TEMPLATE SOFTWARE DISTRIBUTOR AGREEMENT – USER NOTES

This is a simple "supplier friendly" B2B distributor agreement for low value/low risk electronic products.

If the products are high risk or high value, have unique characteristics, and/or the Company (being the product supplier, not the Distributor) will provide additional services to the Distributor, you should use an agreement that has been drafted for those purposes (e.g. more "belts and braces").

This template assumes:

- the Company has a commercial off-the-shelf electronic product
- the product does not require customisation for individual end customers
- the Company is not providing any "stand-alone" software that requires separate end customer licence terms (i.e. the only software being provided is embedded software and/or firmware)
- the Distributor will have the contractual relationship with the end customers for the sale of the products, but won't deal with the products or the end customers after they are sold (i.e. the Company will be providing any related services such as after-sales support and maintenance services).

Competition issues can arise in relation to distributor arrangements, particularly for:

- exclusivity
- territorial restrictions
- restraints on competition
- pricing structures.

We suggest you consult a commercial lawyer when considering the above issues.

Where a Distributor is operating outside New Zealand, we also suggest having a qualified lawyer in the relevant jurisdiction review the agreement for competition issues, unfair contract terms and any other local "fishhooks".

If you will be shipping product before you have received full payment, you may wish to consider seeking advice on how to protect your risk. We suggest you contact the NZ Export Credit Office in the first instance (www.nzeco.govt.nz).

The terms of the agreement are not a "one-size-fits-all" solution, and may require change to reflect the particular commercial arrangement that applies in this instance.

SOFTWARE RESELLER AGREEMENT

A software reseller agreement for "stand-alone" software is also available on our website.

A key distinction between the software reseller agreement and this one is that, in the software reseller agreement, the software supplier (not the reseller) has the contractual relationship with the end customers, and the reseller is paid a fee by the software supplier for the resale services.

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USING THIS TEMPLATE

The ***User Notes*** and the statements in the footer (all marked in red) are included to assist you to prepare this document. They are for reference only. You should delete all user notes and the statements in the footer from the final form of your document.

The use of [*square brackets*] around black text means that:

- the requested details need to be inserted
- there are different options for you to consider
- the whole clause is optional and you need to consider whether to include it, based on your circumstances and the user notes.

Before finalising your document, check for all square brackets to ensure you have considered the relevant option and deleted the brackets.

If you delete any clause or schedule, remember to cross reference check the document.

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DISTRIBUTOR AGREEMENT

DATE

PARTIES

[User note: The Agreement assumes that two companies are entering into the Agreement. Different party identifiers will be required for other entities.]

1 [***INSERT FULL LEGAL NAME***], company number [*insert company number*] (**Company**)

2 [***INSERT FULL LEGAL NAME***], company number [*insert company number*] (**Distributor**)

SECTION A: AGREEMENT AND KEY DETAILS

AGREEMENT

The Company agrees to engage, and the Distributor accepts engagement, to distribute the Products on the terms of the Agreement. The Agreement comprises:

- Section A (Agreement and Key Details), including this cover page and the signature clauses; and
- Section B (General Terms).

KEY DETAILS

[User note: This section should include all of the "distributor specific" details relating to the Products to be distributed. It should include sufficient detail to provide certainty to both parties about the scope of the Agreement, i.e. what is "in" and what is "out".]

ITEM	DETAIL
Start Date	[*On the date both parties sign the Agreement/[Insert date]*]. ***[User note: The Start Date is often the date of the Agreement. However, in some cases the parties may wish to have the Agreement take effect from a future date.]***
End Date	[*Insert length of the initial term of the Agreement, e.g. 12/24/36 months*] from the Start Date. ***[User note: If this is a new relationship, you should consider including a short to medium length initial term of the Agreement so that, if the relationship doesn't work, you are not "locked in" long term. Alternatively, you should include a "no fault"***

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ITEM	DETAIL
	termination right to enable you to easily exit the relationship for reasons other than breach (see clause 15.2).]
Territory	[*Insert the territory in which the Distributor may market, promote and distribute the Products*]. [***User note: Often distribution arrangements are "territory specific", particularly if the Distributor has exclusive rights. This enables you to "carve up" the rights worldwide and to avoid overlap. Including a territory can also be useful in a non-exclusive arrangement, e.g. where the Distributor has knowledge of a particular local market only.***]
Brands	As at the Start Date, [*insert any Company brand, trade mark, logo and/or design that the Distributor may use to conduct the Business*].
Products	[*Insert the products that may be distributed by the Distributor in the Territory, including a description of each product's core functionality*]. [***User note: If there are a number of Products, you may wish to cross-refer to another document that lists the Products, e.g. "As set out in [insert reference to the relevant document]. A copy of [insert reference to the relevant document] as at the Start Date is attached to the Agreement for identification purposes".***]
Currency	[*NZD/Insert the currency used in the Agreement*].
Charges	$[*Insert the charges or price to be paid for each of the Products*]. [***User note: The Agreement assumes that the Distributor pays the Company a set charge or price for each Product purchased and sets its own price for the sale of the Product to the end customer. As a general rule, you should avoid any pricing method that enables the Company to determine at what price the Distributor sells the Product as this is likely to be anti-competitive under the Commerce Act 1986. If you seek to do this, you should consult a commercial lawyer on the legality of the method.***]
Invoice dates	[*Insert the dates and/or milestones on which the Company is to invoice the Distributor for the Charges (including for any deposit, if applicable)*]. [***User note: Where no invoice date is stated or the detail is labelled "N/A", the default position in clause 9.2a applies (namely, invoice following delivery).***]

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ITEM	DETAIL
Payment Terms	[*Insert the dates and/or milestones on which the Distributor is to pay the Charges (including any deposit, if applicable)*]. **[*User note: Where no payment date is stated or the detail is labelled "N/A", the default position in clause 9.2c applies (namely, payment on the 20th of the month after date of invoice).*]**
[Minimum Requirements]	[*Insert the minimum Product purchase requirements and any other minimum requirement (e.g. minimum orders or stock levels, trade show attendance, marketing spend, training requirements, number of sales representatives) for the Distributor and, where applicable, the relevant period for satisfying the requirement, e.g. annually for minimum Product purchase requirements and marketing spend.*] **[*User note: Include Minimum Requirements if the distribution rights within the Territory are exclusive. See our discussion on exclusivity in the user note to clause 2. Minimum Requirements for non-exclusive Distributors may be useful in other circumstances too, e.g. where the Company incurs costs supporting an under-performing Distributor.*]**
[*Minimum Terms*]	[*The Company (and its licensors) owns all existing and future Intellectual Property Rights in the Products.* *The Customer must use the Products for lawful personal or its internal business purposes only and must not copy, reproduce, reverse-engineer, decompile, disassemble, resell, distribute or modify the Products without the written consent of the Company except to the extent expressly permitted by any law or treaty that is in force in the Territory where that law or treaty cannot be excluded, restricted or modified by agreement.* *The Customer Agreement must include limitations of the Company's liability that are no less protective of the Company than the limitations of liability set out in clause 14 of the Agreement.* *The Customer Agreement must include exclusions of the Company's warranties that are no less protective of the Company than the warranty exclusions set out in clause 12 of the Agreement.* *The Customer Agreement is to provide that all of the above terms are for the benefit of, and are enforceable by, the Company against the Customer.*]

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ITEM	DETAIL
	[User note: Insert any provision that must be included in each agreement between the Distributor and its Customers. Some suggested (and non-exhaustive) minimum provisions are set out above. In some situations, Minimum Terms may not be necessary, e.g. for very low risk Products.]
Liability cap for first Year	$[*Insert amount*].
Email addresses for notice	**Company** [*Insert email address*] **Distributor** [*Insert email address*]

SIGNED

[User note: Assumes two companies are entering into the Agreement. Different signature clauses may be required for other persons.]

SIGNED for and on behalf of **[*INSERT NAME OF COMPANY*] LIMITED** by:)
)

Signature of authorised signatory

Print full name of authorised signatory

SIGNED for and on behalf of **[*INSERT NAME OF COMPANY*] LIMITED** by:)
)

Signature of authorised signatory

Print full name of authorised signatory

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SECTION B: TERMS OF THE AGREEMENT

1 INTERPRETATION

1.1 **Definitions:** In the Agreement, the following terms have the stated meaning:

TERM	MEANING
Agreement	Section A (Agreement and Key Details, including the cover page and signature clauses) and Section B (General Terms).
Brands	the brands, trade marks, logos and/or designs set out in the Key Details.
Business	the promotion, marketing and distribution of the Products by the Distributor in the Territory.
Charges	means the charges set out in the Key Details for Products, as updated by the Company from time to time in accordance with clause 9.5.
Confidential Information	the terms of the Agreement and any information that is not public knowledge and that is obtained from the other party in the course of, or in connection with, the Agreement. The Company's Confidential Information includes Intellectual Property owned by the Company (or its licensors).
Customer	an end customer in the Territory to whom the Distributor sells the Products.
Customer Agreement	a written agreement between the Distributor and the Customer for the supply of the Products.
Delivery	the delivery of the Products [*[EXW/FCA] to a common carrier or other person nominated by the Distributor to the Company for the purpose*] at [*the Company's premises/[insert alternative location]*]. This meaning applies to other grammatical forms of the term *Delivery*. ***[User note: If "EXW" is selected, then the Company is deemed to have "delivered" the Products when it has placed the Products at the disposal of the Distributor at the Company's premises (or another named place e.g. a factory or warehouse). The Company is not responsible for loading the Products on any collecting vehicle, nor does it need to clear the Products for export (if applicable). If "FCA" is selected, then the Company is deemed to have "delivered" the Products when it has cleared the Products for export (if applicable)***

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TERM	MEANING
	and handed over the Products to a carrier or other person nominated by the Distributor at the Company's premises (or another named place). For both EXW and FCA terms, the Distributor must arrange and pay for freight, insurance, import clearance and import taxes/duties, and risk in the goods passes at the point of "delivery". Other delivery terms are available, but these generally entail more risk for the Company (e.g. DDP (Delivered Duty Paid) requires the Company to pay all costs in bringing the goods to the named destination including import duties and taxes). See [EXW/FCA] below for further discussion and weblinks.]
Documentation	a hard or electronic copy of the generally released documentation relating to the Products (if any), as updated by the Company from time to time.
End Date	the end date set out in the Key Details.
[*EXW/FCA*] ***[User note: Select the same option chosen in the definition of "Delivery" above.]***	has the meaning given in the 2020 edition of Incoterms and its supplements, published by the International Chamber of Commerce, as modified or replaced from time to time. ***[User note: Incoterms are a set of 11 standard terms used in international commerce, developed by the International Chamber of Commerce (ICC). Each Incoterm defines the tasks, costs, and risks associated with the transportation and delivery of goods. Use of Incoterms reduces uncertainties arising from different interpretation of shipping terms in different countries. For further details see https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020 and https://en.wikipedia.org/wiki/Incoterms.]*.**
Force Majeure	an event that is beyond the reasonable control of a party, excluding: • an event to the extent that it could have been avoided by a party taking reasonable steps or reasonable care; or • a lack of funds for any reason.
Forecast	the forecast prepared by the Distributor in accordance with clause 3.1.
Good Industry Practice	in relation to an undertaking, the exercise of that degree of skill and care which would reasonably be expected from an experienced operator engaging in the same or a similar undertaking.

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TERM	MEANING
Intellectual Property Rights	includes copyright and all rights existing anywhere in the world conferred under statute, common law or equity relating to inventions (including patents), registered and unregistered trade marks and designs, circuit layouts, data and databases, confidential information, know-how, and all other rights resulting from intellectual activity. **Intellectual Property** has a consistent meaning and includes any enhancement, modification, or derivative work of the Intellectual Property.
Key Details	the Agreement specific details set out in Section A of the Agreement.
[*Minimum Requirements*]	[*the minimum requirements set out in the Key Details.*] **[*User note: Include only if the Key Details include Minimum Requirements.*]**
[*Minimum Terms*]	[*the minimum terms set out in the Key Details, as updated by the Company from time to time by notice to the Distributor.*] **[*User note: Include only if the Key Details include Minimum Terms.*]**
Order	a written request by the Distributor to the Company to provide Products.
Payment Terms	the payment terms set out in the Key Details (if any).
Products	the products set out in the Key Details.
Sales Tax	goods and services tax, value added tax, sales tax or equivalent tax payable under any applicable law.
Start Date	the start date set out in the Key Details.
Territory	the territory set out in the Key Details.
Year	a 12 month period from the Start Date or the anniversary of that date.

1.2 **Interpretation:** In the Agreement:

a clause and other headings are for ease of reference only and do not affect the interpretation of the Agreement;

b words in the singular include the plural and vice versa;

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c a reference to:

i a **party** to the Agreement includes that party's permitted assigns;

ii **personnel** includes officers, employees, contractors, and agents, but a reference to the Company's personnel does not include the Distributor;

iii a **person** includes an individual, a body corporate, an association of persons (whether corporate or not), a trust, a government department, or any other entity;

iv **including** and similar words do not imply any limit;

v **$** and **dollars** is a reference to the currency listed in the Key Details; and

vi a statute includes references to regulations, orders or notices made under or in connection with the statute or regulations and all amendments, replacements or other changes to any of them;

d no term of the Agreement is to be read against a party because the term was first proposed or drafted by that party; and

e if there is any conflict between Section B and Section A of the Agreement, Section B prevails unless expressly stated otherwise in Section A.

2 APPOINTMENT

[User note: Clause 2.1 below sets out the nature of the rights granted to the Distributor under the Agreement, including whether those rights are exclusive within the Territory. Often a distributor will seek exclusivity to avoid or limit competition in the market. From the Distributor's perspective, exclusivity provides an incentive to invest in the development of the market for the Products, knowing its work will be for its (and not its competitor's) benefit. However, the Company should carefully consider the impact of granting exclusive rights. If the Agreement is exclusive, it means that neither the Company nor a third party may sell the Products in the relevant territory. If you agree to an exclusive arrangement, you should ensure that there are limits on the exclusivity, e.g. state a limited territory for distribution, keep the duration of the Agreement short, ensure that the Distributor provides adequate assurances as to its level of performance (see the Minimum Requirements), record any right for the Company to sell direct (e.g. to key or multinational accounts or via the internet), etc.. These types of limits are

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discussed throughout the Agreement.]

2.1 **Right to conduct the Business:**

a The Company grants to the Distributor the [*exclusive/non-exclusive*], non-transferable right to conduct the Business in accordance with the Agreement for the duration of the Agreement.

b The Distributor must use best efforts to conduct the Business.

2.2 **Territory:** The Distributor must not market, promote or supply the Products outside the Territory, or to any person that the Distributor knows intends to sell or otherwise commercially resupply the Products outside the Territory. The Distributor will promptly pass to the Company details of any enquiry or order received by it from a prospective customer or distributor outside the Territory.

2.3 **[*No sub-distribution:*** *The Distributor must not supply the Products to any person that the Distributor knows intends to sell or otherwise commercially resupply the Products.*] ***[User note: Include this clause if you wish the Distributor to sell directly to end customers only (e.g. where you want to ensure that the business and sales people representing your product to end customers meet particular quality, brand image or training requirements).]***

2.4 **Status:** The Distributor is an independent contractor of the Company. No other relationship (e.g. employment, joint venture, agency, trust or partnership) exists under the Agreement. The Agreement does not transfer or license any Company Intellectual Property to the Distributor, except as expressly set out in the Agreement.

2.5 [***Non-exclusive arrangement:*** *To avoid doubt, the rights granted to the Distributor under the Agreement are non-exclusive. Nothing in the Agreement applies to limit or restrict the Company's right to conduct the Business (and to authorise third parties to conduct the Business).*] ***[User note: Delete clause 2.5 if the arrangement is exclusive. As a general comment, practical issues in relation to the "claiming" of customers, etc., can arise with non-exclusive arrangements, particularly where the Company is directly marketing and selling its own Products in the Territory, alongside the Distributor. If you think this may be a problem, you should consider including a clause that clarifies what happens if both the Distributor and the Company (or an authorised third party) approach the same customers. This is usually determined based on who was the first person to establish a relationship with the customer.]***

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2.6 **Changes to the Products:**

a The Company may:

i change the specifications of the Products at any time by notice in writing to the Distributor; and

ii add or remove a Product from the scope of the Agreement at any time by notice in writing to the Distributor. On receipt of that notice, the definition of Products in the Agreement is deemed to be amended in accordance with the notice.

b A change to the specifications of a Product or the removal of a Product under clause 2.6a will not apply to any Order accepted by the Company before the Company's notice.

3 FORECASTS

3.1 **[*Monthly/Quarterly*] rolling forecast:** The Distributor will give the Company, at least [*insert period, e.g. 2*] days before the end of each [*calendar month/quarter*], a rolling written forecast of its requirements for each Product to be supplied in the following [*insert period that the forecast must cover, e.g. 12 months*]. ***[User note: If the rolling forecasts are provided on a monthly basis, it may make sense to provide the same deadline here as for the Distributor's monthly reports.]***

3.2 **Forecasts not binding:** The Company acknowledges that all Forecasts are indicative only and are not binding on the Distributor or the Company. ***[User note: Consider whether there is any circumstance in which Forecasts (or parts of Forecasts) should be binding on the Distributor. An example may be where the Company purchases long lead time components in reliance on a Forecast.]***

4 ORDERS

[User note: Under this clause 4, the Distributor may order Products from time to time and the Company may accept or reject those Orders at its discretion.]

4.1 **Placing Orders:** The Distributor must place an Order with the Company setting out the quantities of each type of Product that it wishes to purchase, the requested delivery date and any other information reasonably required by the Company.

4.2 **Accepting Orders:** The Company has the right to accept or reject each Order on reasonable grounds. An Order is not binding unless it is accepted by the Company. If the Company does not accept or reject an Order within 7 days of receipt, the Company is deemed to have rejected that Order.

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4.3 **Rejected Orders:** If the Company rejects an Order, it must provide the Distributor with its reasons for doing so unless the Order is deemed to have been rejected under clause 4.2. The Company may, when rejecting an Order, propose an alternative delivery date that would be acceptable to the Company. In such cases, the Distributor may submit an amended Order that reflects that proposed delivery date. The process in clause 4.2 will apply to any such amended Order.

4.4 **Effect:** Subject to clause 5.1b, once the Company accepts an Order, it becomes a binding contract for the Company to provide the Products in accordance with the Agreement and the relevant Order, and for the Distributor to pay the Charges for those Products.

4.5 **Change of Orders:** Any proposed change to an Order must be provided to the Company in writing and the Company may (at the Company's option) accept or reject the change. The Company's acceptance of a proposed change may be subject to conditions (e.g. the Distributor agreeing to a change in the Charges for the Products the subject of that Order).

4.6 **Cancellation of Orders:** Orders placed and accepted cannot be cancelled without the written consent of both parties.

4.7 **Customer Agreements:** Prior to any supply of the Products, the Distributor must enter into a Customer Agreement with the Customer. Each Customer Agreement must:

a be consistent with the Agreement and the terms of the accepted Order; and

b give effect to the Minimum Terms, provided that any new Minimum Term is to apply only to Customer Agreements signed or renewed after the receipt of the Company's notice to the Distributor of the updated Minimum Terms.

4.8 **Customer prices:** The Distributor is free to set the price at which it sells the Products to Customers.

5 DELIVERY, RISK AND TITLE

5.1 **Delivery:**

a All Products will be sold and delivered [*[EXW/FCA] to a common carrier or other person nominated by the Distributor to the Company for the purpose*] at [*the Company's premises/[insert alternative location]*]. The Distributor is responsible for arranging and paying all costs of transport and insurance. **[*User note: Select the same option chosen in the definition of "Delivery" above.*]**

b The Company will use reasonable endeavours to Deliver the Products on or before the delivery date requested in the Order, but will not be liable for any loss, liability or damage resulting from any delay, nor will the Distributor be relieved of any obligation to accept or pay for the Products by reason of that delay.

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5.2 **Risk:** Risk of loss in a Product passes to the Distributor when the Product is Delivered.

5.3 **Title:** Title in a Product passes to the Distributor when full payment for the Product is received by the Company.

6 MARKETING AND PROMOTION

6.1 **General:** The Distributor must, at its own expense:

a work diligently to promote and protect the Company's interests, enhance and maintain the reputation of the Products and the Company, and act loyally and faithfully towards the Company, including:

i without limiting clause 10.5, representing the Products and Brands to Customers and prospective Customers in the most favourable manner at every reasonable opportunity; and

ii maintaining good relationships with all of the Customers and prospective Customers in the Territory; and

b use best efforts to maximise sales of the Products in the Territory.

6.2 **Marketing review:** The parties must meet every [*insert period between marketing reviews, e.g. 6*] months to:

a review the sales made by the Distributor;

b discuss opportunities and risks, the Distributor's marketing plans and the current Forecast; and

c discuss what assistance may be required from the Company to support those marketing plans.

7 DISTRIBUTOR OBLIGATIONS

[User note: This clause includes some general obligations on the Distributor. You should review each obligation to ensure its relevance and delete subclauses as required. Where your arrangement is "industry specific" or higher risk/value, you should consider including more comprehensive obligations.]

7.1 **General:** In addition to complying with its other obligations in the Agreement, the Distributor must:

a conduct the Business in accordance with Good Industry Practice;

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b comply with:

i all applicable laws, regulations, rules and professional codes of conduct or practice when conducting the Business and performing its other obligations in the Agreement; and

ii reasonable guidance from the Company on the conduct of the Business, as updated by the Company from time to time;

c procure all licences, authorisations and consents necessary for the Distributor to conduct the Business; and

d promptly notify the Company of:

i any breach of the Distributor's obligations under the Agreement or any matter which may impact on the Distributor's ability to perform its obligations under the Agreement; and

ii any complaint relating to the Products that is received by the Distributor, together with all available information relating to the complaint.

7.2 **Requirements and restraints:** The Distributor must:

a [*meet or exceed the Minimum Requirements*]; **[*User note: Delete if no Minimum Requirements apply.*]**

b avoid entering into any arrangement which would result in a conflict of interest with its obligations under the Agreement, including distributing or reselling any product that competes with a Product; and

c without limiting clause 7.2b, during the term of the Agreement and for a period of 6 months after its termination or expiry, not directly or indirectly operate or otherwise be involved in a business that competes with the Company's business or the Products, whether as a principal, employee, partner, agent, shareholder or however else. **[*User note: If the Distributor is a company and there is a risk of the Distributor's directors and/or key personnel taking advantage of this arrangement to compete with the Company, consider seeking an undertaking from those individuals in which they personally agree to the restraint and confidentiality provisions in the Agreement. This is particularly important for "one man band" companies. Otherwise, an individual could claim that he or she is not bound by the restraint and confidentiality provisions (i.e. only the contracting company is bound). To bind the individual, confirmation in the form of a deed (or similar) should be signed before or at the same time as the Agreement. See an example of this in the Kindrik Partners template "Independent Contractor Agreement".*]**

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7.3 **Customer Agreements:** The Distributor must:

a observe and perform its obligations under each Customer Agreement;

b promptly enforce all terms of each Customer Agreement; and

c notify the Company of any breach of a Customer Agreement by either party.

7.4 **Distributor records:** The Distributor must maintain complete and accurate written records of all information relating to its conduct of the Business, all Customer Agreements, the names, addresses, contact details, dates of sale, quantities and shipment addresses of all Customers, and any other information which may be required to enable the Company or its authorised representative to verify the Distributor's compliance with the Agreement. On request, the Distributor must make available those records to the Company, including allowing the Company to copy those records.

7.5 **Reporting:** The Distributor must provide a written report to the Company on a monthly basis from the Start Date, to be provided within 2 days of month end. The report must include:

a [*details of the Distributor's actual performance, as measured against the Minimum Requirements;*] ***[User note: Delete if no Minimum Requirements apply.]***

b details (including names and contact details) of current sales leads, prospects and planned promotional activity; and

c any other information reasonably requested by the Company.

8 COMPANY OBLIGATIONS

In addition to complying with its other obligations in the Agreement, the Company must:

a use reasonable efforts to support and assist the Distributor's conduct of the Business;

b at the Distributor's [*cost and*] reasonable request, provide the Distributor with: ***[User note: Delete the square-bracketed words if the Company will provide this assistance at its own cost.]***

i any existing marketing material to enable the Distributor to conduct the Business; and

ii reasonable Product training and guidance at dates and times agreed by the parties; and

c use reasonable efforts to keep the Distributor informed about any new version of the Products and other products that the Company may be making available to the Distributor.

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9 CHARGES

9.1 **Charges:** The Distributor must pay the Company the Charges.

9.2 **Invoicing and payment:**

a The Company will provide the Distributor with valid Sales Tax invoices on the dates set out in the Key Details, or if there are none, following Delivery of the Products to which the Charges relate.

b The Charges exclude Sales Tax, which the Distributor must pay on taxable supplies under the Agreement.

c The Distributor must pay the Charges:

i on the dates set out in the Payment Terms, or if there are none, by the 20th of the month following the date of invoice; and

ii electronically in cleared funds without any set off or deduction.

9.3 **Overdue amounts:** The Company may:

a charge interest on any overdue amount. Interest will be calculated from the due date to the date of payment (both inclusive) at an annual percentage rate equal to the corporate overdraft reference rate (monthly charging cycle) applied by the Company's primary trading bank as at the due date (or, if the Company's primary trading bank ceases to quote such a rate, then the rate which in the opinion of the bank is equivalent to that rate in respect of similar overdraft accommodation expressed as a percentage) plus 2% per annum; and

b recover all costs incurred in recovering overdue amounts and interest from the Distributor, including the actual fees charged by its lawyers and any debt collection agency.

9.4 **Licences, taxes and deductions:** The Distributor is responsible for paying any applicable customs, duties and taxes in respect of the importation of the Products (if applicable) and the distribution and sale of the Products in the Territory.

9.5 **Adjustment:** The Company may vary the Charge for a Product by giving the Distributor at least 30 days' written notice. Charges updated under this clause are deemed to be the Charges listed in the Key Details from the date set out in the relevant notice. A change to the Charge for a Product under this clause will not apply to any Order accepted by the Company before the date the Company's notice takes effect.

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10 INTELLECTUAL PROPERTY

10.1 **Products:** The Company (and its licensors) owns all Intellectual Property Rights in the Products and the Documentation. The Distributor must not contest or dispute that ownership, or the validity of those Intellectual Property Rights.

10.2 **New Intellectual Property:** As between the parties, from the date it is created, the Company solely owns[:]

a all new Intellectual Property created by the Company in the course of providing the Products or otherwise in connection with the Agreement[.][*; and*

b *all new Intellectual Property in any documentation or other materials created by the Distributor, to the extent the documentation or materials relate to the Products.*] **[*User note: Delete if the Distributor is to own the Intellectual Property in materials relating to the Products that the Distributor creates (e.g. marketing materials in other languages).*]**

10.3 **Feedback:** If the Distributor or any Customer provides the Company with ideas, comments or suggestions relating to the Products or the Documentation (together **feedback**):

a all Intellectual Property Rights in that feedback, and anything created as a result of that feedback (including new material, enhancements, modifications or derivative works), are owned solely by the Company; and

b the Company may use or disclose the feedback for any purpose.

10.4 **Restrictions:** The Distributor must not:

a use the Company's Intellectual Property other than to carry out its obligations under the Agreement;

b alter, remove or otherwise interfere with any copyright or other proprietary marking on the Products, their packaging, or the Documentation; or

c except to the extent permitted by law, reverse-engineer, decompile, disassemble or modify the Products.

10.5 **Brands:**

a The Company grants to the Distributor a non-exclusive, non-transferable licence for the duration of the Agreement to use the Brands in the Territory in order to conduct the Business in accordance with the Agreement.

b The Products must be marketed and sold by the Distributor using the Brands. The Company may add or remove a Brand from the scope of the Agreement at any time by

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notice to the Distributor. On receipt of that notice, the definition of Brands in the Agreement is deemed to be amended in accordance with the notice.

c The Distributor must use the Brands only in accordance with any usage and marketing guidelines provided by the Company from time to time.

d All goodwill generated through the Distributor's use of the Brands accrues to the benefit of the Company.

10.6 **Notifying of issues:**

a The Distributor must promptly notify the Company:

i where the Distributor becomes aware, or reasonably suspects, that the Company's Intellectual Property Rights are being infringed, or are likely to be infringed, including any circumstance that suggests a person may have unauthorised knowledge, possession or use of the Products; and

ii of any proceeding or known intention to bring proceedings against the Distributor and/or the Company, including for infringement of Intellectual Property Rights.

b The Company has the sole right to take, defend or settle any proceeding for any alleged infringement of any Intellectual Property Right of any third party relating to the Intellectual Property of the Company.

c The Distributor must provide the Company with all assistance reasonably requested by the Company, at the Company's reasonable cost, relating to any action taken by the Company on a matter notified by the Distributor under clause 10.6a.

11 CONFIDENTIALITY

11.1 **Security:** Each party must, unless it has the prior written consent of the other party:

a keep confidential at all times the Confidential Information of the other party;

b effect and maintain adequate security measures to safeguard the other party's Confidential Information from unauthorised access or use; and

c disclose Confidential Information to its personnel or professional advisors on a "need to know" basis only and, in that case, ensure that the personnel or professional advisor is aware of, and complies with, clauses 11.1a and 11.1b.

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11.2 **Permitted disclosure:** The obligation of confidentiality in clause 11.1 does not apply to any disclosure or use of Confidential Information:

a for the purpose of performing the Agreement or exercising a party's rights under the Agreement;

b required by law (including under the rules of any stock exchange);

c which is publicly available through no fault of the recipient of the Confidential Information or its personnel;

d which was rightfully received from a third party without restriction and without breach of any obligation of confidentiality; or

e by the Company if required as part of a "bona fide" sale of its business (assets or shares, whether in whole or in part) to a third party, provided that the Company enters into a confidentiality agreement with the third party on terms no less restrictive than this clause 11.

12 WARRANTIES

12.1 **Mutual warranties:** Each party warrants that it has full power and authority to enter into and perform its obligations under the Agreement which, when signed, will constitute binding obligations on the warranting party.

12.2 **Products:** The Company does not give any warranty to either the Distributor or any Customer relating to the Products, other than the warranties:

a that the Company makes to the Distributor in the Agreement or the Documentation;

b that the Company makes directly to Customers in the Documentation; or

c for which the Company cannot exclude its liability.

12.3 **Prohibition:** Other than the warranties referred to in clause 12.2b and 12.2c, the Distributor must not give any warranty or make any representation relating to the Products, including that the Products will be exclusively supplied or made available to a Customer or prospective Customer.

12.4 **No implied warranties:** To the maximum extent permitted by law:

a the Company's warranties are limited to those set out in the Documentation and the Agreement, and all other conditions, guarantees or warranties whether expressed or implied by statute or otherwise (including any warranty under Part 3 of the New Zealand Contract and Commercial Law Act 2017) are expressly excluded and, to the extent that

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they cannot be excluded, liability for them is limited to an amount equal to the Charge paid by the Distributor for the relevant Product; and

b the Company makes no representation concerning the quality of the Products, and does not promise that the Products will operate without error or interruption.

12.5 **Consumer Guarantees Act:** The Distributor agrees and represents that it is acquiring the right to conduct the Business, and entering the Agreement, for the purpose of trade. The parties agree that:

a to the maximum extent permissible by law, the New Zealand Consumer Guarantees Act 1993 does not apply to the supply of that right or the Agreement; and

b it is fair and reasonable that the parties are bound by this clause 12.5.

13 INDEMNITY

13.1 **IP indemnity:** ***[User note: The scope of the indemnity and any other indemnity provided by the Company will depend on the negotiating power of the parties, e.g. in some circumstances the Distributor may require an indemnity to cover use of the Products by the Customers in accordance with the Agreement and the Minimum Terms. Where you are supplying the Products overseas, particularly in a crowded market, you should consider seeking local advice on the scope of this indemnity.]***

a The Company indemnifies the Distributor from and against any claim or proceeding brought against the Distributor in the Territory to the extent that claim or proceeding alleges that the sale of the Products [*or the use of the Brands*] by the Distributor in accordance with the Agreement constitutes an infringement of a third party's Intellectual Property Rights in the Territory (**IP Claim**). The indemnity in this clause is subject to the Distributor:

i promptly notifying the Company of the IP Claim;

ii making no admission of liability and not otherwise prejudicing or settling the IP Claim, without the Company's prior written consent; and

iii giving the Company complete authority and information required for the Company to conduct and/or settle the negotiations and litigation relating to the IP Claim. The costs incurred or recovered are for the Company's account.

b The indemnity in clause 13.1a does not apply to the extent that the IP Claim arises from or in connection with the conduct of the Business in breach of the Agreement, including:

i the supply or distribution of the Products [*or use of the Brands*] outside the Territory; or

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ii any warranty given or representation made by the Distributor to a Customer or prospective Customer in breach of clause 12.3.

c Without limiting the indemnity in clause 13.1a, if at any time an IP Claim is made, or in the Company's opinion is likely to be made, then in defence or settlement of the IP Claim, the Company may modify or replace the items the subject of the IP Claim so they become non-infringing.

13.2 **Distributor indemnity:** The Distributor indemnifies the Company from and against any claim, proceeding, damage, loss, liability, cost and expense (including legal costs on a solicitor and own client basis) suffered or incurred by the Company resulting from:

a infringement of the Company's Intellectual Property Rights by the Distributor, including any misuse of the Brands;

b any warranty given or representation made by the Distributor to a Customer or prospective customer in breach of clause 12.3; or

c any failure of the Distributor to enter into a Customer Agreement in accordance with clause 4.7.

14 LIABILITY

14.1 **Maximum liability:** The maximum aggregate liability of the Company to the Distributor under or in connection with the Agreement, whether in contract, tort (including negligence), breach of statutory duty or otherwise:

a relating to any Product, must not exceed an amount equal to the Charge paid by the Distributor for that Product; and

b must not in any Year exceed [*insert cap e.g. an amount equal to the total Charges payable to the Company under the Agreement in the previous Year (which in the first Year is deemed to be the liability cap for the first Year set out in the Key Details)*].

14.2 **Unrecoverable loss:** Neither party is liable to the other under or in connection with the Agreement for any:

a loss of profit, revenue, savings, business, data and/or goodwill; or

b consequential, indirect, incidental or special damage or loss of any kind.

14.3 **Liability under a Customer Agreement:** The Company is not liable to the Distributor under or in connection with the Agreement for any loss, liability or damage incurred by the Distributor under any provision (including an indemnity) in a Customer Agreement or in connection with any other warranty, representation or indemnity given by the Distributor to a Customer:

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a which is inconsistent with the terms of the Agreement [*and the Minimum Terms*]; or **[*User note: Delete the words in square brackets if there are no Minimum Terms*.]**

b to the extent that, if that loss, liability or damage had been suffered or incurred by the Distributor, it would have been excluded under clause 14.2.

14.4 **Unlimited liability:**

a Clauses 14.1 and 14.2 do not apply to limit the Company's liability:

i under the indemnity in clause 13.1a; or

ii under or in connection with the Agreement for:

- personal injury or death;
- fraud or wilful misconduct; or
- breach of clause 11.

b Clause 14.2 does not apply to limit the Distributor's liability:

i to pay the Charges;

ii for breach of clause 2.2, 7.1bi, 7.1c, 7.2c, 9.4, 10.4 or 10.5;

iii under the indemnity in clause 13.2; or

iv for those matters stated in clause 14.4aii.

14.5 **No liability for other's failure:** Neither party will be responsible, liable, or held to be in breach of the Agreement for any failure to perform its obligations under the Agreement or otherwise, to the extent the failure is directly caused by the other party failing to comply with its obligations under the Agreement, or by the negligence or misconduct of the other party or its personnel.

14.6 **Mitigation:** Each party must take reasonable steps to mitigate any loss or damage, cost or expense it may suffer or incur arising out of anything done or not done by the other party under or in connection with the Agreement.

14.7 **Insurance:** At its own expense, the Distributor must maintain in effect at all times during the term of the Agreement the insurance policies, with a reputable third party insurance company, that a prudent entity conducting the Business would maintain, taking into account the Distributor's risks and potential liabilities under the Agreement.

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15 TERM AND TERMINATION

15.1 **Duration:** Unless terminated under this clause 15, the Agreement:

a starts on the Start Date and ends on the End Date; but

b where there is no End Date, continues for successive terms of [*insert period, e.g. 12 months*] from the Start Date unless a party gives at least [*insert period, e.g. 30 days'*] notice that the Agreement will terminate on the expiry of the then-current term.

15.2 **[*No fault termination:* *The Company may terminate the Agreement on at least [insert period e.g. 3 months'] prior notice to the Distributor.*] [*User note: Include clause 15.2 where it would be useful for the Company to be able to terminate the agreement "at will". If clause 15.2 is retained, clause* Error! Reference source not found. *should be titled "Other termination rights".*]**

15.3 **[*Other t*][*T*]ermination rights:**

a Either party may, by notice to the other party, immediately terminate the Agreement if the other party:

i breaches any material provision of the Agreement and the breach is not:

- remedied within 10 days of the receipt of the notice from the first party requiring it to remedy the breach; or
- capable of being remedied;

ii becomes insolvent, liquidated or bankrupt, has an administrator, receiver, liquidator, statutory manager, mortgagee's or chargee's agent appointed, becomes subject to any form of insolvency action or external administration, or ceases to continue business for any reason; or

iii is unable to perform a material obligation under the Agreement for 30 days or more due to Force Majeure.

b The Company may, by notice to the Distributor, immediately terminate the Agreement if the exercise of the remedy in clause 13.1c does not remedy or settle the IP Claim.

15.4 **[*Company termination:* *The Company may terminate the Agreement by giving at least 30 days' notice if the Distributor fails to meet or exceed the Minimum Requirements.*] [*User note: Delete if no Minimum Requirements apply.*]**

15.5 **[*Loss of exclusivity:* *Where the Company has the right to terminate the Agreement under clause 15.3[or 15.4], it may, instead of exercising that right, by notice convert the rights granted under clause 2.1 into non-exclusive rights. The effect of this will be that the Company*

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(and authorised third parties) has the right to conduct the Business.] **[*User note: Include this clause only if the rights provided to the Distributor under the Agreement are exclusive. Delete the reference to clause 15.4 if that clause is not included.*]**

15.6 **Consequences of termination or expiry:** **[*User note: What is included in this clause will depend on your preferred approach to termination and the extent to which the Company seeks an ongoing relationship with the Distributor. There are many different options available and the approach set out in this clause may not be suitable for all arrangements. In all circumstances, the Company should take care to ensure that it is not bound to deal with the Distributor in perpetuity after the Agreement has ended.*]**

a Termination or expiry of the Agreement does not affect either party's rights and obligations accrued before that termination or expiry.

b On termination or expiry of the Agreement:

i the Distributor must pay all amounts owing to the Company under the Agreement up to the date of termination or expiry;

ii the Company has the option to purchase any or all of the stock of Products held by the Distributor at the date of termination or expiry of the Agreement at the same price that the Distributor originally paid for the Products, or the Distributor's book value, whichever is the lesser. To exercise the option, the Company must give notice to the Distributor within 30 days of the termination or expiry of the Agreement stating the number of Products that it wishes to purchase. The Distributor must deliver those Products to the Company within 20 days of receiving notice from the Company, and the Company must pay for the Products within 20 days of the delivery of the Products to the Company. The Distributor is responsible for all delivery costs of the Products (including all packing, insurance and/or carriage costs, or similar). If the Products are not returned in the condition shipped by the Company to the Distributor, the Company may reduce the price payable for the Products as is reasonable to take into account the condition in which the Products are returned; and

iii subject to clause 15.6d, if the Company does not purchase all of the Distributor's stock of Products in accordance with clause 15.6bii, the Distributor may, for a period of 6 months following the termination or expiry of the Agreement, sell or distribute its remaining stock of Products to Customers in the Territory (and the terms of the Agreement will apply to all such sales).

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c If the Company gives notice that it will purchase all of the Distributor's stock of Products in accordance with clause 15.6bii or the period set out in clause 15.6biii expires, the Distributor must:

i immediately cease to:

- conduct the Business; and
- use the Products, the Documentation, the Brands and all other Company Confidential Information;

ii promptly return, destroy or erase (at the Company's option) all copies of Company Intellectual Property in the Distributor's possession (including the Products, the Documentation, and all signs, stationery, sales brochures and promotional and support materials supplied to or used by the Distributor in relation to the conduct of the Business), and (if requested by the Company) certify in writing its compliance with this clause 15.6cii; and

iii if requested by the Company, promptly deliver to the Company a complete list of names, addresses, phone numbers and other available contact details for all Customers and prospective Customers which, to avoid doubt, the Company may use to conduct the Business. **[*User note: The effect of this clause 15.6ciii is that the Company can have and maintain relationships with the Customers following the termination of the Agreement. The developed Customer base can be a valuable asset and the right to have access to, and a continued relationship with, existing Customers after the end of an agreement can be highly contentious.*]**

d Clause 15.6biii will:

i not apply if the Company terminated the Agreement under clause 15.3ai[,][*or*] 15.3aii[*or 15.4*]; **[*User note: Delete the reference to clause 15.4 if clause 15.4 is not included.*]** and

ii cease to apply on notice from the Company if the Distributor fails to pay any amount due and payable under the Agreement.

e No compensation is payable by the Company to the Distributor as a result of termination of the Agreement for whatever reason.

15.7 **Obligations continuing:** Clauses which, by their nature, are intended to survive termination or expiry of the Agreement, including clauses 7.2c, 7.4, 10.1 to 10.4, 11, 13.2, 14, 15.6, 15.7, 16, and 17.10, continue in force.

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16 DISPUTES

[User note: Where a distributor is operating outside New Zealand and there may be a need to enforce a legal judgment issued in New Zealand against the Distributor outside New Zealand (e.g. because that is where its assets are), it can (depending on the country involved) be better for disputes to be resolved using arbitration instead of the New Zealand courts. We suggest obtaining advice from a qualified lawyer in the relevant jurisdiction on this issue. The position you reach on this clause may also affect the choice of law and jurisdiction provision also (see clause *Error! Reference source not found.)****.]***

16.1 **Good faith negotiations:** Before taking any court action, a party must use best efforts to resolve any dispute under, or in connection with, the Agreement through good faith negotiations.

16.2 **Obligations continue:** Each party must, to the extent practicable, continue to perform its obligations under the Agreement even if there is a dispute.

16.3 **Right to seek relief:** This clause 16 does not affect either party's right to seek urgent interlocutory and/or injunctive relief.

17 GENERAL

17.1 **Force Majeure:** Neither party is liable to the other for any failure to perform its obligations under the Agreement to the extent caused by Force Majeure, provided that the affected party:

a promptly notifies the other party and provides full information about the Force Majeure;

b uses best efforts to overcome the Force Majeure; and

c continues to perform its obligations to the extent practicable.

17.2 **Vienna Convention:** The United Nations Convention on Contracts for the International Sale of Goods 1980 does not apply to the Agreement. ***[User note: The Vienna Convention on Contracts for the International Sale of Goods is an international treaty that applies to the sale of commercial goods where the parties are in different treaty countries. Amongst other things, it implies a number of warranties in relation to the goods, including warranties along similar lines to those in the New Zealand Contract and Commercial Law Act 2017. The Convention allows parties to a contract to exclude or vary the application of the Convention. Delete this clause if this is not an international distribution agreement.]***

17.3 **Rights of third parties:** No person other than the Company and the Distributor has any right to a benefit under, or to enforce, the Agreement.

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17.4 **Waiver:** To waive a right under the Agreement, that waiver must be in writing and signed by the waiving party.

17.5 **Notices:** A notice given by a party under the Agreement must be delivered to the other party via email using the email address set out in the Key Details or otherwise notified by the other party for this purpose. If the notice is given under clause 15, a copy of that email must be immediately delivered (by hand or courier) to the Chief Executive or equivalent officer of the other party at the other party's last known physical address.

17.6 **Severability:**

a If any provision of the Agreement is, or becomes, illegal, unenforceable or invalid, the relevant provision is deemed to be modified to the extent required to remedy the illegality, unenforceability or invalidity.

b If modification under clause 17.6a is not possible, the provision must be treated for all purposes as severed from the Agreement without affecting the legality, enforceability or validity of the remaining provisions of the Agreement.

17.7 **Variation:** Subject to clauses 2.6, 9.5, [*and*] **Error! Reference source not found.**[*, and 15.5*], any variation to the Agreement must be in writing and signed by both parties. **[*User note: Delete the reference to clause 15.5 if that clause is not included.*]**

17.8 **Entire Agreement:** The Agreement, the Orders and the Documentation set out everything agreed by the parties relating to the Products, the relationship between the parties, and the conduct of the Business and supersede and cancel anything discussed, exchanged or agreed prior to the Start Date. The parties have not relied on any representation, warranty or agreement relating to the subject matter of the Agreement that is not expressly set out in the Agreement, and no such representation, warranty or agreement has any effect from the Start Date. Without limiting the previous sentence, the parties agree to contract out of sections 9, 12A and 13 of the New Zealand Fair Trading Act 1986, and that it is fair and reasonable that the parties are bound by this clause **Error! Reference source not found.**.

17.9 **No assignment:**

a The Distributor may not assign, novate, subcontract or transfer any right or obligation under the Agreement, without the prior written consent of the Company. The Distributor remains liable for the performance of its obligations under the Agreement despite any approved assignment, subcontracting, or transfer. Any assignment, novation, subcontracting or transfer must be in writing.

b A change of control of the Distributor is deemed to be an assignment for which the Company's prior written consent is required under clause 17.9a. In this clause, **change of control** means any transfer of shares or other arrangement affecting the Distributor or

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any member of its group which results in a change in the effective control of the Distributor.

17.10 **Law:** The Agreement is governed by, and must be interpreted in accordance with, the laws of New Zealand. Each party submits to the non-exclusive jurisdiction of the Courts of New Zealand in relation to any dispute connected with the Agreement.

17.11 **Counterparts:** The Agreement may be signed in counterparts, each of which constitutes an original and all of which constitute the same agreement. A party may enter the Agreement by signing and emailing a counterpart copy to the other party.

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