**Notes:**

A distribution agreement is an agreement whereby a supplier or manufacturer of goods agrees that an independent third party called the distributor will market and sell the goods. The distributor buys the goods on their own account and trades under their own name.

Distribution Agreements are of two types, exclusive distribution agreement and a non-exclusive distribution agreement.

This template is a standard agreement with respect to the appointment of an exclusive distributor.

**DISTRIBUTION AGREEMENT**

**DATED 2021**

**(the “Supplier”)**

**-and-**

**(the “Distributor”)**

**Drawn By: -**

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**DISTRIBUTION AGREEMENT**

**THIS AGREEMENT** is made on 20

**BETWEEN: -**

1. **[PARTY 1]** a limited liability company incorporated in Kenya and whose address for the purposes hereof is [INSERT ADDRESS], Kenya (hereinafter referred to as the “Company” which expression shall include the Company’s successors in title and permitted assigns); and
2. **[PARTY 2]** a limited liability company incorporated in Kenya and whose address for the purposes hereof is [INSERT ADDRESS], Kenya (hereinafter referred to as the “**Distributor**” which expression shall include the Distributor’s successors in title and permitted assigns).

**WHEREAS: -**

1. The Company deals with the supply of the Products.
2. The Supplier wishes to appoint the Distributor as its non-exclusive distributor for the marketing, promotion and sale of the Products within the Territory, and the Distributor wishes to promote and sell the Products within the Territory.
3. The Company and the Distributor have agreed to enter into this Agreement whereby the Distributor will purchase the Products from the Company for distribution within the Territory on the terms and subject to the conditions contained in this agreement.

**THEREFORE**, in consideration of mutual obligations, representations, covenants and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties agree to the following terms and conditions and to be bound thereby:

# **Interpretation and Construction**

* 1. **Definitions**
     1. In this Agreement including the Recitals and the Schedules (unless the context otherwise requires) the following words and expressions have the following meaning: -
        1. **“Agreement**”, means this agreement and its schedules;
        2. “**Business day**” means a day other than a Saturday, Sunday or public holiday in Kenya when banks in Kenya are open for business;
        3. **“Commencement Date**”, [INSERT DATE];
        4. **“Confidential Information”,** means any and all information, documentation or knowledge in any form, relating to the business of the Company not generally known to the public, disclosed to, or which may be obtained directly or indirectly by, the Distributor, or which may be derived in any way by it as a consequence of the performance of its obligations hereunder, including, without limitation, information relating to the Company’s present and contemplated products and services; product designs; inventions, improvements; standards, specifications, systems, methods and operating procedures; merchandising, marketing plans and strategies; tests and reports; profits, costs, pricing, product sourcing and sales policies and strategies; trade secrets, know-how, data, research and development; patent, trade-mark, copyright, industrial design and all other Intellectual Property rights and shall also include the terms of this Agreement;
        5. **“Control”** means the beneficial ownership of more than 50% of the issued share capital of a company or the legal power to direct or cause the direction of the general management of the company, and **Controls**, **Controlled** and the expression **change of Control**shall be construed accordingly;
        6. **"Intellectual Property",** means any trade mark or trade name (whether registered or un-registered), copyright, design or other similar rights relating to the Products owned by and/or sub-licensed to the Company or any Associated Company including any advertising, marketing and promotional materials or items relating to the Products, whether or not the same are now in existence or are developed by, or for and on behalf of, the Company in the future
        7. **“Interest”,** [INSERT]
        8. “**KShs**” “**Shillings**”, means Kenya Shillings, the currency of the Republic of Kenya;
        9. **"Minimum Orders",** the minimum orders required by the Company in respect of the Distributor's performance in any year of the Term (or such other period as may be determined by the Company from time to time);
        10. **"Order",** means instruction from the Distributor to the Company (subject to the terms of this Agreement) to supply the Products;
        11. **“Parties”,** means the Company and the Distributor and “**Party**” shall be construed to refer to any of them;
        12. “**Products**” means the products of the type and specification set out and listed in Schedule 1 as varied from time to time in accordance with the terms of this Agreement [ and any other products developed by the Company and which the Company may permit the Distributor, by express notice in writing, to distribute in the Territory];
        13. “**Term”,** means the term of this Agreement as set forth in Clause 3 herein;
        14. “**Territory**” means the countries and the areas specified in Schedule 2; and
        15. “**VAT**” means value added tax chargeable in Kenya.
  2. **Construction**
     1. Unless the context or express provisions of this Deed otherwise require:-
        1. Expressions in the singular shall include the plural and words importing a gender shall include every gender.
        2. References to recitals clauses and schedules are references to recitals and clauses of and schedules to this Agreement.
        3. The headings used in this Agreement are inserted for convenience only and shall not affect its construction or interpretation.
        4. Reference to persons shall include any firm, company, corporation, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of two or more of the foregoing and any other legal entity.
        5. The expression “hereof”, “herein” and similar expressions shall be construed as references to this Deed as a whole and not be limited to the particular clause or provisions in which the relevant expression appears.

# **Appointment**

* 1. The Company appoints the Distributor as its exclusive distributor to [import,] market, purchase, distribute and resell the Products in the Territory and the Distributor accepts the appointment on those terms.
  2. [The Distributor shall purchase the Products only from the Company, and shall not for the Term or for the period of five Years from the Commencement Date (whichever shall be the shorter) distribute or manufacture any goods which compete with the Products.]
  3. The Distributor shall buy the Products for its own account for resale under this Agreement.
  4. The Distributor shall not, without the Company’s prior written consent, make any promises or guarantees about the Products beyond those contained in the promotional material supplied by the Company.

# **Term**

* 1. This Agreement shall come into force on the Commencement Date and shall remain in force for a period of [INSERT DURATION] unless earlier terminated in accordance with this Agreement (**“Term”**).
  2. The renewal of the Agreement is subject to the negotiation and agreement of the Parties.

# **Distributor’s Undertakings**

* + 1. The Distributor undertakes and agrees with the Company that at all times during the Term it will:
       1. use reasonable endeavours to promote and sell the Products in the Territory and to expand the sale of the Products by all reasonable, legal and proper means and not to do anything which may hinder or interfere with such sales;
       2. work diligently at all times to protect and promote the interests of the Company, to act in good faith towards the Company in all matters and to comply with the Company's marketing and promotional requirements, including trade incentives, in the Territory;
       3. employ a sufficient number of suitably qualified [and trained] personnel to ensure the proper fulfilment of the Distributor's obligations under this agreement;
       4. maintain a minimum of [NUMBER] [distribution depots **AND/OR** [NUMBER] sales outlets] within the Territory [, and in each year make a Minimum Order of Products;
       5. [not resell the Products at a price exceeding the maximum resale price from time to time specified by the Company in writing;]
       6. submit written reports at regular intervals to the Company, showing details of stock levels and movements, sales [, spare parts], outstanding customer orders and orders placed by the Distributor with the Supplier that are still outstanding, and any other information relating to the performance of its obligations under this agreement that the Supplier may reasonably require from time to time;
       7. maintain, on its own account, an inventory of the Products so that it can supply all orders for Products received by it without delay;
       8. keep full and accurate books of account and records clearly showing all enquiries, quotations, transactions and proceedings relating to the Products and allow the Company, on reasonable notice [during normal business hours], access to such accounts and records for inspection;
       9. keep all stocks of the Products that it holds in conditions appropriate for their storage, and provide appropriate security for the Products, all at its own cost;
       10. the Distributor undertakes to maintain appropriate up-to-date and accurate records to enable the immediate recall of any batches of the Products or any of them from the retail or wholesale markets. These records shall include records of deliveries to customers (including details of batch numbers, delivery date, name and address of customer, and telephone number and fax or telex number if available). The Distributor shall at the Company’s cost, give such assistance as the Distributor may reasonably require for the purpose of recalling as a matter of urgency any quantities of the Products or any of them from the retail or wholesale market;
       11. [insure at its own cost with a reputable insurance company all stocks of the Products as are held by it against all risks which would normally be insured against by a prudent businessperson to at least their full replacement value and produce to the Company on demand full particulars of that insurance and the receipt for the then current premium;]
       12. [provide to customers an after-sale repair and maintenance service in respect of the Products [in accordance with the terms of the service and maintenance manual provided by the Company] during the Term and for [six] months after termination, however terminated;]
       13. inform the Company immediately of any change in Control of the Distributor, and of any change in its organisation or method of doing business that might be expected to affect the performance of the Distributor's duties in this Agreement;
       14. [use reasonable endeavours to ensure that the Products are imported into the Territory with a minimum of delay and to attend to and complete in a proper and efficient manner all necessary documents and formalities in connection with such import;]
       15. to report to the Company immediately any problems in the market with regard to smuggled or counterfeited products;
       16. the Distributor shall be responsible for maintaining vigilance systems and shall promptly provide the Company with notice of all product complaints;
       17. the Distributor shall not directly or indirectly without prior written authorisation from the Company, distribute or sell the Product herein outside the designated territory and shall not solicit orders for Product or advertise the Product outside the designated territory;
       18. bear the cost of all returns from customers relating to the Products [ except in respect of Products which the Company is obliged to replace as defective in accordance with its warranty obligations in the Company’s Standard Supply Terms]; and
       19. pay or ensure payment on the due date to the Company of all sums due to the Company for sales of the Products.

# **Company’s Undertakings**

* 1. The Company shall [use its reasonable endeavours to] meet all orders for the Products forwarded to it by the Distributor but in any event the Company shall at least meet the Minimum Order for the Products, as soon as practicable, [but the Company may, at its discretion, refuse any order that it reasonably considers it would be impracticable to attempt to meet.] [The Distributor acknowledges that the Company may supply other distributors or customers in priority to the Distributor.]
  2. On giving [NUMBER] months' notice in writing to the Distributor, the Company may vary Schedule 1 as it thinks fit to exclude one or more of the Products from this Agreement [if the production of such Products is discontinued for any reason].
  3. The Company may make changes to the specifications of the Products, provided the changes do not adversely affect the quality of the Products. The Company shall give notice of any changes to Product specifications to the Distributor as soon as reasonably practicable.
  4. The Company hereby undertakes and agrees that at all times during the Term it shall:
     + 1. Provide the Distributor with such information and support as the Company, in its sole discretion, considers appropriate to enable the Distributor to enable it to discharge its duties under this Agreement properly and efficiently; and
       2. Endeavour to respond as soon as practicable to any reasonable enquiries from the Distributor concerning the Products.
  5. The Company agrees that at all times during the Term it shall:
  6. [not supply the Products for resale in the Territory to any person other than the Distributor, and the Company shall not supply the Products to customers in the Territory;
     1. **OR**
     2. not supply the Products for resale in the Territory to any person other than the Distributor. The Supplier reserves the right to supply the Products directly to the customers in the Territory;]
  7. restrict other distributors to which it sells the Products from making active sales of the Product in the Territory;
  8. approve or reject any promotional information or material submitted by the Distributor within [INSERT] days of receipt;
  9. [supply any spare parts requested by the Distributor that are required to enable it to fulfil its repair and service obligations under this agreement, subject to availability;] and
  10. make reasonable commercial efforts to supply the Products to the Distributor for resale in the Territory in accordance with Distributor's forecast requirements.

# **Representations and Warranties**

* 1. Each Party warrants to the other Party that:
     + 1. It validly exists or has been duly registered and has all the necessary power and authority to enter into this Agreement.
       2. That its execution, delivery and performance of this Agreement will not be in conflict with or breach any other agreement or obligation to which it is a party or is bound.
       3. It is duly authorized by a Competent Authority to undertake the supply, marketing, sale and distribution of the Products and has in force the requisite license and all other applicable permits, licenses and authorizations required for the performance of its obligations under this Agreement.
       4. There are no proceedings pending or, to its knowledge, threatened, and there is no existing basis for any such proceedings, against or affecting it by or before any court, arbitrator, or other governmental authority which, if adversely determined, individually or in the aggregate might be reasonably expected to materially and adversely affect its properties, business, prospects, profits or condition or adversely affect its ability to perform its obligations under this Agreement.
  2. Each Party hereby understands and accepts that the other Party is entering into this Agreement in reliance upon each of the Warranties and undertakes to disclose to the Distributor anything which is or may be inconsistent with any of the Warranties immediately it comes to his notice.
  3. [Each Party] **OR** [The Company] **OR** [The Distributor] hereby agrees to indemnify the [other Party] **OR** [the Company] **OR** [the Distributor] on a full and unqualified basis from and against any and all losses, actions, claims, demands, proceedings (whether criminal or civil), costs, legal expenses, insurance premiums and calls, liabilities, judgments, damages or other sanctions whatsoever arising directly or indirectly from or in relation to any breach or non-performance or non-observance by the [other Party] **OR** [the Company] **OR** [the Distributor] of its obligations hereunder and as a result of any Warranty being breached or being untrue or incorrect.
  4. [In the event that the Minimum Orders are not achieved in whole or in part in any year of the Term from the Commencement Date the Company may give to the Distributor at least [INSERT] days’ notice in writing specifying the default and requiring the Distributor to remedy the same within [INSERT] and if the Distributor shall fail to remedy any such breach relating to Minimum Orders referred to in this Agreement the Company shall be entitled under this Agreement or any law to do any of the following;
     + 1. reserve the right to terminate this Agreement. The provisions on termination of this Agreement shall apply to any such termination.
       2. As an alternative to termination, the Company shall be entitled to reduce the Territory and/or to convert the Distributor's exclusive rights into non-exclusive Rights for the whole or any part of the Territory and/or withdraw Product(s), each such change to be immediately effective upon the giving of written notice to the Distributor by the Company.]

# **Conduct of Business and Compliance with Laws**

* 1. The Distributor shall not to describe itself as an agent or representative of the Company or hold itself out to bind the Company in any manner whatsoever and to ensure that all customers and other third parties dealing with the Distributor are aware that the Distributor is dealing as principal and not on behalf of the Company.
  2. The Distributor shall comply with and ensure that each of its employees complies with all laws, regulations, licenses and consents applicable to or otherwise affecting the importation, distribution, sale and promotion of the Products in the Territory by the Distributor and its employees pursuant to the terms and conditions of this Agreement.
  3. [Local regulations relating to the Products:
     + 1. The Distributor warrants to the Company that it has informed the Company of all laws and regulations affecting the manufacture, sale, packaging and labelling of Products which are in force within the Territory or any part of it (Local Regulations) at the date of this agreement.
       2. The Company, in turn, warrants to the Distributor that the Products comply with the Local Regulations in force at the date of this Agreement.
       3. The Distributor shall give the Supplier as much advance notice as reasonably possible of any prospective or actual changes in the Local Regulations.
       4. On receipt of notification from the Distributor under clause 7.3 (c), the Company shall [make reasonable commercial efforts to] ensure that the Products comply with any change in the Local Regulations by the date of implementation of that change, or as soon as is [reasonably] possible afterwards.]

# **Prices**

* 1. The price provided to the Distributor for the Products during the Term of this Agreement shall [be as notified by the Company to the Distributor from time to time] OR [be the Prices set out in Schedule 1 alongside the Products]. The Company shall give to the Distributor [INSERT DURATION] written notice of its intention to increase the price of the Products and such increased prices shall apply from the date of their notification to the Distributor to any orders for Products placed by the Distributor on or after that date.
  2. Any and all expenses, costs and charges incurred by the Distributor in the performance of its obligations under this agreement shall be paid by the Distributor, unless the Company has expressly agreed in advance in writing to pay such expenses, costs and charges.
  3. The Distributor shall pay the full amount invoiced to it by the Supplier in [CURRENCY] within [INSERT DURATION] days of the date of invoice.
  4. All prices quoted for the Products are inclusive of all imports and duties however exclusive of any VAT or any other sales tax for which the Distributor shall be additionally liable for.

# **Purchase Orders and Product Supply**

* 1. The Distributor shallplace its orders for supply of products [INSERT DURATION] Days/weeks prior to the expected delivery date and such order shall be accompanied by a local purchase order which shall set out the products to be purchased, the number of units/ cartons of each product and the expected delivery date.
  2. Upon supply of Products to the Distributor, the Company will issue a delivery note which shall be signed by a representative of Company and the Distributor and each party shall retain a copy of such delivery note as proof of supply of Products. Company shall within Seven (7) days after supply of an order to the Distributor issue the Distributor with an invoice for Products supplied.
  3. The Distributor shall not be allowed to cancel a purchase order or to return any product that has already been supplied. However, any unsold inventory may within six (6) months from the date of supply be exchanged for another product provided that the product has not been damaged or destroyed save for reasonable wear and tear.

# **Data Protection**

* 1. The following definitions apply in this clause 10:
     + 1. Agreed Purposes: [STATE THE PURPOSES FOR WHICH THE PERSONAL DATA IS TO BE HELD].
       2. Data controller, data **processor**, **data subject**, **personal data**, personal data breach and processing: as set out in the Data Protection Act No.24 of 2019 (the “Data Protection Act”).
       3. Permitted Recipients: the parties to this Agreement, the employees of each party, any third parties engaged to perform obligations in connection with this agreement, and [ADD ANY OTHER PERMITTED RECIPIENTS].
       4. Shared Personal Data: the personal data to be shared between the parties under this agreement. Shared Personal Data shall be confined to the following categories of information relevant to the following categories of data subject: [TYPE OF PERSONAL DATA]; [TYPE OF PERSONAL DATA]; and [TYPE OF PERSONAL DATA].
  2. This clause 10 sets out the framework for the sharing of personal data between the parties as controllers. Each party acknowledges that one party (the **Data Discloser**) will regularly disclose to the other party Shared Personal Data collected by the Data Discloser for the Agreed Purposes.
  3. Each party shall comply with all the obligations imposed on a controller under the Data Protection Act, and any material breach of the Data Protection Act by one party shall constitute a material breach.
  4. Each party shall:
     + 1. ensure that it has all necessary notices and consents and lawful bases in place to enable lawful transfer of the Shared Personal Data to the Permitted Recipients for the Agreed Purposes;
       2. give full information to any data subject whose personal data may be processed under this Agreement of the nature of such processing. This includes giving notice that, on the termination [or expiry] of this Agreement, personal data relating to them may be retained by or, as the case may be, transferred to one or more of the Permitted Recipients, their successors and assignees;
       3. process the Shared Personal Data only for the Agreed Purposes;
       4. not disclose or allow access to the Shared Personal Data to anyone other than the Permitted Recipients;
       5. ensure that all Permitted Recipients are subject to written contractual obligations concerning the Shared Personal Data (including obligations of confidentiality) which are no less demanding than those imposed by this agreement;
       6. ensure that it has in place appropriate technical and organisational measures, reviewed and approved by the other party, to protect against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data; and
       7. not transfer any personal data received from the Data Discloser outside the Territory unless the transferor ensures that:
          1. the transfer is to a country approved under the applicable Data Protection Act as providing adequate protection; or
          2. there are appropriate safeguards or binding corporate rules in place pursuant to the applicable Data Protection Act; or
          3. the transferor otherwise complies with its obligations under the applicable Data Protection Act by providing an adequate level of protection to any personal data that is transferred; or
          4. one of the derogations for specific situations in the applicable Data Protection Act applies to the transfer.
  5. Each party shall assist the other in complying with all applicable requirements of the Data Protection Legislation. In particular, each party shall:
     + 1. consult with the other party about any notices given to data subjects in relation to the Shared Personal Data;
       2. promptly inform the other party about the receipt of any data subject rights request;
       3. provide the other party with reasonable assistance in complying with any data subject access request;
       4. not disclose, release, amend, delete or block any Shared Personal Data in response to a data subject rights request without first consulting the other party wherever possible;
       5. assist the other party, at the cost of the other party, in responding to any request from a data subject and in ensuring compliance with its obligations under the Data Protection Act;
       6. notify the other party without undue delay on becoming aware of any breach of the Data Protection Act;
       7. at the written direction of the Data Discloser, delete or return Shared Personal Data and copies thereof to the Data Discloser on termination [or expiry] of this Agreement unless required by law to store the Shared Personal Data;
       8. use compatible technology for the processing of Shared Personal Data to ensure that there is no lack of accuracy resulting from personal data transfers;
       9. maintain complete and accurate records and information to demonstrate its compliance with this clause 10 [and allow for audits by the other party or the other party's designated auditor]; and
       10. provide the other party with contact details of at least one employee as point of contact and responsible manager for all issues arising out of the Data Protection Act, including the joint training of relevant staff, the procedures to be followed in the event of a data security breach, and the regular review of the parties' compliance with the Data Protection Act.
  6. Each party shall indemnify the other against all liabilities, costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs (calculated on a full indemnity basis) and all other [reasonable] professional costs and expenses) suffered or incurred by the indemnified party arising out of or in connection with the breach of the Data Protection Act by the indemnifying party, its employees or agents, provided that the indemnified party gives to the indemnifier prompt notice of such claim, full information about the circumstances giving rise to it, reasonable assistance in dealing with the claim and sole authority to manage, defend and/or settle it.

# **Product liability insurance**

* + 1. During the Term, the Company shall maintain product liability insurance with a reputable insurer of no less than [AMOUNT] for any one occurrence and no less than [AMOUNT] in total in any one year for any and all liability (however arising) for a claim that the Products are faulty or defective. The Company shall provide a copy of the insurance policy [and proof of payment of the current premium] to the Distributor on request.

# **Indemnities**

* 1. Subject to the Distributor fulfilling all the conditions in this clause 12, the Company shall indemnify the Distributor against all liabilities, costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs (calculated on a full indemnity basis) and all other [reasonable] professional costs and expenses) suffered or incurred by the Distributor arising out of or in connection with:
     + 1. any claim made against the Distributor in respect of damage to property, death or personal injury arising from any fault or defect in the materials or workmanship of the Products; and
       2. any claim made against the Distributor for actual or alleged infringement of a third party's intellectual property rights arising out of or in connection with the sale of the Products by the Distributor,
  2. (each a **Relevant Claim**).
  3. The indemnities in clause 12.1 shall not cover the Distributor to the extent that the Relevant Claim results from the Distributor's negligence or wilful misconduct.
  4. Liability under the indemnities in clause 12.1 is conditional on the Distributor discharging the following obligations. If any third party makes a claim, or notifies an intention to make a claim, against the Distributor which may reasonably be considered likely to give rise to a liability under clause 12.1 (**Claim**), the Distributor shall:
     + 1. as soon as reasonably practicable, give written notice of the Claim to the Company, specifying the nature of the Claim in reasonable detail;
       2. not make any admission of liability, agreement or compromise in relation to the Claim without the prior written consent of the Company;
       3. give the Company and its professional advisers access at reasonable times (on reasonable prior notice) to its premises and its officers, directors, employees, agents, representatives or advisers, and to any relevant assets, accounts, documents and records within the power or control of the Distributor, so as to enable the Company and its professional advisers to examine them and to take copies (at the Company’s expense) for the purpose of assessing the Claim; and
  5. [subject to the Company providing security to the Distributor to the Distributor's reasonable satisfaction against any claim, liability, costs, expenses, damages or losses which may be incurred,] take such action as the Company may reasonably request to avoid, dispute, compromise or defend the Claim.
  6. If a payment due from the Company under this clause 12 is subject to tax (whether by way of direct assessment or withholding at its source), the Distributor shall be entitled to receive from the Company such amounts as shall ensure that the net receipt, after tax, to the Distributor in respect of the payment is the same as it would have been where the payment not subject to tax.
  7. Nothing in this clause 12 shall restrict or limit the Distributor's general obligation at law to mitigate a loss it may suffer or incur as a result of an event that may give rise to a claim under this indemnity.]

# **Limitation of liability**

* 1. The Company has obtained insurance cover in respect of its own legal liability for individual claims not exceeding [AMOUNT] per claim. [The Company has been unable to obtain insurance in respect of certain types of loss at a commercially viable price.] The limits and exclusions in this clause reflect the insurance cover the Company has been able to arrange and the Distributor is responsible for making its own arrangements for the insurance of any excess loss.
  2. The restrictions on liability in this clause 13 apply to every liability arising under or in connection with this agreement including liability in contract, tort (including negligence), misrepresentation, restitution or otherwise.
  3. [The Supplier may not benefit from the limitations and exclusions set out in this clause in respect of any liability arising from its deliberate default.]
  4. Nothing in the agreement limits any liability which cannot legally be limited, including liability for:
     + 1. death or personal injury caused by negligence;
       2. fraud or fraudulent misrepresentation; and
       3. breach of the terms implied by section the Sale of Goods Act.
  5. Subject to [clause 13.3, ] [clause 13.4] [and] clause 13.5, the Company’s total liability to the Distributor:
     + 1. for damage to property caused by the negligence of its employees and agents in connection with this agreement shall not exceed [AMOUNT LINKED TO RELEVANT INSURANCE POLICY] for any one event or series of connected events;
       2. [for loss arising from the Supplier's failure to comply with its data protection obligations under clause 10 shall not exceed [AMOUNT]; and]
       3. [for all other loss or damage which does not fall within subclause (a) [or (b)] shall not exceed [AMOUNT].
  6. [The following types of loss are wholly excluded:
     + 1. loss of profits;
       2. loss of sales or business;
       3. loss of agreements or contracts;
       4. loss of anticipated savings;
       5. loss of use or corruption of software, data or information;
       6. loss of or damage to goodwill; and
       7. indirect or consequential loss.
  7. [The following types of loss and specific losses are not excluded:
     + 1. sums paid by the Distributor to the Company pursuant to the Agreement, in respect of any goods or services not provided in accordance with the Agreement;
       2. wasted expenditure;
       3. additional costs of procuring and implementing replacements for, or alternatives to, goods or services not provided in accordance with the agreement. These include consultancy costs, additional costs of management time and other personnel costs, and costs of equipment and materials; and
       4. losses incurred by the Distributor arising out of or in connection with any third party claim against the Distributor which has been caused by the act or omission of the Company. For these purposes, third party claims shall include [but not be limited to] demands, fines, penalties, actions, investigations or proceedings, including those made or commenced by subcontractors, the Company’s personnel, regulators and customers of the Distributor.
  8. [Unless the Distributor notifies the Company that it intends to make a claim in respect of an event within the notice period, the Company shall have no liability for that event. The notice period for an event shall start on the day on which Distributor ought reasonably to have become aware of [the event having occurred **OR** its having grounds to make a claim in respect of the event] and shall expire [NUMBER] months from that date. The notice must be in writing and must identify the event and the grounds for the claim in reasonable detail.]

# **Termination**

* 1. **Termination on Notice**
     1. Each Party shall be entitled to terminate this Agreement by giving [INSERT DURATION] written notice to the other Party such termination immediately effective upon the giving of such notice of termination: -
        1. the other party fails to pay any amount due under this Agreement on the due date for payment and remains in default not less than [NUMBER] days after being notified [in writing] to make such payment;
        2. the other party commits a material breach of this agreement (other than failure to pay any amounts due under this agreement) which breach is irremediable or (if that breach is remediable) fails to remedy that breach within a period of [14] days after being notified [in writing] to do so;
        3. the other party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or [(being a company or limited liability partnership) is deemed unable to pay its debts within the meaning of the Insolvency Act;
        4. a creditor or encumbrancer of the other party attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of the other party's assets and such attachment or process is not discharged within [14] days;
        5. the other party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business;
        6. the other party's financial position deteriorates so far as to reasonably justify the opinion that its ability to give effect to the terms of this agreement is in jeopardy;
        7. there is a change of Control of the other party;
        8. if a receiver, administrator or similar officer is appointed over all or any part of the assets or undertaking of the other Party;
        9. if one Party makes any arrangement for the benefit of its creditors;
        10. if one Party goes into liquidation save for the purposes of a genuine amalgamation or reconstruction; or
        11. in the event of either party being prohibited by any law or official requirement from complying with the terms of this Agreement
  2. **Termination for Convenience**
     1. Either party may terminate this Agreement by giving to the other party not less than [INSERT] days’ notice in writing.
  3. **Effects of Termination**
     + 1. The Distributor shall immediately cease the distribution obligations under this Agreement.
       2. The Company shall procure the transportation and return of any unsold products at its own costs from the premises the Distributor or any premises where the Distributor may have stored the goods.
       3. The Company shall have no claim for any loss against the Distributor from the date of the termination of the agreement.

# **Notices**

* 1. Any notice required to be given by any Party to the other Party under or in connection with this Agreement will only be effective:
     + 1. if by way of hand delivery, when it has been delivered to the relevant address [and upon proof of delivery by signature of a delivery receipt];
       2. if by way of pre-paid first class registered post, seven (7) Business Days after the envelope addressed to the other Party containing the notice was delivered into the custody of the postal authorities;
       3. if by way of commercial courier, five (5) Business Days after being couriered by a reputable courier service (courier prepaid) in an envelope addressed to the other Party at the relevant address;
       4. if by way of electronic communication, only when the email is actually received in readable form and if the notice letter is scanned and sent with the email addressed to a particular department or officer provided further that any notice given or made outside of normal working hours shall be deemed to be given or made at the start of the normal working hours on the next Business Day.
  2. Any notice given or made in accordance with this Agreement shall be delivered to the relevant Party at its address set out below:
     + 1. For the [INSERT PARTY NAME]:

Address: [insert text]

Email: [insert text]

For the attention of: [insert text]

* + - 1. For the [INSERT PARTY NAME]:

Address: [insert text]

Email: [insert text]

For the attention of: [insert text]

* 1. A Party may change its details for service of notices specified in clause15.2 by giving notice in writing to the other Party.
  2. [Any notice or other communication given or made in accordance with this Agreement by or to a party may be given or made by or to the party’s Advocates on behalf of the Party; and
  3. This clause 15 does not apply to the service of any proceedings or other documents in any legal action.

# **Force Majeure**

* 1. Neither Party shall be liable in respect of any delay in performing, failure to perform, or failure to adequately perform any of his or its obligations hereunder in consequence of any act, cause or event which:
     + 1. was not within his or its control;
       2. was not caused or precipitated by his or its negligence; and
       3. could not have been prevented by his or its reasonable diligence, including without limitation:
       4. any act of God;
       5. any war or hostilities (whether war be declared or not);
       6. any act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalization;
       7. any plague, epidemic, pandemic, outbreaks of infectious disease or any other public health crisis, including quarantine or other employee restrictions;
       8. any sabotage, riots or other act of civil disobedience, civil commotion, rebellion, act of a public enemy or invasions;
       9. any judicial actions, strikes, lockouts, industrial disputes or actions of such nature;
       10. any actions or inactions of any government or any agency or department;
       11. any act of terror;
       12. any storms, floods or other inclement, weather, earthquakes, subsidence, epidemics or other natural physical disasters; and
       13. fire, accident, explosion or shortage of labour

(hereinafter called a “**Force Majeure Event**”) for so long as and to the extent that the effects of the Force Majeure Event continue.

* 1. The Party which claims that a Force Majeure Event has prevented it from fulfilling any of his or its obligations under this Agreement shall, within five (5) days of the occurrence of a Force Majeure Event, notify the other Party (the “**Force Majeure Notice**”) of the Force Majeure Event in sufficient detail including the nature and effect of the Force Majeure Event. Similarly, Such Party shall notify the other Party when the Force Majeure Event ceases.
  2. [Where the Force Majeure Event continues for more than one (1) months after the date of the Force Majeure Notice either party may terminate this Agreement but without prejudice to any accrued rights either party may have against the other but subject to agreement, such affected Party undertakes to continue its performance of obligations under this Agreement immediately the Force Majeure event ceases.] **OR** [Where the Force Majeure Event continues for more than one (1) months after the date of the Force Majeure Notice, the Parties shall consult with each other with a view to agreeing on appropriate measures to be taken in the circumstances.]
  3. Any payment obligations arising during the subsistence of the Force Majeure event shall be deemed to be suspended. In the event that the Agreement is terminated in accordance with the terms of this Clause [INSERT], the [INSERT]shall refund to the [INSERT] any monies that have been paid to the [INSERT] by the [INSERT] under the terms of this Agreement within thirty (30) days of such termination.

# **Dispute Resolution**

* 1. **Good Faith Negotiations**
     1. In case of any dispute arising out of this Agreement including any question regarding its interpretation, existence, validity or termination, each party will use its best efforts to resolve the dispute by good faith negotiation within a period of Thirty (30) Business Days following notification of the dispute.
  2. **Mediation**
     + 1. If the dispute has not been settled pursuant to the Good Faith Negotiations under clause [INSERT] above within (30) Business Days from when the settlement discussions were instituted, any party may elect to refer the dispute to mediation. The mediation shall take place in in accordance with the Nairobi Centre for International Arbitration (Mediation) Rules, 2015.
       2. The mediator shall be appointed by mutual agreement between the Parties or in default of such agreement within five (5) days of the notification of a dispute, upon the application of either Party, by the Registrar of the Nairobi Centre for International Arbitration in accordance with the Nairobi Centre for International Arbitration (Mediation) Rules, 2015.
       3. The mediation shall take place in Nairobi and shall be conducted in accordance with the Nairobi Centre for International Arbitration (Mediation) Rules, 2015.
       4. Unless otherwise agreed, the mediation will start not later than Fourteen (14) Business Days from the date of notification of the dispute. No party may commence any court proceedings or arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and the mediation has terminated.
       5. Nothing in this Agreement shall prevent or delay a Party seeking urgent injunctive or interlocutory relief in a court having jurisdiction.
  3. **Arbitration**
     + 1. If the dispute has not been settled pursuant to Good Faith Negotiations under Clause [INSERT] or under Mediation under clause [INSERT] above within thirty (30) Business Days (or such longer period as may be agreed upon between the parties) from when the settlement discussions were instituted, any party may elect to commence arbitration.  Such arbitration shall be referred to arbitration by a single arbitrator to be appointed by agreement between the Parties or in default of such agreement within fourteen (14) days of the notification of a dispute, upon the application of either Party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitration of the United Kingdom.
       2. Such arbitration shall be conducted in Nairobi in accordance with the Rules of Arbitration of the said Institute and subject to and in accordance with the provisions of the Arbitration Act 1995.
       3. To the extent permissible by Law, the determination of the Arbitrator shall be final, conclusive and binding upon the Parties hereto.
       4. Pending final settlement or determination of a dispute, the Parties shall continue to perform their subsisting obligations hereunder.
       5. Nothing in this Agreement shall prevent or delay a Party seeking urgent injunctive or interlocutory relief in a court having jurisdiction.

# **Confidentiality**

* 1. Each party undertakes that it shall not [at any time **OR** at any time during this Agreement, and for a period of [two] years after termination or expiry] of this agreement,] disclose to any person any Confidential Information, except as permitted by clause 18.2.
  2. Each party may disclose the other party's confidential information:
     + 1. to its employees, officers, representatives, contractors, subcontractors or advisers who need to know such information for the purposes of exercising the party's rights or carrying out its obligations under or in connection with this agreement. Each party shall ensure that its employees, officers, representatives, contractors, subcontractors or advisers to whom it discloses the other party's Confidential Information comply with this clause 18; and
       2. as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority.
  3. No party shall use any other party's Confidential Information for any purpose other than to exercise its rights and perform its obligations under or in connection with this Agreement.

# **Severance**

* 1. If any provision of this Agreement or part thereof is rendered under any law void, illegal or unenforceable in any respect (whether against all or only some of the parties), the validity, legality and enforceability of the remaining provisions (and such aforesaid provision against the other parties) shall not in any way be affected or impaired thereby.
  2. If any provision or part-provision of this agreement is deemed deleted under clause 19.1, the parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.

# **Survival of Rights, Duties and Obligations**

* + 1. Termination of this Agreement for any cause shall not release a party from any liability which at the time of termination has already accrued to another party or which thereafter may accrue in respect of any act or omission prior to such termination.

# **Waiver**

* + 1. No failure or delay to exercise any power, right or remedy by either Party shall operate as a waiver of that right, power or remedy and no single or partial exercise by that party of any right, power or remedy shall preclude its further exercise or the exercise of any other right, power or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

# **Variation**

* + 1. No amendment or variation to this Agreement shall be effectual or binding on the parties hereto unless it is in writing and duly executed by or on behalf of the parties hereto.

# **Cumulative Rights and Remedies**

* + 1. The rights and remedies of the Parties provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by law.

# **Entire Agreement**

* 1. This Agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.
  2. Each party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this agreement. Each party agrees that it shall have no claim for innocent or negligent misrepresentation [or negligent misstatement] based on any statement in this agreement.

# **Time of the Essence**

* + 1. Time shall be of the essence in respect of all the obligations of the Parties under this Agreement.

# **Third party rights.**

* + 1. No one other than a party to this agreement shall have any right to enforce any of its terms.

# **Authority to Execute**

* 1. The Parties warrant that the individuals executing this Agreement on behalf of each Party have been fully empowered to execute this Agreement on behalf of such Party and that all necessary corporate action to authorize the execution of this Agreement have been taken by such Party.
  2. The execution and delivery of this Agreement, and the performance by either party of its obligations under this Agreement, will not result in a breach of any provision of, or constitute a default under, any agreement or instrument to which it is a party or by which it is bound.

# **No Agency or Partnership**

* 1. Nothing in this Agreement shall create or be deemed to create a partnership or agency between the Parties and neither Party shall enter or have authority to enter into any agreement or make any representation or warranty on behalf of the other or pledge the credit of or otherwise bind the other Party.
  2. Each party confirms it is acting on its own behalf and not for the benefit of any other person.

# **Assignment**

* 1. This Agreement shall be binding on the parties and their respective successors/personal representatives and assigns. None of the parties shall be entitled to assign this Agreement or any of its rights and obligations hereunder except as expressly permitted in this Agreement.

OR

* + 1. This agreement is personal to the [INSERT] and the [INSERT] shall not without the prior written consent of the [INSERT](which consent may be conditioned at the sole discretion of the [INSERT]) assign, transfer, mortgage, charge, subcontract, delegate, declare a trust over or deal in any other manner with any of its rights and obligations under this Agreement.
  1. The [INSERT] may assign, transfer, charge, declare a trust over or deal in any other manner with any of its rights and obligations under this agreement.

# **Set-off**

* + 1. All amounts due under this agreement shall be paid in full without any set-off, counterclaim, deduction or withholding (other than any deduction or withholding of tax as required by law).

# **Conclusive Evidence**

* + 1. This Agreement shall be sufficient evidence of the matters specified herein and may be produced in court as evidence of the matters specified herein without the need to call for further or other evidence.

# **Counterparts**

* 1. This agreement may be executed in any number of counterparts, each of which when executed [and delivered] shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement.
  2. No counterpart shall be effective until each party has executed [and delivered] at least one counterpart.

# **Governing Law**

* + 1. The construction, validity and performance of this agreement shall be governed by Kenyan law

**IN WITNESS WHEREOF** this Agreement has been duly executed by or on behalf of the Parties.

# **Schedule 1 The Products [And Prices]**

# **Schedule 2 The Territory**

|  |  |
| --- | --- |
| Signed by the duly authorised representative of the Company  *Signature:*  *Name:*  *Designation:* | Signed by the duly authorised representative of the Distributor  **………………………………………..**  *Signature:*  *Name:*  *Designation:* |
| in the presence of:-  *Witness’s signature*  *Witness’s Name:*  *Witness’s Designation*  *Witness’s Address* | in the presence of:-  *Witness’s signature*  *Witness’s Name:*  *Witness’s Designation:*  *Witness’s Address* |

**Drawn by:-**