging infringement of intellectual property rights; or (iii) claims seeking emergent injunctive relief. The parties may agree in writing to exclude any dispute from arbitration.]

NOTE: You should be very clear and concise regarding arbitration procedures, including any limitations. The provision should address the costs of arbitration and limit the arbitrator from awarding damages not contemplated by the parties in the agreement, such as punitive damages.

c. **Injunctive Relief.** Either party may at its sole discretion and at any time during the dispute resolution process, seek injunctive relief to any court of competent jurisdiction (including, but not limited to, preliminary injunctive relief.) [Distributor acknowledges that Manufacturer has a vital interest in enjoining any unauthorized use of Manufacturer software or violation of confidentiality obligations, because damages would not adequately compensate Manufacturer for any infringements of Manufacturer’s intellectual property rights.]  

d. **No Withholding.** Disputes will not be a basis for withholding payment of any undisputed amounts due under this Agreement or offsetting other amounts due, whether or not the disputed item is on the same Purchase
Order or invoice, nor will any amount be retained in anticipation of a dispute for which notice has not been received.]

11.4 **Survival.** The following provisions shall survive the expiration or termination of this Agreement: [Section 4.8 (Software License);] [Section 5.2 (Record Keeping and Reporting); Article 7 (Patent and Copyright Indemnification); Article 8 (Limitation of Liability); Article 9 (Warranties); Section 11.1k (Confidential Information) and Section 11.4 (Survival).

11.5 **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one instrument.

Attachment 1: Product List and Pricing  
Attachment 2: Territory List  
[Attachment 3: End User Software License]  
[Attachment 4: Warranty]

**IN WITNESS WHEREOF,** the duly authorized representative of Manufacturer and Distributor have executed this Agreement on the dates shown below:

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NOTE: The manufacturer and distributor should develop a precise list of product offerings with associated pricing, including applicable discounts.
NOTE: The list of territories should be as precise as possible. The less ambiguity, the less likelihood of a dispute.
**NOTE:** If a software license is required by the manufacturer, it should be added as an attachment to the agreement.
NOTE: In the event the manufacturer is providing a warranty directly to the distributor as set forth in the alternative Article 9, you can include the warranty as an attachment.
D. REAL PROPERTY LEASE

1. Introduction

Commercial leases for new tenancies are among the most common of business documents. They are regulated as contracts under specific state statutes (e.g., Fla. Stat 83 et seq.). The common legal relationship created is that of landlord and tenant. These relationships are invariably written and sometimes recorded. The parties may choose to use a commercial lease form or tailor provisions for specific needs. The basic provisions often are negotiated, and reflect the economic leverage each party may bring to the table.

The following lease is an example of a comprehensive document suitable for a stand-alone retail establishment in a shopping center. However, many of its clauses can be employed in other contexts. Its provisions reflect the economic leverage of a large anchor-type tenant.

As with any business contract, the final terms can be the result of custom in a particular jurisdiction, or of bargaining and tradeoffs between the parties. A small firm renting space in a multioffice building under normal market conditions could not expect to get the kind of concessions given to a tenant that is expected to bring consumer traffic to the general area.

For these reasons, an attorney should make a careful survey of lease provisions available to the type of client she or he is representing before approaching the bargaining table.