

AGREEMENT

DATED _____ **2004**

BETWEEN

[]

AND

[]

SERVICE CONTRACT

KAPLAN & STRATTON
Advocates
P.O. Box 40111 - 00100
Nairobi
KENYA

TABLE OF CONTENTS

1.	INTERPRETATION	1
2.	APPOINTMENT, DURATION AND WAIVER	2
3.	DUTIES OF THE EXECUTIVE.....	3
4.	PLACE OF WORK AND RESIDENCE.....	4
5.	PAY AND BONUS	4
6.	EXPENSES	5
7.	HOLIDAY.....	5
8.	SICKNESS.....	5
9.	TERMINATION.....	5
10.	INTELLECTUAL PROPERTY.....	7
11.	CONFIDENTIALITY	8
12.	NON-COMPETITION	9
13.	NO WAIVER OF RIGHTS	10
14.	SURVIVAL OF PROVISIONS	10
15.	SUPREMACY OF AGREEMENTS.....	10
16.	VARIATION.....	10
17.	SEVERABILITY	11
18.	ARBITRATION.....	11
19.	COSTS	11
20.	NOTICES.....	11
21.	GOVERNING LAW.....	11

THIS AGREEMENT¹ is made on 2004 between:

- (1) [] a company incorporated in Kenya and of P.O Box [] Nairobi Kenya (“**Company**”);
- (2) [] of P.O. Box [], Nairobi Kenya (“**Executive**”).

WHEREAS:

- (A) The Executive is and will remain a director and shareholder of the Company and has acted as managing director of the Company for some time on an informal basis.
- (B) This agreement is entered into pursuant to and is ancillary to an investment agreement dated of or about today’s date and made between the Company, the Executive and [] (“**Investment Agreement**”).
- (C) Under the terms of the Investment Agreement the Executive is to be appointed as the managing director of the Company.
- (D) This agreement records those terms.

IT IS AGREED as follows:

1. INTERPRETATION

- a) In this agreement:
 - i) “**Board**” means the board of directors of the Company;
 - ii) “**Group Company**” means any other company which is a member of the group of companies of which the Company is a member and “**Group**” shall be construed accordingly;
 - iii) “**Intellectual Property**” includes patents, trade marks, semi conductor topography rights, service marks, design rights (whether registrable or otherwise) and applications for any of the foregoing, and copyrights, database rights. rights in inventions, discoveries, patents, utility models, know-how, trade or business names, confidential information, proprietary information and other similar rights and obligations whether registrable or not in any country (including but not limited to Kenya) and applications for any of the listed rights as may exist anywhere in the world;

¹ *This is a sample CEO service contract drawn up under Kenyan law for an expatriate who requires an entry permit from the Kenyan immigration authorities to enable him to work in Kenya. The contract anticipates a new institutional investor acquiring equity in the Company on a short to medium term basis (ie five to ten years) under the terms of a separate investment agreement (not attached) with a condition of that new investment being the entering into of a formal service contract with the CEO. The CEO was the principal shareholder in the Company and is regarded as a key man. Consideration should therefore be given to requiring the Company to take out key man insurance on the life and health of the CEO. In this instance this provision was included in the Investment Agreement and not in this service contract.*

- i v) “**Inventions**” means all inventions, improvements, modifications, formulae, models, prototypes, sketches, drawings, plans or other works or material which the Executive alone or with one or more others may take, devise or discover during the Executive's employment (whether under this agreement or prior to this agreement)and which pertain or are actually or potentially useful to any of the commercial or industrial activities from time to time of the Company or any Group company or the processes or machinery of the Company or any Group company or which pertain to, result from or are suggested by any work which the Executive or any other employee of the Company or any other Group company has done or may during the Executive's employment for the Company or any Group company;
 - v) the symbol “**Shs**” or the word “**Shillings**” means shillings in the currency of the Republic of Kenya;
 - vi) the symbol “**\$**” or the word “**Dollars**” means dollars in the currency of the United States of America.
- b) In this agreement, unless the context otherwise requires, any reference to:
- i) the singular includes the plural and *vice versa*;
 - ii) a person includes reference to a body corporate or other legal entity;
 - iii) any written law includes that law as amended or re-enacted from time to time;
 - iv) any agreement or other document includes that agreement or other document as varied or replaced from time to time;
 - v) a clause is to the relevant clause of this agreement;
 - vi) any party includes that party’s successors and assigns.
- c) Clause headings are inserted for convenience only and shall be ignored in construing this agreement.

2. APPOINTMENT, DURATION AND WAIVER

- a) The Company hereby appoints the Executive and the Executive hereby agrees to serve as Managing Director of the Company with effect from the date on which []² acquires shares in the Company under the terms of the Investment Agreement and such appointment shall continue (subject to earlier termination as provided in this Agreement) unless or until terminated by either party giving to the other not less than 90 days prior written notice³.
- b) The Executive accepts that given the nature of his job he may be required to perform other duties or tasks not within the scope of his normal duties and the Executive agrees to perform those duties or undertake those tasks as if they were specifically set out in this Agreement.

² Into the square brackets would be inserted the name of the new investor.

³ The statutory minimum notice period would be one month.

- c) The Executive warrants that by virtue of entering into this Agreement or the other agreements or arrangements made or to be made between the Company and him he will not be in breach of any express or implied terms of any contract with or of any other obligation to any third party binding upon him.
- d) Subject to his receiving payment of all amounts due to him as anticipated in the Investment Agreement the Executive hereby waives any rights or claims he has or may against the Company arising from his employment by the Company prior to today's date.

3. DUTIES OF THE EXECUTIVE

- a) The Executive shall at all times during the period of this Agreement:
 - i) accept (without further remuneration and in addition to the Executive's duties to the Company set out below) such offices or directorships in other Group companies as the Company may reasonably require and to resign from such offices or Directorships at the request of the Company;
 - ii) devote substantially the whole of his time, attention and ability to the duties of his appointment under this Agreement;
 - iii) faithfully and diligently perform those duties and exercise such powers consistent with them which are from time to time assigned to or vested in him by the Board;
 - iv) obey all lawful and reasonable directions of the Board;
 - v) use his best endeavours to promote the interests of the Company and its affiliates;
 - vi) keep the Board promptly and fully informed (in writing if so requested) of his conduct of the business or affairs of the Company and its affiliates and provide such explanations as the Board may require;
 - vii) not at any time make any untrue or misleading statement relating to the Company or any Group Company.
 - viii) prepare and submit to the Board a business plan before the commencement of each calendar year which shall include, *inter alia*, estimates of capital and revenue expenditure and income for the next ensuing financial year and, at any time when necessary, due to any change in working, trading or other conditions, to submit revised or supplemental business plans and estimates to the Board and to agree with the Board upon any business plans to be implemented;
 - ix) comply with any obligation imposed upon him under the terms of the Investment Agreement;
- b) The Executive shall abide by and procure that the Company abides by all covenants and restrictions that are given by the Executive and the Company in the Investment Agreement as if they were set out in this Agreement, and specifically shall procure that no actions are taken by him or the Company which, under the terms of the Investment Agreement, require the prior approval of [].

- c) The Executive shall submit any application required to be made for the issue or renewal of an entry permit in his favour at least six month's before the date of expiry.

4. PLACE OF WORK AND RESIDENCE

The Executive shall perform his duties at the head office of the Company and/ or such other place of business of the Company as the Company requires whether inside or outside Kenya and the Company shall not without his prior consent require him to go to or reside anywhere outside Kenya except for occasional visits in the ordinary course of his duties.

5. PAY AND BONUS

- a) During his appointment under this Agreement the Company shall, subject to clause 5 (b), pay or provide to the Executive a salary per month of Shs [] ([] Shillings) which shall accrue day-to-day and be payable by equal monthly instalments in arrears ("Salary"). Each monthly instalment of Salary shall be deemed to accrue rateably from day to day in arrears at the end of each calendar month and shall be paid into an account in the name of the Executive as he may designate or in such other manner as the Executive may agree with the Company. The Company shall be entitled to deduct all PAYE, and other statutory deductions required under the Laws of Kenya from such salary for each month prior to making payment to the Executive.⁴
- b) The Salary shall be deemed to include any fees receivable by the Executive as a Director of the Company or any Group Company, or of any other company or unincorporated body in which he holds office as nominee or representative of the Company or any Group company.
- c) The Executive shall be entitled to receive a bonus in addition to Salary in the circumstances set out in the Investment Agreement. The Company shall be entitled to deduct all PAYE, and other statutory deductions required under the Laws of Kenya from any such bonus paid prior to making payment to the Executive.
- d) The amount referred to in clause 5 (a) shall be reviewed by the Board each year and such amount may be varied by the Board with effect from that date by such amount, if any, as the Board shall think fit, subject to the terms of the Investment Agreement.
- e) Other than as provided in this agreement the Executive shall not be entitled to receive any further payment or benefit arising from his employment with the Company.
- f) The Company shall be entitled at any time during the currency of this Agreement and in any event on termination to deduct from the Salary any sum due from the Executive to the Company including any loans, advances, excess holiday or other sums owed to the Company by the Executive.

⁴ *Employers in Kenya are moving away from providing non-cash benefits to senior expatriate employees, due to the way in which such benefits are taxed. Previously one would have expected to see included in such a contract benefits such as: school fees, provision of a motor vehicle, accommodation and staff, club membership, medical insurance and air tickets.*

6. EXPENSES

- a) The Company shall reimburse to the Executive on a monthly basis all travelling, hotel, entertainment and other expenses reasonably incurred by him in the proper performance of his duties subject to the Executive complying with such guidelines or regulations issued by the Company from time to time in this respect and to the production to the Company of such vouchers or other evidence of actual payment of the expenses as the Company may reasonably require.
- b) Where the Company issues a company sponsored credit or charge card to the Executive he shall use such card only for expenses reimbursable under clause 6 (a) above, and shall return it to the Company forthwith on the termination of his employment.

7. HOLIDAY

a) In addition to Kenyan public holidays the Executive is entitled to 25⁵ working days paid holiday in each year to be taken at such time or times as are agreed with the Board. The Executive shall not without the consent of the Board carry forward any unused part of his holiday entitlement to a subsequent year.

8. SICKNESS⁶

- a) If the Executive is absent because of sickness (including mental disorder) or injury he shall report this fact forthwith to the Board and if the Executive is so prevented for seven or more consecutive days he shall provide a medical practitioner's statement on the eighth day and weekly thereafter so that the whole period of absence is certified by such statements.
- b) If the Executive shall be absent due to sickness (including mental disorder) or injury duly certified in accordance with the provisions of sub-clause 8 (a) hereof, he shall be paid his full remuneration hereunder for up to three months absence in any period of twelve consecutive months and thereafter such remuneration, if any, as the Board shall from time to time determine.
- c) At any time during the period of his appointment, (but not normally more often than once every second year) the Executive shall at the request and expense of the Company permit himself to be examined by a registered medical practitioner to be selected by the Company and shall authorise such medical practitioner to disclose to and discuss with the Company's medical adviser the results of such examination and any matters which arise from it in order that the Company's medical adviser can notify the Company of any matters which, in his opinion, might hinder or prevent the Executive (if during a period of incapacity) from returning to work for any period or (in other circumstances) from properly performing any duties of his appointment at any time.

9. TERMINATION

- a) This Agreement shall automatically terminate:

⁵ The statutory minimum is 22 working days excluding public holidays.

⁶ The provision set out in this clause improve the minimum entitlements under statute.

- i) on the Executive reaching his 65th birthday; or
 - ii) if the Executive becomes prohibited by law from being a director; or
 - iii) if he resigns his office.
- b) As an alternative to giving any notice provided for by in clause 2 (a) above or elsewhere under the terms of this Agreement the Company may terminate this Agreement summarily without prior notice on payment to the Executive of a payment in lieu of notice (subject to statutory deductions) equal to the Salary to which the Executive would have been entitled during the period of notice.
- c) Once notice has been given either by the Executive or the Company, the Company may, in its absolute discretion, at any time during such notice terminate the Agreement and make a payment in lieu of Salary to which the Executive would have been entitled during any period of un-expired notice.
- d) In order to investigate a complaint against the Executive of misconduct the Company is entitled to suspend the Executive on full pay for so long as may be necessary to carry out a proper investigation and hold a disciplinary hearing.
- e) The Company may by notice terminate this Agreement with immediate effect if the Executive:
- i) commits any act of gross misconduct or repeats or continues (after written warning) any other serious breach of his obligations under this Agreement; or
 - ii) himself breaches, or procures the Company to breach, any of the terms of the Investment Agreement;
 - iii) is guilty of any conduct which in the opinion of the Board brings him, the Company or any Group company into disrepute; or
 - iv) is convicted of any criminal offence (excluding an offence under road traffic legislation in the Kenya or elsewhere for which he is not sentenced to any term of imprisonment whether immediate or suspended); or
 - v) commits any act of dishonesty whether relating to the Company, any Group company, any of its or their employees or otherwise; or
 - vi) becomes bankrupt or makes any arrangement or composition with his creditors generally; or
 - vii) ceases to be authorised to engage in business in Kenya and work for the Company by reason of the withdrawal, cancellation, revocation or failure to renew (“**Withdrawal of Authority**”) of the entry permit issued to him under the Immigration Act (Chapter 172 of the Laws of Kenya) for a period of forty five days from such Withdrawal of Authority. During such Withdrawal of Authority period the Executive shall ensure that he continues to reside in Kenya lawfully through the issue of a visitors pass and shall not work or engage in any other conduct contrary to the Immigration Act but shall receive his Salary;

- viii) is in the reasonable opinion of the Board incompetent in the performance of his duties and when determining the Executive's performance for these purposes the Board may take into account a failure by the Company to achieve the financial targets set out in the Investment Agreement.
- f) The Company may terminate this Agreement notwithstanding clause 8 above by not less than 3 months' prior notice given at any time while the Executive is incapacitated by ill-health or accident from performing his duties under this Agreement and he has been so incapacitated for a period or periods aggregating 180 days in the preceding 12 months provided that the Company shall withdraw any such notice if during the currency of the notice the Executive returns to full time duties and provides a medical practitioner's certificate satisfactory to the Board to the effect that he has fully recovered his health and that no recurrence of his illness or incapacity can reasonably be anticipated
- g) On the termination of this Agreement for whatever reason, the Executive shall at the request of the Company, but not if such action would be inconsistent with the terms of the Investment Agreement, :
 - i) resign from all and any offices which he may hold as a Director of the Company or of any Group company (without prejudice to any claims which the Executive may have against any company arising out of this Agreement or the Investment Agreement) and from all other appointments or offices which he holds as nominee or representative of the Company or any Group company; and
 - ii) if he should fail to do so within seven days the Company is hereby irrevocably authorised to appoint some person in his name and on his behalf to sign any documents or do any things necessary or requisite to effect such resignation(s).

10. INTELLECTUAL PROPERTY

- a) Any and all Intellectual Property created either solely or jointly by the Executive during the terms of his employment, whether created in the course of his employment under this agreement or before or otherwise, shall be the property of the Company. The Executive may not use or authorise others to use, disclose or reproduce any of the Intellectual Property in any form without the prior written consent of the Company
- b) At the Company's request and at the Company's expense, the Executive shall do all acts and execute all documents which may be necessary to vest the title of the Intellectual Property in the Company whether in connection with any registration or otherwise.
- c) If the Executive creates or discovers or participates in the creation or discovery of any Intellectual Property during the term of his employment under this Agreement but which is not the property of the Company under Clause 10 (a), the Company shall have first option to acquire the Executive's rights in the intellectual property within 3 months after disclosure on terms to be agreed between the parties.

- d) The Executive hereby unconditionally and irrevocably waives in favour of the Company all moral rights in relation to the Intellectual Property to which he may now or at any time in the future be entitled to by virtue of any legislation in Kenya relating to the Intellectual Property in question (or any subsequent substituted legislation) and under any similar laws in force from time to time in any part of the world.
- e) Any records or notes made by the Executive during his employment hereunder shall be the exclusive property of the Company, and the Executive shall not use, reproduce or divulge any part of them without the prior written consent of the Company.
- f) The Executive shall promptly disclose to the Company (and to no one else) full details of any Intellectual Property (including designs, inventions, formulae and working papers) he conceives makes or improves on his own or with others where such discovery:
 - i) is made in the course of his employment or is suggested by his duties; or
 - ii) is connected with the businesses of the Company or Group company; or
 - iii) is capable of being used by the Company or any Group company; or
 - iv) is made after employment as a result of knowledge gained during employment.
- g) The rights and obligations under this clause shall survive the termination of this Agreement.

11. CONFIDENTIALITY

- a) The Executive, by virtue of his association with the Group, will become possessed of and will have access to the Company and the Group's trade secrets and confidential information including, *inter alia*, but without limiting the generality of the foregoing, the following matters, all of which are hereinafter referred to as "**the Group's trade secrets**":
 - i) know-how, processes and techniques;
 - ii) designs, copyrights and wordings;
 - iii) knowledge of and influence over the Group's customers and business associates;
 - iv) the contractual arrangements between the Group and its business associates;
 - v) the financial details of the Group's relationship with its business associates;
 - vi) the financial details (including credit and discount terms) relating to the Group's customers;
 - vii) the names of prospective customers and their requirements;

- viii) details of the Group's financial structures and operating results;
 - ix) details of the remuneration paid by the Group to its various employees and their duties;
 - x) other matters which relate to the business of the Group and in respect of which information is not readily available in the ordinary course of business to a competitor of the Group.
- b) Having regard to the above, the Executive undertakes that, in order to protect the proprietary interest of the Group in the Group's trade secrets:
- i) he will not during his association with the Group or at any time thereafter, either use or directly or indirectly divulge or disclose to others (except as required by the terms and nature of their association) any of the Group's trade secrets;
 - ii) all written instructions, drawings, notes, memoranda or records relating to the Group's trade secrets which are made by the Executive or which come into his possession, shall be deemed to be the property of the Group and shall be surrendered to the Group on demand and the Executive shall not retain any copies thereof or extracts therefrom.
- c) The provisions of this clause 11 shall continue in force in accordance with their terms, notwithstanding the termination of this agreement for any reason.

12. NON-COMPETITION⁷

- a) The Executive undertakes that he will not (and will use his best endeavours to procure that no person connected with him or body corporate associated or controlled by him whether directly or indirectly) for so long as [] remains a shareholder in the Company and anywhere within East Africa:
- i) either on his own account or in conjunction with or on behalf of any person, firm or company carry on or be engaged, concerned or interested, directly or indirectly, whether as shareholder, partner, agent or otherwise in carrying on any business similar to, in competition or potentially in competition with, the business of the Company or its Subsidiaries as carried on in the year prior to today's date;
 - ii) he will not either on its own account or in conjunction with or on behalf of any person, firm or company solicit or entice away or attempt to entice away or procure that another person should do the same from the Company or any Group Company, the custom of any person, firm or company who shall at any time within the year before today's date have been a customer, client, distributor, agent or enter into any contract for sale and purchase or accept business from any such person;

⁷ *To be enforceable in a court the party relying on the restriction would have to demonstrate that the clause was reasonable in all respects. In this instance the clause seeks to prevent the CEO competing with the Company for so long as the institutional investor remains a shareholder in the Company. These clauses are usually much wider and often seek to prevent competition post-termination of employment.*

- iii) he will not at any time hereafter make use of, disclose or divulge to any person any information (other than information already in the public domain or to be disclosed pursuant to an order of a court of competent jurisdiction) relating to the Company or any Group company, the identity of its customers and suppliers, its products, finance, contractual arrangements, business or methods of business.
- b) While the restrictions contained in this clause are considered by the parties to be fair and reasonable in the circumstances and intended to protect the business of the Company and any Group company and the interests of the shareholders of the Company, it is recognised that restrictions of this kind may fail on certain grounds and accordingly it is hereby agreed and declared that if any such restrictions shall be adjudged to be void as going beyond what is reasonable to protect the interests of the Company and its shareholders but would be valid if part of the wording were deleted or the period of time were reduced or the range of activities or area dealt with thereby reduced in scope the said restriction shall apply with such modifications as may be necessary to make it valid and effective.

13. NO WAIVER OF RIGHTS

The failure to exercise or delay in exercising a right or remedy provided by this agreement or by law does not constitute a waiver of the right or remedy or a waiver of other rights or remedies. No single or partial exercise of a right or remedy provided by this agreement or by law prevents the further exercise of the right or remedy or the exercise of another right or remedy. The rights and remedies provided by this agreement are cumulative and not exclusive of any rights or remedies provided by law.

14. SURVIVAL OF PROVISIONS

The determination of this agreement however arising, shall not affect those terms which are expressed to operate or have effect after the termination of this agreement and shall be without prejudice to any right of action already accrued to either party in respect of any breach of this agreement by the other party.

15. SUPREMACY OF AGREEMENTS

In the event of any conflict between the terms of this agreement and the terms of the Investment Agreement, the terms of the Investment Agreement shall apply to the extent permitted by the laws of Kenya.

16. VARIATION

This agreement shall not be varied or cancelled, unless such variation or cancellation shall be expressly agreed in writing by each party and for so long as [] remains a shareholder, with the prior consent of [].

17. SEVERABILITY

If any of the provisions of this agreement is found by an arbitrator, court or other competent authority to be void or unenforceable, such provision shall be deemed to be deleted from this agreement and the remaining provisions of this agreement shall continue in full force and effect. Notwithstanding the foregoing, the parties shall thereupon negotiate in good faith in order to agree the terms of a mutually satisfactory provision to be substituted for the provision so found to be void or unenforceable.

18. ARBITRATION

In the event of any dispute or difference which shall arise either during the term of this Agreement or afterwards it shall be referred to a single arbitrator agreed upon by the parties or failing agreement, upon the application of either party by an arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators, Kenya Branch. Such arbitration shall be in accordance with the Arbitration Act 1995 or any statutory modification or re-enactment thereof for the time being in force.

19. COSTS

Each party shall be responsible for its own legal costs and expenses in connection with the negotiation, preparation and execution of this agreement.

20. NOTICES

Any notice or communication under or in connection with this agreement shall be in writing shall be delivered by hand or sent by post, telex or fax to the addresses given above or such other address as the recipient may have notified to the other parties in writing. In the absence of evidence of earlier receipt, any notice or communication shall be deemed to have been received, if delivered by hand, at the time of delivery or, if sent by post, four days after posting or, if sent by telex or fax, on the completion of transmission.

21. GOVERNING LAW

The construction, validity and performance of this agreement shall be governed in all respects by Kenyan law.

IN WITNESS this agreement has been duly executed.

Signed byduly)
authorised for and on behalf of [])
in the presence of:)
)
)
)

Signed and delivered by [])
the presence of:))
)
)