



## 208 Anatomy of a Product Distribution Agreement

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## Faculty Biographies

### Howard Feller

Howard Feller is a partner with McGuireWoods LLP in Richmond. He is the head of the firm's antitrust group and has extensive experience in dealing with antitrust issues relating to distribution arrangements, sales and pricing practices, joint ventures, and mergers and acquisitions. Mr. Feller's antitrust practice includes counseling clients on various matters, litigation, and representation before government enforcement agencies. Most recently, Mr. Feller was successful in obtaining summary judgment for Trigon Healthcare (now Anthem) in an antitrust conspiracy case brought by the American Chiropractic Association. This summary judgment award was affirmed by the Fourth Circuit.

Mr. Feller is a past chair of both the Sherman Act Section 1 committee and the health care committee of the ABA antitrust section. He also is a past chair of the antitrust section of the Virginia State Bar, and a past editor of the *Section 1 Newsletter* and the *Antitrust Health Care Chronicle* published by the ABA antitrust section. Currently, Mr. Feller is serving as the chair of the program committee of the ABA antitrust section.

Mr. Feller received a B.A. from the University of Virginia and a J.D. from Georgetown University Law Center.

### Bernard Gaffaney

Bernard A. Gaffaney is senior corporate counsel for Pioneer North America, Inc. in Long Beach, California. His principal responsibilities at Pioneer include managing litigation matters, drafting and reviewing legal agreements, and providing legal counsel to managers and executives.

Prior to joining Pioneer, Mr. Gaffaney worked as a litigation associate in the Orange County, California office of Morrison & Foerster.

He currently serves on the board of directors of ACC's Southern California Chapter, and he is a member of the government affairs council of the Consumer Electronics Association.

Mr. Gaffaney received a B.A. from UCLA and is a graduate of UC Hastings College of the Law.

### Matthew H. Schwartz

Matthew H. Schwartz is assistant general counsel for La Curacao, a growing retail concern in Los Angeles that offers telecommunications and ISP services, international money transfer services, export services, and travel agency services. The company also owns a rapidly expanding quick-service restaurant chain named Pollo Campero. As assistant general counsel, Mr. Schwartz drafts and negotiates all business transactions, creates company-wide SOPs, supervises compliance initiatives, manages outside litigation counsel, and maintains the company's intellectual property portfolio.

Prior to accepting this position with La Curacao, Mr. Schwartz was a partner in the law firm of Sussman & Schwartz in Los Angeles, where he served as trial counsel in business litigation, employment law, real estate, and entertainment law cases.

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**ANTITRUST ISSUES RAISED BY INTERNET  
SALES PRACTICES AND POLICIES**

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by

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**INTRODUCTION: INTERNET COMMERCE**

Retail sales over the Internet are exploding. According to the Department of Commerce, an estimated \$19.8 billion in goods were purchased through the medium of the Internet in the first quarter of 2005, an increase of 23.8 percent from the first quarter of 2004.

Products Old and New

High-tech goods and services as well as common retail products are being marketed and sold on the Internet. Books, music, computer equipment, airline tickets and nearly every other manner of fungible product are being sold on the Internet.

The advent of the electronic marketplace also has spurred the introduction of entirely new goods and services, such as Internet marketing services, web page design services, and Internet multimedia services.

New Mode of Distribution

The Internet has proven itself a more efficient medium of distribution than the mails both for electronic products, such as computer software, and for products which are readily convertible into electronic form, such as "electronic" airline tickets and written materials. Electronic distribution can drastically reduce a retailer's shipping and packaging costs, and provide customers with nearly instantaneous delivery. In the case of the sale of copyrighted products such as sheet music and computer software, this mode of distribution means that the product can be "metered" so that the licensee need only pay for the number of copies that it actually needs (downloads).

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**ANTITRUST LAW FUNDAMENTALS****I. OVERVIEW****A. Antitrust Policy**

The basic objective of the antitrust laws is to eliminate practices that interfere with free competition. Antitrust laws are designed to promote a vigorous and competitive economy in which each business has a full opportunity to compete on the basis of price, quality, and service.

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition." Northern Pacific Railway v. United States, 356 U.S. 1, 4-5 (1958).

**B. The Principal Antitrust Statutes**

1. The principal federal antitrust statutes are the Sherman Act, the Federal Trade Commission Act, the Clayton Act, and the Robinson-Patman Act. The Sherman Act has particularly widespread application.
2. The Sherman Act prohibits:
  - a. Contracts, combinations, and conspiracies in restraint of trade. Sherman Act § 1 (15 U.S.C. § 1).
  - b. Monopolization, attempts to monopolize, and conspiracies to monopolize. Sherman Act § 2 (15 U.S.C. § 2).
3. Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) contains two prohibitions:
  - a. "Unfair methods of competition," which have been held to encompass not only all Sherman and Clayton Act violations, but also restraints of trade contrary to the policy or spirit of those laws. FTC v. Brown Shoe Co., 384 U.S. 316 (1966).

- b. "Unfair or deceptive acts or practices," which prohibits false or misleading advertisements or representations as well as practices which are "unfair" to consumers. FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

4. The Clayton Act (including the Robinson-Patman Act amendments) declares certain specific actions or practices to be illegal:
  - a. Section 2 of the Clayton Act (popularly known as the Robinson-Patman Act) declares unlawful discrimination in prices between different purchasers in the sale of a commodity, where the discrimination may lessen competition. 15 U.S.C. § 13.
  - b. Section 3 of the Clayton Act prohibits exclusive dealing arrangements, tying arrangements and requirements contracts involving the sale of commodities, where the effect may be to substantially lessen competition. 15 U.S.C. § 14.
  - c. Section 7 of the Clayton Act prohibits mergers, joint ventures, consolidations, or acquisitions of stock or assets where the effect may be to substantially lessen competition or tend to create a monopoly. 15 U.S.C. § 18.

**C. Enforcement and Penalties**

1. The federal antitrust laws are enforced by the Antitrust Division of the Department of Justice, by the Federal Trade Commission, and by suits brought by private parties. States can be private parties for purposes of federal antitrust law. In addition, states have their own antitrust laws.
2. The Department of Justice has responsibility for enforcement of the Sherman Act (under which it can bring criminal or civil actions and recover damages suffered by the United States Government) and the Clayton Act (under which it can obtain civil injunctions and recover damages suffered by the United States Government).
  - a. Criminal violations of the Sherman Act are felonies punishable by imprisonment for up to ten years and/or fines of up to \$1 million for individuals and \$100 million for corporations per violation. Under an alternative provision,

- a defendant may be fined up to twice the gross gain or twice the gross loss if any person derives pecuniary gain from the offenses or if the offense results in pecuniary loss to a person other than the defendant. These penalties were increased to their current levels pursuant to the Antitrust Amendments Act of 1990. 18 U.S.C. § 3571.
- b. Department of Justice enforcement actions, either civil or criminal, are brought in federal district courts.
3. The Federal Trade Commission and the Antitrust Division jointly must be notified of certain proposed mergers, acquisitions, joint ventures and tender offers.
  4. The Federal Trade Commission is responsible for enforcement of the Federal Trade Commission Act and, with the Department of Justice, the Clayton Act, as well as numerous other specific statutes dealing primarily with such matters as product labeling, consumer credit, and consumer warranties.
    - a. Commission enforcement proceedings are brought in an administrative setting: a trial is held before an Administrative Law Judge with a right of appeal by either the Commission staff (the Complaint Counsel) or the party sued (the Respondent) to the full Commission. Commission decisions adverse to the Respondent can be appealed to a federal court of appeals. Commission decisions adverse to the Commission's staff cannot be appealed.
    - b. If the Commission determines a particular practice to be illegal, it enters a cease and desist order, which may not only require that the practice be stopped but may also require affirmative action by the violator. Violations of cease and desist orders are punishable by a civil penalty of \$10,000 per violation.
    - c. The Commission also has authority to promulgate rules defining acts or practices which either are unfair or deceptive or are unfair methods of competition. Depending on the manner in which the rule was promulgated, a knowing violation of the rule may subject a party to civil penalties. 15 U.S.C. § 45 (m)(1)(A).

## II. BASIC ANTITRUST CONCEPTS

### A. Market Power

1. Definition: Market power has been defined as the power to control prices or exclude competition. It also has been described as the ability of a market participant to increase prices above levels that would be charged in a competitive market. NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 109 n.38 (1984); Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 27 n. 46 (1984); United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956); Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc., 784 F.2d 1325, 1334 (7th Cir. 1986); Lie v. St. Joseph's Hospital, 964 F.2d 567 (6th Cir. 1992).
2. Proof of market power.
  - a. Identification of relevant product market.
  - b. Identification of relevant geographic market.
  - c. Determination of market share in relevant markets.
  - d. Conduct consistent with exercise of market power.

### B. Monopoly Power

1. Definition: "The power to control prices or exclude competition." United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956).
2. Proof of monopoly power.
  - a. Identification of relevant product and geographic markets.
  - b. Direct evidence of the power to control price or of actual exclusion of competitors.
  - c. Indirect proof of monopoly power through evidence of high market share.
    - (1) Exception possible for regulated industries.
    - (2) Low barriers to entry may counterbalance market share data.

C. "Horizontal" Agreements or Conduct

Concerted conduct is characterized as "horizontal" when it involves market participants occupying the same level in the chain of distribution. Thus, an agreement by two competing manufacturers to charge X dollars per unit for a commodity that they sell is a horizontal agreement. Similarly, an agreement by two competing suppliers to charge no greater than X dollars for a specific service they perform is a horizontal agreement.

D. "Vertical" Agreements or Conduct

An agreement between parties occupying different levels in the chain of distribution is characterized as "vertical." An example of a vertical agreement is an agreement between a manufacturer and a reseller where the reseller agrees not to sell the manufacturer's product at less than X dollars per unit. Also, an agreement between a manufacturer and a distributor that the distributor will only sell certain equipment within a specific metropolitan area is a vertical agreement.

E. "Rule of Reason"

The "rule of reason" is the fundamental rule of antitrust analysis. The Sherman Act, despite its facial prohibition of all restraints of trade, is interpreted to prohibit only those restraints which are unreasonable. Under the rule of reason, a court weighs the pro-competitive benefits of the defendant's challenged conduct against the anticompetitive consequences of that conduct, only prohibiting conduct that, on balance, is anticompetitive. See Standard Oil Co. v. United States, 221 U.S. 1, 58-60 (1911); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977); Flegel v. Christian Hospital Northeast-Northwest, 4 F.3d 682 (8th Cir. 1993); Coffey v. Healthtrust, Inc., 955 F.2d 1388 (10th Cir. 1992).

F. Per Se Violations

Per se violations of the antitrust laws are carved out from the general application of the rule of reason. Judicial experience has shown that certain types of conduct are so pernicious, and so lacking in pro-competitive justification, that they are conclusively presumed to be illegal. Such conduct is held to be a per se violation of the antitrust laws. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Northern Pacific Railway Co. v. U.S., 356 U.S. 1 (1958).

G. A Middle Standard

Under certain circumstances, where "horizontal restraints on competition are essential if the product is to be available at all", the restraint will be analyzed under the rule of reason rather than under the per se rule. See NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 101 (1984); see also Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

1. In FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986), a group of dentists conspired to withhold x-rays requested by dental insurers for evaluating benefit claims. The Supreme Court refused to invoke the per se rule by forcing the dentists' policy into the "boycott pigeonhole". The court noted that the use of the per se approach in boycott cases generally has been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor. The Court further justified the application of the rule of reason analysis because of judicial reluctance "to condemn rules adopted by professional associations as unreasonable per se." See National Society of Professional Engineers v. United States, 435 U.S. 679 (1978), and, in general, to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious, see Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

III. HORIZONTAL RESTRAINTS OF TRADE UNDER SECTION 1 OF THE SHERMAN ACTA. "Naked" Restraints

As a general rule, "naked" restraints of trade agreed to between competitors, particularly those which tamper, even indirectly, with pricing are per se illegal. If competitors can make a clear showing that their agreement is a "market creating" mechanism that provides a product or service that could not exist absent cooperation, they may persuade a court to examine their conduct under the rule of reason.

B. Proof

Proof of a contract, combination or conspiracy is a prerequisite to establishing a violation of Section 1 of the Sherman Act. See Oksanen v. Page Memorial Hospital, 945 F.2d 696, 702 (4th Cir. 1991). A combination or conspiracy is established by proof of a "conscious commitment to a

common scheme designed to achieve an unlawful objective." Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984). It is unnecessary to prove an overt, formal agreement among wrongdoers; a mere understanding can suffice. See Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 704 (1969).

1. Conspiracy may be established by direct or circumstantial evidence. However, where defendants have no rational economic motive to conspire, and their conduct is consistent with other equally plausible explanations, an inference of conspiracy may not arise. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 596-97 (1986); Todorov v. DCH Healthcare Authority, 921 F.2d 1348, 1356 (11th Cir. 1991).
2. The doctrine of "conscious parallelism" suggests that one or more companies may intentionally act in parallel fashion with the certain knowledge that their concurrent behavior will achieve an anticompetitive objective. Generally, this type of behavior alone is not enough to support a finding of conspiracy. Theatre Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537, 540-41 (1954). However, if other factors in addition to conscious parallel action can be established, such as conduct contrary to the independent self-interest of the alleged conspirators, or opportunities for meetings among the alleged conspirators, such factors may be sufficient to permit an inference of conspiracy. See Weit v. Continental Illinois National Bank & Trust, 641 F.2d 457, 463 (7th Cir. 1981), cert. denied, 455 U.S. 988 (1982); United States v. Container Corp. of America, 393 U.S. 333, 335 (1969). In Cooper v. Forsyth County Hospital Authority, Inc., 789 F.2d 278 (4th Cir.), cert. denied, 479 U.S. 972 (1986), the Fourth Circuit Court of Appeals held that mere contacts and communications among the defendants were insufficient evidence from which a conspiracy could be inferred.

C. Per Se Violations

1. These violations are the most common targets for criminal prosecutions, and must be avoided at all costs.
2. Price fixing in its many forms, including express agreements on prices and bid rigging, is the most egregious of all antitrust violations. The Supreme Court has stated:

Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing

the price of a commodity in interstate or foreign commerce is illegal per se.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

- a. Joint efforts to increase market prices are condemned. United States v. Socony-Vacuum; FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990).
  - b. Agreements to establish minimum or maximum prices are also condemned. Arizona v. Maricopa County Medical Society, 457 U.S. 332, 348 (1982).
  - c. Efforts to stabilize prices. United States v. Container Corp. of America, 393 U.S. 333 (1969).
  - d. Agreements to establish uniform discounts or terms of sale. Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980).
  - e. The price-fixing prohibition is not limited to tampering with price alone. Thus, efforts to limit output or product quality which are utilized as means to indirectly affect price have been attacked successfully, as have limitations on hours of retailer operation or other activities indirectly affecting price. See National Macaroni Manufacturers Association v. FTC, 345 F.2d 421 (7th Cir. 1965); Detroit Auto Dealers Association, Inc. v. FTC, 1992-1 Trade Cases (CCH) 69,696 (6th Cir. 1992).
3. Agreements among competitors to divide markets or customers are illegal per se. Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990).
  4. Concerted refusals to deal by competitors.
    - a. Agreements among competitors to deny the provision of goods or services to a common buyer are illegal per se. FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990).
    - b. An agreement among competitors to exclude another competitor from the market or to combine with entities at another level of distribution to exclude a competitor from the market, is illegal per se. Klor's Inc. v. Broadway-Hale

Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).

- c. Other refusals to deal for which some justification might be asserted are increasingly analyzed under the rule of reason (see discussion below).
- D. Conduct Which Possibly Could be Viewed as Per Se but More Commonly Is Evaluated Under the Rule of Reason
1. Trade association activity, including membership restrictions and restrictions on advertising. California Dental Ass'n v. FTC, 526 U.S. 756 (1999).
  2. Exchanges of data, particularly price information, among market competitors. See FTC Staff Advisory Opinion from Robert F. Leibenluft, Assistant Director, Health Care Division, Bureau of Competition, Federal Trade Commission, to Kirk B. Johnson, Esq., American Medical Association (March 26, 1996).
  3. Group selling and purchasing activities.
  4. Joint ventures among competitors, including joint research and development.
  5. Standard setting and certification programs. Poindexter v. American Board of Surgery, Inc., 911 F. Supp. 1510 (N.D. Ga. 1996)
- E. Limitations on Application of the Per Se Doctrine to Horizontal Conduct
1. Certain activities which traditionally fell within the classic per se rule have received favorable treatment from the courts in recent years. In its analysis of a blanket license agreement among composers, the Supreme Court refused to apply a per se rule, despite the fact that the agreement literally constituted price fixing, because the agreement was essential to the creation of a market and the production of a product which would not otherwise exist. Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979); see also NCAA V. Board of Regents, 458 U.S. 85 (1985).
  2. In Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 296 (1985) the Supreme Court determined that the per se rule should not be applied to the

expulsion of a competitor from a purchasing cooperative because the group did not possess "market power or exclusive access to an element essential to effective competition."

F. Intra-Enterprise Conspiracy Doctrine

1. Intra-enterprise conspiracy refers to the legal ability of constituent parts of a single enterprise to conspire for purposes of Section 1. In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), the Supreme Court held that a parent corporation and its wholly-owned subsidiary are incapable of conspiring as a matter of law. The Court specifically avoided the question of whether a parent and a less than wholly-owned subsidiary could conspire. Nevertheless, the Court's rationale in support of its decision sheds some light on how such a question might be resolved. Where there is "complete unity of interest" or where "there is no sudden joining of economic resources that had previously served different interests," there is unlikely to be a combination of independent competitors. Radford Community Hospital, 1990-2 Trade Cas. (CCH) 69,152 (4th Cir. 1990)(two wholly-owned subsidiaries of the same parent are incapable of conspiring for purposes of Section 1 and 2 of the Sherman Act and Section 3 of the Clayton Act). Compare, Weiss v. York Hospital, 745 F.2d 786, 817 (3d Cir. 1984); Oksanen v. Page Memorial Hospital, 945 F.2d 696, 704 (4th Cir. 1991); Nurse Midwifery Associates v. Hibbett, 918 F.2d 605, 614 (6th Cir. 1990); Pudlo v. Adamski, 2 F.3d 1153 (7th Cir. 1993), with Oltz v. St. Peter's Community Hospital, 861 F.2d 1440, 1450 (9th Cir. 1988); Bolt v. Halifax Hospital Medical Center, 851 F.2d 1273, 1280 (11th Cir. 1988). While corporate divisions and employees are incapable of conspiring with the corporation, joint venturers usually are capable of conspiring both among themselves and with the venture. Key Enterprises v. Venice Hospital, 919 F.2d 1550 (11th Cir. 1990).
2. In American Chiropractic v. Trigon Healthcare, 367 F.3d 212 (4th Cir. 2004), the plaintiff claimed that the defendant health care insurer and the doctors on its Managed Care Advisory Panel conspired to formulate referral guidelines which were harmful to chiropractors. Plaintiff also claimed that the intracorporate immunity doctrine did not apply because the insurer and the doctors did not have a unity of interest. The court noted that usually doctors and insurance companies do not have a unity of interest, but in this case the insurer and the doctors on the Advisory Panel shared an interest in addressing clinical issues about treatment and referrals. The appeals court also determined that the



Advisory Panel had no separate authority and was not legally distinct from defendant. Therefore, the appeals court held that the insurer and the doctors lacked the capacity to conspire and thus did not violate the Sherman Act.

#### IV. VERTICAL RESTRAINTS OF TRADE UNDER SECTION 1 OF THE SHERMAN ACT

##### A. General Rule

Vertical restraints are generally analyzed under the rule of reason, meaning that defendants will have the opportunity to present evidence justifying their allegedly anticompetitive conduct. The courts are reluctant to impede a producer's ability to distribute goods or services in the absence of an abuse of market power by the producer. The only remaining area of per se liability is for vertical price fixing, although control of retail prices may be achieved legitimately if certain rules are followed.

##### B. Control Over Territories and Customers

In Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the Supreme Court held that nonprice, vertical restrictions, such as territorial franchises, are analyzed under the rule of reason.

##### C. Tying Arrangements

1. A tying arrangement is a requirement by a seller that the sale of a product or service which possesses market power (the tying product) will only be made on condition that the purchaser buy a second product or service (the tied product) from the producer. "The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984).
2. In Jefferson Parish, the Court reiterated that a plaintiff, to prevail, must establish two distinguishable product markets which are linked by the tying arrangement, and further establish that the seller has market power over the tying product. Proof of "market power" or "leverage" is

necessary to establish a per se tying violation. There also must be proof of an adverse effect on competition in the market for the tied product.

3. The Supreme Court applied tying analysis to Kodak's restrictions on the sale of replacement parts for its micrographic equipment. In Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992), the Court held that Kodak was not entitled to summary judgment in defense of a charge that it had improperly tied the purchase of replacement parts to the provision of repair service. In discussing the issue of market power, the court determined that the relevant market could be limited to replacement parts for Kodak equipment. The dissent strongly criticized the court's holding, arguing that it makes no economic sense to limit the market power analysis to a determination of market share in a single brand aftermarket.

##### D. Exclusive Dealing Arrangements

Exclusive dealing arrangements are arrangements under which a party agrees to purchase only from a particular manufacturer or distributor. A common variant of an exclusive dealing arrangement is a "requirements contract" under which a party agrees to obtain all of its needs for a particular commodity from a single source. These arrangements are tested under a rule of reason which focuses on the percentage of the market which is foreclosed and the competitive effect of the foreclosure in the relevant market. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327-29 (1960); United States v. Dentsply Int'l, 399 F.3d 181 (3d Cir. 2005) (The Third Circuit held that Dentsply's exclusivity arrangements with 23 distributors and Dentsply's ability to exercise market power qualified as an illegal monopoly-maintenance scheme in violation of Section 2 of the Sherman Act.); Oltz v. St. Peter's Community Hospital, 861 F.2d 1440 (9th Cir. 1988).

#### V. MONOPOLIZATION, ATTEMPTS TO MONOPOLIZE, CONSPIRACY TO MONOPOLIZE

##### A. Definition

Definition of the offense of monopolization: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product,

business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Konik v. Champlain Valley Physicians Hospital, 733 F.2d 1007, 1018 (2d Cir. 1984).

B. Monopoly Power--see definition in Section II(B) above

1. Mere possession of monopoly power itself does not violate Section 2 of the Sherman Act. Section 2 requires proof of illegal conduct.
2. As a general rule, 70-90 percent of the market is enough to constitute monopoly power; it is questionable whether 60 or 65 percent is enough; and certainly 33 percent is not enough. United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945).
3. The Supreme Court held in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), that an incumbent local exchange carrier's ("ILEC") breach of duty under the Telecommunications Act of 1996 to share its network with competitors cannot form the basis of a claim under § 2 of the Sherman Act for refusal to deal. The plaintiffs alleged that the ILEC had denied, degraded or delayed providing elements of its network to its competitors in violation of the Telecommunications Act of 1996 and was therefore unlawfully seeking to maintain its monopoly in local exchange services. Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2. However, the court has been cautious in recognizing such exceptions, because of the questionable advantage of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.
4. Categories of anticompetitive conduct viewed by the courts as willful acquisition, maintenance or abuse of monopoly power.
  - a. Predatory pricing - generally defined as pricing below some appropriate measure of cost.
  - b. Refusal to deal - requires proof of "exclusionary" conduct or conduct lacking a legitimate business purpose.

- c. Leveraging - refers to the use of monopoly or market power in one market to obtain market power, or at least a competitive advantage, in another market. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979). The leveraging theory has been discredited by Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 (2004).
- d. New product innovation/introduction.
- e. Essential facilities - application of the essential facilities doctrine requires proof of the following factors: (1) control of the essential facility by a monopolist; (2) the inability of a competitor to practicably or reasonably duplicate the essential facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of the monopolist to provide access to the facility. MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1132-33 (7th Cir.), cert. denied, 464 U.S. 891 (1983); McKenzie v. Mercy Hospital, 854 F.2d 365, 369 (10th Cir. 1988). This doctrine is meant to address the problem that a monopolist, by means of denying access to the essential facility, can exclude competitors from the "downstream" market.

C. Elements of Attempt to Monopolize

1. Specific intent to destroy competition or build a monopoly. Advanced Health-Care Serv., Inc. v. Radford Community Hospital, 910 F.2d 139, 147 (4th Cir. 1990).
2. Dangerous probability that the attempt would succeed in achieving monopoly in the relevant market. See generally White Bag Co. v. International Paper Co., 579 F.2d 1384, 1387 (4th Cir. 1974). There is no specific market share that automatically establishes dangerous probability of success, but it generally requires more than 30 percent.

D. Elements of Conspiracy to Monopolize

1. Existence of a combination or conspiracy.
2. Overt acts done in furtherance of the conspiracy.

3. Specific intent to monopolize. See generally United States v. Yellow Cab Co., 332 U.S. 218 (1947); Cullum Elec. & Mechanical v. Mechanical Contractors Ass'n, 436 F. Supp. 418, 425 (D.S.C. 1976), aff'd, 569 F.2d 821 (4th Cir.), cert. denied, 439 U.S. 910 (1978).

## INTERNET IMPLICATIONS

### I. PRODUCT SALES AND ADVERTISING

In addition to their normal sales practices, manufacturers, distributors, dealers and retailers are now able to sell goods over the Internet. This has created a new set of problems and issues for manufacturers and distributors that wish to control the sale and distribution of their products. Manufacturers and distributors are evaluating the extent to which they may eliminate, limit or structure online sales of their products. Almost certainly the answers to such questions will not be cut from whole cloth, but will be fashioned by logical extension of settled antitrust and trade regulation principles. Potential issues include the following:

#### A. **May a manufacturer prohibit its retailers from selling its products over the Internet?**

##### 1. Problems raised by some Internet sales by retailers

Some manufacturers may wish to ban all sales by retailers over the Internet out of a concern that the quality of pre- or post-sale customer service may be diminished. For example, for a time Tupperware Corporation prohibited Internet sales because of the customer service importance of their "Tupperware parties." Melanie Warner, *Can Tupperware Keep a Lid on the Web?*, FORTUNE Magazine, Jan. 12, 1998, at 144.

In other cases, Internet commerce can disrupt a manufacturer's system of exclusive sales territories for retailers. Distant competitors, free from the costs of promoting the product in the local community and the expense of personalized sales and repair service, can dramatically undercut a local retailer. Since this free-rider problem discourages local retailers from investing in product promotion and service, the local promotion of products and service quality may suffer. Consequently, a manufacturer may find that "new" sales on the Internet coincide with an overall drop in sales volume. This may prompt the manufacturer to forbid retailers from selling on the Internet to eliminate this free rider problem among its retailers.

##### 2. The legality of banning retailer sales on Internet

The manufacturer must be careful that the prohibition of Internet sales by retailers is not an illegal restraint on competition under the antitrust laws. In Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), aff'd, 694 F.2d 1132 (9th Cir. 1982), amended, 1982 U.S. App. LEXIS 22964 (9th Cir.), the Supreme Court mandated the rule of reason analysis for vertical nonprice restraints, and specifically cited the free-rider problem as a legitimate reason for the use of vertical restraints to create a system of exclusive sales territories, id. at 54-55. Exclusive sales territories have been systematically upheld after Continental. The fact that exclusive sales territories decrease intrabrand competition is not a problem where the vertical restraint promotes and enhances interbrand competition. R.J. Reynolds Comp. v. Philip Morris Inc., 199 F. Supp. 2d 362 (M.D.N.C. 2002), aff'd 2003 U.S. App. LEXIS 12755 (4th Cir.) (upholding system of regional retailers since there was no "market power" in the relevant geographic and interbrand product market); Murphy v. Business Cards Tomorrow, Inc., 854 F.2d 1202 (9th Cir. 1988) (the state of intrabrand competition is irrelevant where there is robust interbrand competition) (overruled on separate and unrelated grounds in Townsend v. Holman Consult. Corp., 914 F.2d 1136 (9th Cir. 1990)); Electronics Communications Corp. v. Toshiba America Consumer Products, 129 F.3d 240 (2d Cir. 1997) ("exclusive distributorship arrangements are presumptively legal"); see also E & L Consulting, Ltd. v. Doman Indus., Ltd., 360 F. Supp. 2d 465 (E.D.N.Y. 2005). Consequently, courts are likely to uphold restraints aimed at allowing a system of exclusive sales territories to function in the Internet world.

In addition, manufacturers have been permitted to prohibit telephone and mail-order sales. Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, 878 F.2d 801 (4th Cir. 1989) (upheld unilateral termination of furniture dealer which violated ban on mail-order and telephone sales, where company's marketing plan mandated furniture galleries displaying furniture in a room-like setting); National Marine Electronic Distributors, Inc. v. Raytheon Company, 778 F.2d 190 (4th Cir. 1985) (ban upheld under the rule of reason); see also Bailey's Inc. v. Windsor America Inc., 948 F.2d 1018 (6th Cir. 1991). O.S.C. Corporation v. Apple Computer, Inc., 792 F.2d 1464 (9th Cir. 1986) (ban justified because "Apple's marketing strategy require[d] sales support such as assessing the needs of prospective purchasers, assembling the particular package to meet those needs, hands-on instruction, education and training, and follow-up servicing"); Computer Place, Inc. v. Hewlett-Packard Co., 607 F. Supp. 822, 830-31 (C.D. Cal. 1984), aff'd 779 F.2d 56 (9th Cir. Cal. 1985) (manufacturer's ban on mail order sale of computers was held

justified by the manufacturer's concern over free riding by mail order dealers).

Furthermore, absent an intent to monopolize, manufacturers can arguably refuse to supply a product to any dealer that makes Internet sales. Credit Chequers Information Services, Inc. v. CBA, Inc., 1999 U.S. Dist. Lexis 6084 (S.D.N.Y. 1999), aff'd 205 F.3d 1322 (2d Cir. 2000) (data supplier refused to continue dealing with reseller that began distributing data on the Internet, "a supplier's restriction of its sales to those resellers who meet its specifications is not a per se restraint of trade"); David A. Balto, *Emerging Antitrust Issues in Electronic Commerce*, Speech at the 1999 Meeting of the Antitrust Institute in Columbus, Ohio (Nov. 12, 1999), *available at* <http://www.ftc.gov/speeches/other/ecommerce.htm>, at 12 ("a manufacturer can refuse to supply product to any dealer that makes Internet sales in the absence of an intent to monopolize.")

### 3. Caveats

- a. If a manufacturer prohibits sales of its products on the Internet by retailers, it must make that decision unilaterally and independently. In other words, the decision cannot be the result of an agreement with another person, such as a retailer. Otherwise, the manufacturer's decision could be the result of an illegal conspiracy under § 1 of the Sherman Act.
- b. Restrictions on the sales activities of retailers could result in breach of contract claims, particularly where the manufacturer has a written dealer or retailer agreement. Breach of contract issues have to be examined whenever such a sales restriction is imposed.

### 4. Alternative solutions in exclusive sales territory cases

There are other ways in which a manufacturer may protect its system of exclusive sales territories from the problem of Internet free-riders.

#### a. Directing Internet traffic to a single web page

One way to confine retailers to their exclusive sales territories and still allow them to make sales on the Internet is to direct all Internet traffic to the manufacturer's web page, which then provides the customer with a hyperlink to the web page of the nearest retailer. The nearest retailer can be determined by requesting the customer's zip code or similar information. Under this system, retailers must agree to sell products over the Internet

only to customers who reside in their assigned sales territory. Penalties or sanctions, including possible termination, also may be imposed for any Internet sales by retailers to customers located outside of their assigned sales territory.

There are both logistical and legal issues that must be resolved for such a system to succeed. Logistically, the fact that Internet search engines will pick up even occasional references to the manufacturer's name may make it challenging to direct customer inquiries to the manufacturer's web page. The manufacturer will need to exert significant control over the web pages of its retailers and distributors to ensure that the customers are led to the correct Internet site. However, even if a limited number of customers accidentally arrive at the web page of the wrong retailer, the free rider problem is largely solved by the retailers' agreement not to sell the manufacturer's products on the Internet to customers who are outside their sales territory.

#### b. Pass-over fees

Instituting a system of pass-over fees is another way manufacturers may solve the problem of Internet retailers whose discount sales undermine a system of exclusive sales territories. Under a pass-over fee agreement, a distant seller must make payments to the local retailer to compensate it for its past promotional costs and future repair and service costs. See Superior Bedding Company v. Serta Associates, Inc., 353 F. Supp. 1143 (N.D.Ill. 1972)(fee of 7% of the sales price upheld under a rule of reason analysis).

### B. **May a manufacturer reserve all Internet sales to itself?**

In addition to the legal issues discussed above arising from prohibitions against Internet sales by retailers, reserving all Internet sales to the manufacturer itself would put the manufacturer in direct competition with its retailers and distributors. One reason manufacturers have been slow to sell their products on the Internet, particularly at a lower price, is the fear of retaliation from the retailers manufacturers depend on for sales of their products. In a survey of 50 consumer goods manufacturers by Forrester Research, 66 percent indicated that conflict with retail channels was the biggest issue they faced in formulating online sales strategies. Robert Atkinson, *Possible Anticompetitive Efforts to Restrict Competition on the Internet*, PROGRESSIVE POLICY INSTITUTE (2002).

In the majority of circuits such "dual distribution" structures, where the manufacturer is in direct competition with its retailers and distributors, are not

considered horizontal restraints which are per se illegal, but rather vertical restraints subject to the rule of reason. In Hampton Audio Electronics, Inc. v. Contel Cellular, Inc., 966 F.2d 1442 (4th Cir. 1992), appeal after remand 23 F.3d 401 (4th Cir. 1994), aff'd 1994 U.S. App. LEXIS 11848 (4th Cir.), the Fourth Circuit decided that, though dual distribution has both horizontal and vertical “elements,” such arrangements are subject to a rule of reason analysis if the restrictions redound primarily to the benefit of the manufacturer as a result of increased interbrand competition.

Therefore, if a manufacturer can show that limiting all Internet sales to itself gives it a competitive advantage in the interbrand market, the reduced competition in the intrabrand market is unlikely to offend the rule of reason. See also David Bender, George L. Paul, Camellia Noriega, *Antitrust Online - Bottlenecks, Exchanges and Other Issues*, 743 PLI/Pat 409, 455-6 (2003) (reasoning that, based on existing precedent “manufacturers arguably may prohibit Internet sales by their dealers and reserve Internet customers for themselves”). In fact, a recent survey was unable to identify a single case in which a manufacturer’s policy of retaining all internet sales to itself was successfully challenged. Richard J. Wegener, *Non-Price Vertical Restraints.com/Historical Perspectives and New Millennium Issues*, ALI-ABA COURSE OF STUDY MATERIALS, Vol. I, p. 22 (2001).

C. **May a manufacturer allow only selected retailers to sell on the Internet, or provide hyperlinks only to favored retailers?**

A manufacturer may designate certain of its retailers as primary or favored dealers and grant them preferential treatment. Ezzo’s Invs., Inc. v. Royal Beauty Supply, Inc., 243 F.3d 980 (6th Cir. 2001), cert. denied, 534 U.S. 993 (2001) (applying rule of reason and allowing manufacturer to restrict sales of its hair care products to salons that derive more than 50% of their revenue from hair-care services rather than product sales); Terry’s Floor Fashions, Inc. v. Burlington Industries, Inc., 763 F.2d 604 (4th Cir. 1985)(allowing manufacturer to give lower prices to certain very effective commercial carpet dealers in order to encourage those dealers to bid and otherwise promote the manufacturer’s carpets rather than the carpets of competitors); see also Crossroads Cogeneration Corp. v. Orange & Rockland Util., Inc., 159 F.3d 129 (3d Cir. 1998). AAA Liquors, Inc. v. Seagram and Sons, Inc., 705 F.2d 1203 (10th Cir. 1982), cert. denied, 461 U.S. 919 (1983)(liquor company could give discounts to high-volume retailers to encourage those retailers to sell its products at competitive prices); see also Lewis Service Center Inc. v. Mack Trucks, Inc., 714 F.2d 842 (8th Cir. 1983)(sales assistance program, under which appellant reduced its wholesale price to dealers who could not meet interbrand competition from other truck dealers, giving dealers a guaranteed profit, held not to violate the Sherman Act).

Similarly, allowing only certain retailers to sell on the Internet is probably allowable, provided that the manufacturer can point to a reasonable business purpose to justify the vertical restraint and the decision is not the result of an agreement with another retailer.

D. **May a manufacturer control the character, structure or appearance of its retailers’ web pages?**

Manufacturers may exert significant control over the selling methods of their retailers and distributors. Murrow Furniture Galleries, Inc. v. Thomasville Furniture Industries, Inc., 889 F.2d 524 (4th Cir. 1989)(upholding requirement that retailers present furniture in room-like settings); see also Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, 878 F.2d 801 (4th Cir. 1989)(same); Wilson v. I.B.E. Industries, Inc., 510 F.2d 986 (5th Cir. 1975)(upholding requirement that service stations not be “cluttered”); O.S.C. v. Apple Computer Corp., 792 F.2d 1464 (9th Cir. 1986)(upholding requirement that retailers provide extensive pre and post-purchase customer service).

Consequently, manufacturer controls on the character of retailer and distributor advertising on the Internet, if implemented to support the manufacturer’s public image or otherwise make its brand more competitive in the interbrand market, are likely to be upheld under the rule of reason. Francis H. Casola, *Old Antitrust Doctrine Meets new Economy*, ANTITRUST, FRANCHISE AND TRADE REGULATION, 24 at 26, October, 2000.

II. **PRODUCT PRICING**

A manufacturer’s restrictions on the prices charged by its retailers or distributors on the Internet will raise significant issues and concerns under the antitrust laws. Among these issues are the following:

A. **May a manufacturer set the minimum sales price for its products sold by retailers over the Internet?**

1. **Resale Price Maintenance Programs**

While a manufacturer may announce a minimum suggested resale price and unilaterally refuse to deal with a retailer that sells below the suggested minimum retail price, United States v. Colgate & Co., 250 U.S. 300 (1919), it is a per se violation of § 1 of the Sherman Act to secure its customers’ adherence to suggested minimum prices by means that go beyond announcing a price policy and refusing to deal with discounters. United States v. Parke, Davis & Co., 362 U.S. 29, 43 (1960)(drug manufacturer had wholesalers cease selling all products to drug stores after the drug

stores discounted manufacturer's vitamins below its suggested prices).

A per se violation of § 1 of the Sherman Act requires concerted action -- i.e., an agreement or understanding between two or more parties -- in restraint of trade, and this agreement must be on price or price levels. Business Electronics Corporation v. Sharp Electronics Corporation, 485 U.S. 717, 726-7 (1988), *cert. denied*, 486 U.S. 1005 (1988)(An agreement with a dealer to terminate a price cutter was not a per se violation without a further agreement on subsequent prices or price levels, and a rule of reason analysis was warranted by the existence of legitimate pro-competitive business reasons for terminating price-cutters. The termination was found reasonable "since price cutting and some measure of service cutting usually go hand in hand," and since it may actually increase interbrand competition when a manufacturer reduces intrabrand competition to allow each retailer enough revenue to be able to provide desirable services.)

Thus, a manufacturer can establish a minimum resale price maintenance policy and terminate discounters who violate the policy, provided that the manufacturer does not attempt to obtain the retailer's consent or acquiescence to the policy through pressure, coercion, threats or withholding shipments. Suburban Propane v. Proctor Gas Inc., 953 F.2d 780 (2d Cir. 1992); Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); Russell Stover Candies, Inc. v. FTC, 718 F.2d 256 (8th Cir. 1983).

## 2. Application to Internet Sales

A manufacturer will generally be able to communicate suggested minimum resale prices to its retailers and terminate those who sell at lower prices over the Internet, so long as it does not coerce or enforce the suggested prices in any other way, or seek or obtain the acquiescence or agreement of any retailer to the suggested prices.

## B. **May a manufacturer determine the maximum sales price for Internet sales?**

Vertical restraints establishing a maximum sales price do not constitute a per se violation of § 1 of the Sherman Act, but are subject to a rule of reason analysis. State Oil Co. v. Khan, 522 U.S. 3 (1997)(maximum prices are beneficial to consumers unless set at predatory levels); *see also Francis Mathias v. Daily News*, 152 F. Supp. 2d 465 (S.D.N.Y. 2001)(stating Kahn should not be mistaken

for the proposition that maximum resale price maintenance schemes are presumptively lawful. The Court merely established that these agreements should be analyzed under the rule of reason, an inquiry which hinges on "a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect").

## C. **May a manufacturer set the minimum advertised price for retailer advertisements on the Internet?**

### 1. Minimum Advertised Price (MAP) Programs

Minimum advertised price programs typically consist of the payment of cooperative advertising funds by a manufacturer to support product advertising by retailers. The manufacturer usually provides the retailers with a minimum advertised price schedule and the payment of the cooperative advertising funds often is conditioned upon the retailer advertising the manufacturer's products at or above the minimum advertised price guidelines.

Manufacturers have been allowed to enforce minimum advertised price programs so long as the retailer is free to charge whatever sales price it wishes. Holabird Sports Discounters v. Tennis Tutor, Inc., 993 F.2d 228 (4th Cir. 1993), *cert. denied*, 510 U.S. 868 (1993)(upholding termination of retailer that ignored a minimum advertised price policy which included call-for-price ads); In re Nissan Antitrust Litigation, 577 F.2d 910 (5th Cir. 1978) (upholding cooperative advertisement agreement under which retailers were required to contribute to a fund and were partially reimbursed only for ads which, among other conditions, listed either the manufacturer's recommended price or no price at all). As long as minimum advertised price programs do not result in an agreement on the actual resale price, the programs are evaluated under the rule of reason standard which focuses on their purpose and effect on competition.

## III. BUSINESS TO BUSINESS ("B2B") INTERNET EXCHANGES

Business to business exchanges (or "B2Bs") are industry-specific Internet marketplaces that enable buyers and sellers to exchange goods and services directly, often in an auction or exchange format. Although B2Bs can allow companies to dramatically cut procurement costs, these collaborations among competitors can raise significant antitrust risks and need to be carefully structured to avoid these problems.

#### A. Collusion Concerns

One significant antitrust concern that has been expressed with respect to B2Bs is that these exchanges will allow the sharing of competitively sensitive information that could facilitate coordination among competitors on price or other terms.

Agreements to share information are typically assessed under the rule of reason. Factors that are considered in determining whether a particular agreement to share information is likely to be considered anticompetitive are: (1) market concentration; (2) whether information is shared among competitors; (3) the type of information shared; (4) the age of the information shared; and (5) whether the shared information is accessible through avenues other than the B2B exchange. *Entering the 21<sup>st</sup> Century: Competition Policy in the World of B2B Electronic Marketplaces*, Report Issued by the Federal Trade Commission Staff, at 8-10 (2000).

For this reason, any internet-based exchange involving competitors should ensure that competitively sensitive information is not shared inappropriately among the competitors. Firewalls and other safeguards must be in place to ensure that pricing, cost, sales and marketing information, or any other competitively sensitive information, is not exchanged in a manner that could facilitate coordination of pricing among competitors or other forms of collusion.

#### B. Monopsony Power Concerns

The inverse of monopoly power, monopsony power is market power exercised on the buying side of the market. This power allows a buyer or buyer group reduce the purchase price by scaling back its purchases. A concern is that B2Bs could be used as joint purchasing agreements to allow a buying group with a large market share to coordinate to reduce their volume of purchases and drive down the price below competitive levels.

The FTC and DOJ have suggested as a general rule that legitimate collaborations among competitors with respect to joint purchasing agreements maybe in a safe harbor when (1) the participants account for less than 35% of the total purchases in the market, and (2) the cost of the purchased products is less than 20% of the total revenues from all products or services sold by each participant in the joint purchasing arrangement. Even if these thresholds are exceeded, the B2B exchange may still be permissible and the antitrust enforcement agencies will then

evaluate its impact on the market. See 2003 Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care.

It is important to note that not all B2Bs facilitate joint purchasing. Certain B2Bs merely enable participants to purchase goods individually and thus would be "no more controversial than firms using the same telephone network" to make such purchases. Id. at 13 (internal citations omitted).

#### C. Exclusivity Concerns

One set of antitrust issues arises when the participants in a B2B deny their competitors access to that Internet exchange. This could be seen as an attempt to disadvantage rivals of the B2B's current participants by raising their costs and thereby impairing their ability to effectively compete. However, if the B2B is set up to facilitate joint purchasing, open-access to the venture must be balanced against the concern that the venture not constitute too large a percentage of a given market which could lead to concerns regarding monopsony power. For these reasons, the founders of the B2B need to develop objective, nondiscriminatory standards for participation that balance these concerns.

Another form of exclusivity that raises antitrust concerns is a requirement that buyers or sellers only participate in a specific Internet exchange. Such an exclusivity requirement needs to be examined carefully because it could be viewed as unduly limiting competition and preventing other exchanges from forming.

#### IV. BUNDLING AND TYING:

##### A. The Microsoft Case

##### 1. Background

In October, 1997, the Antitrust Division of the U.S. Department of Justice (DOJ) asked the U.S. District Court for the District of Columbia to hold Microsoft in contempt for violating a 1995 consent decree in which Microsoft had agreed not to condition the licensing of its Windows operating system on the purchase or licensing of any other product. The DOJ claimed that Microsoft had conditioned the licensing of Windows on the licensing of Internet Explorer in violation of the consent decree. The District Court, while declining to hold Microsoft in contempt, did enjoin it from bundling the two products. The Court of Appeals for the D.C. Circuit reversed, accepting Microsoft's contention that Windows and the Internet Explorer were in fact one integrated

product because there were “plausible benefits to its integrated design.” United States v. Microsoft Corp., 147 F.3d 935, 950 (D.C. Cir. 1998). Therefore, the court said, Microsoft had not violated the consent decree.

On May 18, 1998, the DOJ brought a second lawsuit, which later was consolidated with a lawsuit filed on behalf of numerous states, alleging that the bundling of these two software products violated the antitrust laws. Though the crux of the new lawsuit was the bundling allegation, the complaint also alleged many other violations of the antitrust laws: e.g., that Microsoft attempted to persuade a competitor, Netscape, to divide the browser market between them, and that Microsoft gave away Internet Explorer in a predatory effort to drive Netscape out of business.

## 2. The Illegal Tying Claim: Law and Allegations

Under Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 12-16 (1984), a tying arrangement is *per se* illegal only if, with respect to two distinct products, a seller with market power in the tying product market uses that power to restrain a “substantial” amount of commerce in the tied product market.

Microsoft again argued that Windows and Internet Explorer are not two distinct products, but instead one product whose integration is technologically beneficial. The D.C. Circuit seemed to support this theory when in dicta it said that its consent decree holding was consistent with tying law, since “new products integrating functionalities in a useful way should be considered single products regardless of market structure.” Microsoft Corp., 147 F.3d at 950. Additionally, Microsoft disputed that it has market power because Netscape’s browser market share exceeds its own.

The DOJ’s chief argument was that the bundling is *per se* illegal under Jefferson Parish. It emphasized that the Supreme Court stated “the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather of the character of the demand for the two items.” Jefferson Parish, 466 U.S. at 20. The DOJ argued that, since some Windows users prefer Explorer and others prefer Netscape’s browser, the demand for Explorer is distinct from that of Windows, making the products distinct.

To meet the remainder of the Jefferson Parish elements, the Department of Justice argued that Microsoft used its market power in the operating systems market to restrain trade in the browser market, “forcing” consumers to purchase the tied product. To establish that a “substantial” number of consumers have been forced to purchase Explorer, the DOJ contended that buying another browser would require paying for two

browsers, since the cost of the bundled explorer necessarily is included in that of the whole Windows package. Therefore, the DOJ concluded, Microsoft used its market power in the operating systems market to restrain trade in a distinct product market.

Following a 78-day trial, the U.S. District Court for the District of Columbia found that Microsoft possessed monopoly power in the market for Intel-compatible PC operating systems, and that Microsoft had used this power to injure competition in the operating systems market and in the market for web browsers. The District Court entered Conclusions of Law holding that Microsoft’s anticompetitive conduct to protect its Windows monopoly violated Section 2 of the Sherman Act, and that Microsoft had also violated Section 2 by attempting to monopolize the market for web browsers. Furthermore, the Court held that Microsoft had violated Section 1 of the Sherman Act by tying Internet Explorer to Windows. United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000).

The District Court subsequently entered an order requiring Microsoft to reorganize itself into two separate firms, one that would receive the operating systems business and an applications company that would receive the rest of Microsoft’s businesses. United States v. Microsoft Corp., 97 F. Supp. 2d 59, 64-65 (D.D.C. 2000).

On appeal, the Court of Appeals for the D.C. Circuit largely affirmed the district court’s findings that Microsoft’s anticompetitive conduct to sustain its Windows monopoly had violated Section 2. However, the Court of Appeals reversed the District Court’s decision with respect to the Section 2 attempted monopolization claims because the District Court had failed to define a relevant market within which the attempt to monopolize could be assessed. Finally, the Court of Appeals reversed and remanded the District Court’s ruling with respect to the Section 1 tying claims holding that it had improperly applied a *per se* standard of review which was inappropriate in analyzing tying arrangements involving platform software products. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

On November 12, 2002, the District Court approved a proposed settlement between Microsoft and nine State Attorneys General to resolve the remaining liability findings. Under this settlement, Microsoft avoided the break-up of the company, retained the ability to expand the function of Windows as well as the ability to continue to bundle Internet Explorer with Windows. In exchange, Microsoft agreed to a series of limitations regarding its treatment of licensees and agreed to disclose the documentation required for middleware to interoperate



effectively with Windows. United States v. Microsoft Corp., 231 F. Supp. 2d 144 (D.D.C. 2002).

B. LePage's Inc. v. 3M

1. In LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003), cert. denied, 124 S.Ct. 2932 (2004), 3M utilized a multi-tiered "bundled rebate" structure, which offered higher rebates when customers purchased products in 3M's different product lines. The court held 3M's bundled pricing programs violated Section 2 of the Sherman Act. The court came to this conclusion despite the fact 3M's discounted prices were above cost and LePage's maintained a significant market share. The Third Circuit rejected any rule of *per se* legality for bundled discount programs that are above cost and could be matched by a competitor.

IV. ADVERTISING REGULATION AND CONSUMER PROTECTION

Industry surveys indicate that as many as 62 million people in the United States have access to the Internet, and that in 1997 alone businesses spent nearly \$1 billion in advertising to reach them. Such tremendous promotional activity has, predictably, become the focus of state and federal consumer protection regulation.

For those businesses that wish to attract customers via the Internet, state regulation of Internet advertising raises the specter of attempting to comply with the diverse or even conflicting consumer protection rules of fifty different jurisdictions. Whether Internet businesses will in fact be subject to fifty regulatory regimes will probably turn on whether state courts have personal jurisdiction over foreign businesses that advertise on the Internet.

In addition to state regulation, Internet advertisers must comply with the increasingly extensive federal regulations enforced by the Federal Trade Commission (FTC). The FTC enforces the Federal Trade Commission Act (FTCA), which seeks to promote competition and protect the consuming public from false or misleading commercial overtures and unfair trade practices. 15 U.S.C. §§ 41-58. The FTCA authorizes the FTC to promulgate and enforce regulations, which may be found in 16 C.F.R., ch.1, 0-999, but does not provide for private actions. However, 43(a) of the Lanham Act does authorize private suits for trademark violations, false designations of origin, and false and misleading advertising. 15 U.S.C. § 101 et seq. Barnes & Noble, Inc. v. Amazon.com Books, Inc., No. 97 Civ. 9466 (S.D.N.Y. filed May 12, 1997) (Barnes & Noble sued Amazon for false advertising over Amazon's claim that it was the "world's largest bookstore;" case was settled).

The FTC has been very active in prosecuting false advertising on the Internet, bringing administrative and judicial actions against hundreds of companies.

*New FTC Report Extols Efforts to Fight Fraud and Promote Consumer Education*, 72 Antitrust & Trade Reg. Rep. (BNA), Feb. 13, 1997 at 159. The Commission is also on the verge of issuing a new policy statement regarding the application of its consumer protection rules and guidelines to on-line advertising. In a May 6, 1999 statement in the Federal Register, the FTC formally requested comments on, and a general discussion of, the content of its contemplated policy statement. In particular, participants were invited to comment on the meaning of the terms "writing," "written," "printed," and "direct mail" in FTC rules and regulations; on what are clear and conspicuous disclosures in electronic media; on the use of hyperlinks to make disclosures; and on possible rules as to the placement, prominence and repetition of disclosures in electronic media.

FTC regulation of Internet advertising is likely to be extensive. As indicated above, the FTC intends to issue guidelines for businesses on how to comply with advertising and consumer protection laws in their online advertising and commercial transactions. These guidelines will be extremely critical for businesses in conducting their commercial activities over the Internet.



\_\_\_\_\_ Initials  
\_\_\_\_\_ Date

**Extreme Widgets'  
AUTHORIZED DIRECT DEALER AGREEMENT  
PARAGRAPHS 1-18**

This Authorized Direct Dealer Agreement is entered into between **Extreme Widgets, Inc.**, 555 West Street, California 90000 ("**Extreme Widgets**"), and

\_\_\_\_\_  
(Dealer)

d/b/a \_\_\_\_\_ ("Dealer").

WHEREAS, **Extreme Widgets** is the exclusive distributor in the United States of quality consumer widgets sold under the **Extreme Widgets** brand name and trademarks; and

WHEREAS **Extreme Widgets** products distributed under the **Extreme Widgets** brand name and trademarks have a valuable reputation and goodwill; and

WHEREAS it is **Extreme Widgets'** policy to sell **Extreme Widgets** products only through selected dealers that (1) are willing to sell and promote such products on a full-time, year-round basis; (2) have satisfactory display and demonstration facilities; (3) display such Products prominently and attractively, and demonstrate such products fairly under appropriate conditions for proper performance; (4) have a sales staff educated sufficiently to explain and demonstrate **Extreme Widgets** products; (5) have the ability to handle, to the satisfaction of the customers in the markets in which Dealer is located, all matters relating to the sale of **Extreme Widgets** products; and (6) are willing to assume in good faith the technical and marketing responsibilities of this Authorized Direct Dealer Agreement; and

WHEREAS **Extreme Widgets** spends and will continue to spend substantial sums of money in the promotion and advertising of **Extreme Widgets** products; and

WHEREAS Dealer wishes to become an authorized **Extreme Widgets** dealer for the categories of **Extreme Widgets** products as designated on Exhibit A ("Products");

NOW, therefore, in consideration of the premises and mutual covenants set forth herein, **Extreme Widgets** and Dealer hereby agree as follows:

1. **Appointment.** **Extreme Widgets** hereby appoints Dealer, and Dealer hereby accepts such appointment, as an authorized dealer for the resale of only those Products designated on Exhibit A, subject to the terms and conditions set forth in this Agreement including Exhibits and Attachments hereto. This appointment is solely for Dealer's retail outlet(s) described on Exhibit B, attached hereto, and Dealer shall not engage in the sale of Products at any other location(s) without first obtaining **Extreme Widgets'** written approval for such location(s), in the form of an amendment to Exhibit B. Dealer shall, upon request by **Extreme Widgets**, provide **Extreme Widgets** with a current list of retail locations using the d/b/a identified on Exhibit A/B. **Extreme Widgets** reserves the absolute right, for any reason whatever, to increase or decrease the number of authorized dealers at any time without notice to Dealer.

2. **Obligations and Warranties of Dealer.** Dealer hereby undertakes and warrants as follows:

- (a) **Marketing Obligations.** To use Dealer's best efforts to promote conscientiously and diligently the distribution of Products on a full-time, year-round basis within the market area immediately surrounding each of Dealer's authorized selling locations as identified on Exhibits A/B, attached hereto. Dealer is required to comply fully with the prohibitions set forth in subparagraphs (i) and (ii), below, unless Dealer has obtained **Extreme Widgets'** prior written agreement to the contrary.
  - (i) **200-Mile Radius & Electronic Promotions Prohibited.** Dealer shall not, directly or indirectly, promote the sale of Products at a distance of more than 200 miles from each authorized selling location. Also, by signing this Agreement, Dealer expressly agrees not to use any portion of the Internet, including the World Wide Web, or any other electronic network to promote the sale of Products. Without limiting the foregoing, Dealer is expressly prohibited, unless Dealer has entered into **Extreme Widgets'** separate agreement entitled Internet Account Agreement or unless Dealer has otherwise obtained the prior written authorization of **Extreme Widgets'** Senior Vice President of Sales or its Executive Vice President, from indicating on any Dealer web site that it sells, or is authorized to sell, **Extreme Widgets** Products, and any use of the **Extreme Widgets** name or logo on any such web site will be considered both trademark infringement and cause for termination.
  - (ii) Dealer d/b/a. Dealer shall not engage in the promotion, marketing or sale of Products under any d/b/a different from those identified on Exhibit A/B.
- (b) **Authorized Product Sources.** To purchase its requirements of Products only from **Extreme Widgets** or the **Extreme Widgets** distributor authorized to serve Dealer's locations. Products purchased from non-authorized sources may not carry warranties valid in the United States, may not be UL approved, and may not be FCC certified, and the sale of Products obtained from non-authorized sources may severely detract from the quality, image, and goodwill of **Extreme Widgets**, its Products and its authorized dealers.
- (c) **Demonstration and Sales Facilities.** To maintain each authorized location in a manner that insures the attractive display and demonstration of Products. Dealer's promotional efforts and floor display and demonstration space for Products shall be subject to approval by **Extreme Widgets** personnel or representatives, and shall be at least equivalent to its promotional efforts and floor display and demonstration space devoted to competing products. Dealer agrees to maintain in good working order a separate audio or audio-video room at each authorized location for demonstration of such products to consumers under conditions that permit proper performance of such Products.
- (d) **Sales Personnel.** To train and maintain sufficient personnel to sell and service the demand and need for Products in the market area around each of Dealer's authorized location(s), and otherwise to carry out the obligations and responsibilities of this Agreement. Dealer shall have at least one full-time salesperson trained and capable of expert demonstration of all Products in each category for which Dealer is authorized as shown on Exhibit A.
- (e) **Inventory.** To maintain at least a 30-day inventory of Products, as measured by current and anticipated demand created by **Extreme Widgets'** and Dealer's advertising of Products.

- (f) **Financial Stability of Dealer.** To maintain and employ, in connection with Dealer's business under this Agreement, such working capital and net worth as may be required, in the reasonable opinion of **Extreme Widgets**, to enable Dealer to carry out and perform all of Dealer's obligations and responsibilities under this Agreement and, from time to time upon request by **Extreme Widgets**, to furnish such financial reports and other financial data as **Extreme Widgets** may reasonably request as necessary to determine Dealer's financial position. Dealer has represented to **Extreme Widgets**, as an inducement to **Extreme Widgets** for entering into this Agreement, that the financial statements of Dealer provided to **Extreme Widgets** as part of its application for this Authorized Direct Dealer Agreement are complete and accurate, and that Dealer is not only solvent but is in good, substantial and stable financial condition. Dealer does not possess any information indicating that it may not continue to be in good substantial financial condition in the future and Dealer warrants that it will immediately advise **Extreme Widgets** in the event of any material adverse change in Dealer's financial condition. Dealer further acknowledges that its financial statements form part of the basis (together with personal guarantees, letters of credit, and other forms of security) on which **Extreme Widgets** will establish Dealer's open account limits and payment terms, and that such terms and limits, but not the guarantees, letters of credit and other forms of security, form an integral part of this Agreement.
- (g) **Customer Demands.** To make reasonable efforts to handle, to the satisfaction of the customer, all matters relating to the sale of Products in the market area surrounding each of Dealer's authorized location(s), and to report promptly to **Extreme Widgets** each charge, complaint or claim received by Dealer from customers relating to any **Extreme Widgets** Products.
- (h) **Extreme Widgets and Dealer Reputation.** To conduct business in a manner that will reflect favorably at all times on Dealer, **Extreme Widgets** and **Extreme Widgets** Products, and the good name, goodwill and reputation of **Extreme Widgets**. Dealer shall not itself or with others participate in any illegal, deceptive, misleading or unethical advertising or other practices, including, but not limited to, use of illegal "loss leader" or "bait and switch" techniques that are or might be detrimental to **Extreme Widgets**, **Extreme Widgets** Products, or the public. Dealer shall indemnify and save **Extreme Widgets** harmless from all liability, loss, damage or injury to itself or its good reputation, including, but not limited to, reasonable attorneys' fees and litigation costs that arise in any manner out of violation of this subparagraph.
- (i) **Compliance.** To comply with all applicable laws and with the terms of this Agreement in the distribution of Products, including, without limitation, all record keeping and governmental reporting requirements. Dealer further agrees to maintain all records of its sales of Products for at least 12 months, and to permit **Extreme Widgets** reasonable access to such records (excluding information regarding Dealer's resale prices), and to Dealer's authorized retail location(s), upon 2 days' notice from **Extreme Widgets**, to enable **Extreme Widgets** to fulfill any reporting requirements imposed by law or regulation, and to monitor Dealer's compliance with its obligations under this Agreement. Under no circumstances may Dealer sell Products where Dealer knows, or reasonably should know, that such Products are intended for use outside the United States.
- (j) **In-store Sales.** To sell or distribute Products only to consumers who visit Dealer's authorized retail location(s). Dealer acknowledges that it is to the advantage of Dealer

and **Extreme Widgets** to present Products to consumers only in an environment where they can be properly displayed and demonstrated, and where their features, specifications and benefits can be explained by knowledgeable sales personnel. Dealer therefore agrees not to sell or distribute Products in response to orders received over the telephone, by mail or other form of courier delivery, or electronically (including e-mail), without the prior written approval of **Extreme Widgets'** Vice President of Sales.

- (k) **Sale for Resale.**
- (i) Not to sell such Products to any dealer, group, organization or individual whose purpose it is to resell such Products, without the prior written authorization of **Extreme Widgets'** Senior Vice President of Sales, or other designated officer of **Extreme Widgets**.
- (ii) If Products originally shipped to Dealer are located or identified by **Extreme Widgets** as available for resale by any unauthorized source, such location or identification by **Extreme Widgets** shall be presumptive evidence of violation by Dealer of this subparagraph 2(k), and shall be grounds for termination.
3. **Dealer's Retail Prices.** Dealer is free to set its own resale prices unilaterally. No employee or representative of **Extreme Widgets** has any authority to tell Dealer what its resale prices must be, nor to inhibit in any way Dealer's independent pricing decisions. **Extreme Widgets** will not give any favorable treatment to Dealer for its selection of resale prices, nor will it give any unfavorable treatment to Dealer for its selection of resale prices, unless such prices are part of the conduct prohibited by subparagraph 2(h) above. In the event Dealer believes any employee or representative of **Extreme Widgets** has violated this paragraph 3, Dealer warrants and represents that Dealer will immediately notify **Extreme Widgets**, in writing, of the particulars of any such alleged violation, such notice to be sent by first class mail to the Legal Department at the **Extreme Widgets** address set forth above.
4. **Terms and Title.**
- (a) **Payment.** Payment for each Product purchased by Dealer shall be in accordance with the invoice therefor, not withstanding any documents from Dealer to the contrary. A service charge equal to the lesser of 2% per month or the maximum amount permitted by law shall be assessed on each invoice remaining unpaid 30 days after its due date and Dealer shall be responsible for all costs and expenses, including attorneys' fees, incurred by **Extreme Widgets** in connection with collection of any delinquent invoice. **Extreme Widgets** may make partial shipments, and reserves the right to reject all or any portion of any order and ship only the balance of such orders not rejected. Each shipment shall constitute a separate sale obligating Dealer to pay therefor. If Dealer, at any time, fails to pay any invoice in accordance with its terms (as modified by any **Extreme Widgets** promotional program applied to such invoice), then **Extreme Widgets**, at its option, may, by written notice to Dealer, accelerate and declare immediately due and payable all sums owed by Dealer to **Extreme Widgets**, notwithstanding any credit terms previously extended by **Extreme Widgets** to Dealer, and service charges shall accrue and be payable on the outstanding accelerated balances until Dealer's entire indebtedness to **Extreme Widgets** is paid. Acceleration of payments pursuant to this provision shall not constitute termination or breach of this Agreement by **Extreme Widgets**. **Extreme Widgets** may also change its open account terms, or suspend Dealer's open

account purchasing privileges, until all amounts owing **Extreme Widgets** have been paid.

- (b) **Title and Risk of Loss.** All deliveries of Products shall be FCA (Free Carrier; see *Incoterms*, 2000) **Extreme Widgets'** warehouse. Title to all Products shall pass to Dealer hereunder and all risk of loss or damage shall pass to Dealer, or to such financing institution or party as may have been designated to **Extreme Widgets** by Dealer, upon delivery by **Extreme Widgets** of such Products to the first carrier or to Dealer, whichever occurs first, regardless of any provision for payment of freight or insurance by **Extreme Widgets** or the form of the shipping documents.
- (c) **State and Local Taxes.** Dealer represents and warrants that all Products purchased from **Extreme Widgets** are for resale in the ordinary course of Dealer's business, that Dealer has complied, and will comply, with applicable state and local laws relating to the collection and/or payment by Dealer of sales, use and similar taxes applicable to all such resale transactions and agrees to indemnify and hold **Extreme Widgets** harmless from all costs whatsoever, including, but not limited to, reasonable attorneys' fees and litigation costs, for any breach of this warranty and/or failure to so collect or pay any of the aforementioned taxes. Dealer will be charged sales tax by **Extreme Widgets** unless it has on file with **Extreme Widgets** a valid Resale Certificate.

#### 5. Orders.

- (a) **Acceptance.** All orders by Dealer for Products shall be subject to acceptance by **Extreme Widgets** at the appropriate **Extreme Widgets** place of business at the time received. All purchase orders received by **Extreme Widgets** shall only be accepted and effective as to the type and quantity of Products to be purchased by Dealer. No other terms contained in any such purchase order shall be a part of this Agreement or of any force or effect. **Extreme Widgets** shall use its best efforts to make prompt deliveries of orders so accepted, but **Extreme Widgets** shall not be liable for any damages, direct, consequential, special, incidental or otherwise, to Dealer or any other person for **Extreme Widgets'** failure to fill any order or orders, or for any delay in delivery, or for any error in filling any orders for any reason whatsoever. Should orders for Products exceed inventory, **Extreme Widgets** may allocate available inventory among any or all of its customers, including Dealer, in such manner as **Extreme Widgets**, in its sole discretion, deems appropriate.
- (b) **Discontinuance.** **Extreme Widgets** shall have the right to discontinue the sale and/or availability of any or all Products, at any time, without further notice and without liability of any kind to Dealer or any other person. **Extreme Widgets** is at liberty to change its service policies, its financial requirements and the design of its Products, at any time, without notice, and Dealer shall have no claim against **Extreme Widgets** for damages by reason of such changes.
- (c) **Cancellation.** In addition to any rights which **Extreme Widgets** may have under paragraph 7(c) of this Agreement, **Extreme Widgets** shall have the right to cancel any orders placed by Dealer, or to refuse or delay the shipment thereof, if Dealer (i) fails to meet any payment as provided for in subparagraph 4(a) of this Agreement or under the terms of payment set forth in any schedule agreed to by **Extreme Widgets** with Dealer, or (ii) fails to meet the credit, financial or other obligations specified in paragraph

2, or (iii) has been notified of **Extreme Widgets** intention not to renew Dealer pursuant to paragraph 7(c) hereof. No such cancellation, refusal or delay shall be deemed a termination or breach of this Agreement by **Extreme Widgets**.

#### 6. Intellectual Property

- (a) **Ownership.** Dealer acknowledges and agrees that except as may be expressly and specifically set forth in this paragraph 6 of this Agreement, **Extreme Widgets** does not grant Dealer any rights in any of its intellectual property, including without limitation patents, trade secrets, trade names, trademarks and copyrights. Dealer will not reverse-engineer, disassemble or attempt otherwise to reproduce or to produce **Extreme Widgets** Products.
- (b) **Trademarks and Trade Names.** Dealer concedes and recognizes the rights of **Extreme Widgets** to its trade names and trademarks, and acknowledges that Dealer has no rights to the trademark or trade names owned, used or claimed now or in the future by **Extreme Widgets** or in the applicable trademarks or trade names used on or affixed to any Product. Subject to the provisions of paragraphs 6 and 7 of this Agreement, Dealer may refer to applicable trademarks or trade names in promoting the distribution of Products as long as such reference complies with **Extreme Widgets'** rules and policies, communicated to Dealer by **Extreme Widgets**, governing the use of any such trademarks or trade names.
- (c) **Copyright.**
- (i) Dealer shall not acquire ownership of any software Product pursuant to this Agreement. Dealer acquires only the right to possess and to transfer possession of software Products acquired pursuant to this Agreement, in accordance with the terms of license set forth herein.
  - (ii) Dealer shall not represent to any consumer that Dealer is the owner of any software Product acquired hereunder or that it has the right or power to transfer ownership of any such software Product to any such consumer, or hold itself out to any consumer as having such ownership, right or power.
  - (iii) Except to the extent expressly provided in paragraph 6 herein, **Extreme Widgets** reserves to itself as against Dealer and Dealer's sublicensees all of the exclusive rights set forth in Section 106 of the Copyright Act of 1976, 17 U.S.C. § 106, which Section is incorporated herein by reference, and Dealer concedes and recognizes such copyright interests on the part of **Extreme Widgets**.
  - (iv) Dealer shall not alter or change in any manner the packaging of software Products or the labeling of software Products or their packages.
- (d) **Limited License.** Subject to the provisions of this paragraph 6, **Extreme Widgets** hereby grants to Dealer a limited license in the software Products solely to distribute such software Products as incorporated into or bundled with hardware Products by **Extreme Widgets**. Dealer warrants and represents that it will not use or authorize the use of software Products in any other manner whatsoever.

#### 7. Duration and Termination.

- (a) **Term.** The initial term of this Agreement shall be from the date of acceptance by **Extreme Widgets** in accordance with paragraph 13, until December 31 of the same

year. Thereafter, the Agreement shall renew automatically for successive 1-year terms, unless terminated by operation of subparagraphs (b) or (c) hereof or superseded by a new form of Agreement. It is expressly agreed that **Extreme Widgets** is not obligated to permit this Agreement to renew from year to year.

- (b) **Termination by Dealer.** Dealer may terminate this Agreement, at will, at any time, by written notice to **Extreme Widgets**, not less than 10 days prior to the effective date of such notice.
- (c) **Termination by Extreme Widgets.**
- (i) Notwithstanding paragraph 7(a), this Agreement shall not renew if **Extreme Widgets** notifies Dealer, in writing, of **Extreme Widgets's** intention not to renew Dealer. Such notice, to be effective, must be given to Dealer not later than November 30. Upon notice of non-renewal, **Extreme Widgets** may cancel orders or alter its terms of sale, including credit terms, and take such other action as may be consistent with the non-renewal of Dealer as an authorized **Extreme Widgets** dealer.
- (ii) **Extreme Widgets** may terminate this Agreement, by written notice to Dealer, not less than 10 days prior to the effective date of termination, at will or in the event that (i) Dealer violates any of the obligations set forth in paragraphs 1, 2, 4, 6, 10, or 16; or (ii) control of Dealer is acquired, directly or indirectly, by a third party, or Dealer is merged with a third party; or (iii), other good cause is shown.
- (iii) In the event Dealer makes no purchases of Products for any 120 consecutive day period, **Extreme Widgets** will notify Dealer, in writing, of this fact, and Dealer will have 60 days within which to place an order with **Extreme Widgets** for Products. In the event no order is placed within the 60-day period, Dealer will be terminated without further notice or action, and may not thereafter obtain Products from **Extreme Widgets**.
- (iv) At the option of **Extreme Widgets**, this Agreement shall terminate immediately if (A) a receiver is appointed for Dealer or its property; (B) Dealer becomes insolvent or unable to pay its debts as they mature or ceases to pay its debts as they mature in the ordinary course of business, or makes an assignment for the benefit of creditors; (C) any proceedings are commenced by or for Dealer under any bankruptcy, insolvency or debtors' relief law; (D) any proceedings are commenced against Dealer under any bankruptcy, insolvency, or debtors' relief law, and such proceedings have not been vacated or set aside within 60 days from the date of commencement thereof; or (E) Dealer is liquidated or dissolved.
- (d) **Termination/Expiration Accounting.** Notwithstanding any prior agreements to the contrary, upon termination or expiration of this Agreement: (i) all amounts payable by Dealer to **Extreme Widgets** shall survive such termination and become immediately due and payable; (ii) **Extreme Widgets** shall have the option, for 30 days after the effective date of termination, to repurchase from Dealer any or all Products unsold by Dealer at net prices at which such Products were originally invoiced to Dealer, less any allowances that **Extreme Widgets** may have given Dealer on account of such Products, upon the condition that **Extreme Widgets** pay all transportation and other costs connected with shipping such Products to **Extreme Widgets**, it being understood and agreed that promptly after receipt of notice of termination, Dealer shall furnish

**Extreme Widgets** with an inventory of such Products and that within 10 days after receipt of such inventory **Extreme Widgets** shall notify Dealer, in writing, whether or not **Extreme Widgets** shall exercise its option; and (iii) Dealer shall cease to use any of **Extreme Widgets'** trademarks or trade names in connection with any Dealer promotion or advertising of any Products.

- (e) **Continuing Obligations.** Dealer's obligations under paragraphs 2, 4, 6, 7(d), 10 and 16 shall survive termination or expiration of this Agreement.
8. **Advertising.** Dealer is expected to advertise in reasonable amounts to promote the sale of Products to the greatest extent possible in the market areas around each of its authorized location(s).
9. **Notices.** All notices required or desired to be given under this Agreement shall be in writing and shall be delivered in person, by certified U.S. mail, return receipt requested, or by express courier with delivery confirmation, to the respective addresses of the parties appearing herein or to such other address as the receiving party shall designate, in writing, pursuant to this paragraph. Notice shall be deemed effective upon receipt or refusal.
10. **Non-assignment.** Dealer is appointed an authorized **Extreme Widgets** dealer by reason of **Extreme Widgets'** confidence in Dealer, which appointment is personal in nature. This Agreement shall not be assignable by Dealer, nor shall any of the rights granted hereunder be assignable in any manner whatsoever, without the prior written consent of **Extreme Widgets**. **Extreme Widgets** may, at any time and without the consent of Dealer, assign all or any part of this Agreement to any affiliated company.
11. **Complete Agreement.** This Agreement, including all exhibits hereto, is intended by the parties as a final expression of their agreement with respect to Dealer's purchase and resale of Products, superseding all prior and contemporaneous negotiations, correspondence, memoranda, or agreements, whether oral or written. No modification of any of the provisions of this Agreement shall be binding on **Extreme Widgets** unless such modification is in writing and signed by a duly authorized representative of **Extreme Widgets**. No terms contained in any memoranda, correspondence, proposed agreement or offer, including without limitation any terms contained in purchase orders sent by Dealer to **Extreme Widgets** pursuant to paragraph 5, above, shall be binding or of any effect, or shall be considered to be additional terms to this Agreement, unless approved of and accepted by **Extreme Widgets** pursuant to the terms of this paragraph. No course of dealing, usage of trade or course of performance shall modify or alter the terms of this Agreement, nor shall such course of dealing, usage of trade or course of performance constitute an additional term hereto or become a part hereof.
- 
- Dealer Signature
12. **Disclaimer of Partnership or Agency.** Dealer and **Extreme Widgets** are independent contractors and neither shall represent itself as having any power to bind the other or to assume or to create any obligation or responsibility, express or implied, on behalf of the other party. Nothing contained in this Agreement shall be deemed to establish a relationship of principal and agent between **Extreme Widgets** and Dealer, nor any of their agents or employees for any purpose whatsoever. This Agreement shall not be construed as constituting Dealer and **Extreme Widgets** as partners, or to create any other form of legal



association or arrangement that would impose liability upon one party for the act or failure to act of any other party.

13. **Effectiveness of Agreement.** This Agreement shall become effective only upon its execution and acceptance by the President or Sr. Vice President, for **Extreme Widgets** at the Executive Offices of **Extreme Widgets**, in Los Angeles County, California.
14. **GOVERNING LAW AND LITIGATION.** THIS AGREEMENT SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA. IN THE EVENT OF ANY DISPUTE OR CONTROVERSY ARISING UNDER THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED HEREIN, THE PARTIES MUTUALLY CONSENT TO THE JURISDICTION OF THE COURTS OF THE STATE OF CALIFORNIA, AND OF THE FEDERAL DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, AND AGREE THAT ANY AND ALL PROCESS DIRECTED TO ANY OF THEM IN ANY SUCH LITIGATION, MAY BE SERVED OUTSIDE THE STATE OF CALIFORNIA WITH THE SAME FORCE AND EFFECT AS IF SERVICE HAD BEEN MADE WITHIN THE STATE OF CALIFORNIA. THE PARTIES FURTHER AGREE THAT VENUE FOR LITIGATION ARISING UNDER THIS AGREEMENT OR FROM TRANSACTIONS CONTEMPLATED HEREIN SHALL BE EXCLUSIVELY IN THE CENTRAL DISTRICT OF CALIFORNIA OR ITS COUNTERPART STATE COURT, IN RECOGNITION OF THE FACT THAT THIS AGREEMENT BY ITS TERMS CAN BE ACCEPTED ONLY IN CALIFORNIA. THE AGREEMENT IS GOVERNED BY THE LAWS OF CALIFORNIA, AND ORDERS FOR PRODUCT MAY BE ACCEPTED BY **Extreme Widgets** ONLY IN CALIFORNIA. IN THE EVENT OF ANY SUIT OR OTHER PROCEEDING WITH RESPECT TO THE SUBJECT MATTER HEREOF, THE PREVAILING PARTY (WHICH SHALL BE DEEMED TO BE THE PARTY ENTITLED TO RECOVER COSTS OF SUIT, WHETHER OR NOT THE SUIT PROCEEDS TO FINAL JUDGMENT) SHALL BE ENTITLED TO RECOVER REASONABLE ATTORNEYS' FEES AND COSTS AND DISBURSEMENTS ACTUALLY INCURRED, INCLUDING FOR EXPERT WITNESSES, INVESTIGATORS, IN ADDITION TO SUCH OTHER RELIEF AS THE COURT MAY AWARD. IN THE EVENT ANY PROVISION OF THIS AGREEMENT, OR THE APPLICABILITY OF ANY PROVISION TO **Extreme Widgets** OR DEALER, IS HELD BY A COURT OF COMPETENT JURISDICTION TO BE CONTRARY TO APPLICABLE STATE OR FEDERAL LAW, THE REMAINING PROVISIONS OF THIS AGREEMENT SHALL CONTINUE IN FULL FORCE AND EFFECT.
15. **[WAIVER OF RIGHT TO JURY – Deleted].**
16. **Warranties.** Dealer shall, at all times, comply with the provisions of the Magnuson-Moss Warranty Act and regulations thereunder, and comparable state laws and regulations relating to delivery of warranties to consumers. DEALER ACKNOWLEDGES THAT NO WARRANTIES WITH RESPECT TO PRODUCTS ARE CREATED BY THIS AGREEMENT. PRODUCTS ARE SUBJECT ONLY TO **Extreme Widgets'** STANDARD LIMITED WARRANTIES. **Extreme Widgets** HEREBY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.
17. **Limitation of Liability.** NEITHER PARTY HERETO SHALL BE LIABLE TO THE OTHER PARTY FOR COMPENSATION OR REIMBURSEMENT OR DAMAGES ON

ACCOUNT OF PRESENT OR PROSPECTIVE PROFITS, EXPENDITURES, INVESTMENTS OR COMMITMENTS, WHETHER MADE IN THE ESTABLISHMENT, DEVELOPMENT OR MAINTENANCE OF THE BUSINESS GOODWILL OF EITHER PARTY OR FOR ANY OTHER REASON WHATSOEVER. WITH RESPECT TO ANY ORDER, THE PERFORMANCE THEREOF, OR THE PRODUCTS COVERED THEREBY, **Extreme Widgets'** LIABILITY FOR NEGLIGENCE OR OTHERWISE SHALL NOT EXCEED DEALER'S PURCHASE PRICE OF THE ITEMS PERTAINING THERETO. IN NO EVENT SHALL **Extreme Widgets** BE LIABLE TO DEALER FOR SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES.

18. **Miscellaneous.** Each of the parties to this Agreement represents and warrants that it has had the benefit and advice of independent counsel in connection with its review and execution of this Agreement. Each party further agrees that any statute or rule of construction mandating that ambiguities are to be resolved against the drafting party shall not apply to the interpretation of this Agreement, and each party expressly waives the applicability of California Civil Code §1654.

IN WITNESS WHEREOF the parties hereto have executed this Agreement the day and year specified on Exhibit A by affixing their signatures thereto and to Paragraph 11.

Direct Dealer Agreement

**Extreme Widgets  
INTERNET ACCOUNT AGREEMENT**

**EXHIBIT A**

\_\_\_\_\_ New  
\_\_\_\_\_ Renewal  
\_\_\_\_\_ Change

Dealer Name: \_\_\_\_\_  
Authorized d/b/a: \_\_\_\_\_  
Owner/President: \_\_\_\_\_  
HQ Address: \_\_\_\_\_  
City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_  
Phone: ( ) \_\_\_\_\_ Fax: ( ) \_\_\_\_\_  
Social Security Number or Federal Tax Identification Number: \_\_\_\_\_

Authorized Products (Regional Director must initial for each)

\_\_\_\_\_ Home Widgets      \_\_\_\_\_ Car Widgets  
\_\_\_\_\_ Hand-held Widgets      \_\_\_\_\_ Kiddie Widgets

Account Responsibility: \_\_\_\_\_ #: \_\_\_\_\_  
Sales Manager Name      ID Number

“Account’s Website” shall mean the Account’s site on the Internet, located at the following URL address:  
\_\_\_\_\_

The term “Extreme Widgets’ Website” shall mean the **Extreme Widgets** site on the Internet, located at the following URL address: <http://www.extremewidgets.com>.

THIS AGREEMENT CONSISTS OF EXHIBIT A AND PARAGRAPHS 1-16; READ ALL PARAGRAPHS BEFORE SIGNING. **ORIGINAL SIGNATURES ALSO REQUIRED ON EXHIBIT A AND PARAGRAPHS 3 AND 11.**

Dealer Name/Authorized d/b/a \_\_\_\_\_

By \_\_\_\_\_ Date: \_\_\_\_\_  
Signature: (Owner/Officer)

Recommended for **Extreme Widgets** Corporate Approval:

By \_\_\_\_\_ Date: \_\_\_\_\_  
Vice President, Sales

Approved by **Extreme Widgets**:

By \_\_\_\_\_ Date: \_\_\_\_\_  
Executive Vice President or  
Senior Vice President, Sales



**Extreme Widgets**  
**INTERNET ACCOUNT AGREEMENT**

This Internet Account Agreement is entered into between **Extreme Widgets, Inc.**, 555 West Street, California 90000 ("**Extreme Widgets**"), and \_\_\_\_\_, d/b/a \_\_\_\_\_ ("**Account**").

WHEREAS **Extreme Widgets** is the exclusive authorized distributor in the United States of quality consumer widgets under the **Extreme Widgets** brandname and trademarks; and

WHEREAS **Extreme Widgets** products distributed under the **Extreme Widgets** brandname and trademarks have a valuable reputation and goodwill; and

WHEREAS it is **Extreme Widgets'** policy to sell certain of its consumer widgets from time to time on an Internet basis through specialty Internet distribution companies that are capable of presenting the benefits of **Extreme Widgets'** products in comparison to competing products; and

WHEREAS Account wishes to become an authorized **Extreme Widgets** Internet Account and desires to sell certain categories of **Extreme Widgets** products designated on Exhibit A (the "Products"), as the same may be modified from time to time by written amendment;

NOW, THEREFORE, IN CONSIDERATION OF the promises and mutual covenants set forth herein, **Extreme Widgets** and Account hereby agree as follows:

1. **APPOINTMENT; SCOPE OF AUTHORIZATION.** **Extreme Widgets** hereby appoints Account, and Account hereby accepts such appointment, as a non-exclusive authorized account for the distribution of only those Products designated on Exhibit A, including amendments thereto, subject to the terms and conditions set forth in this Agreement including Exhibits and Attachments hereto. This appointment is solely for Account's Internet business described on Exhibit A, attached hereto, and Account shall not engage in the sale or distribution of Products, retail or wholesale, at or through any other location or outlet in which Account has or hereafter acquires any direct or indirect interest without first obtaining **Extreme Widgets'** prior written approval, such as, for example, in the form of an Authorized Direct Dealer Agreement. **Extreme Widgets** reserves the absolute right to determine whether later-developed products shall be "Products" or not within the scope of Account's authorization. **Extreme Widgets** reserves the absolute right for any reason whatever to increase or decrease the number of authorized accounts at any time without notice to Account.

2. **OBLIGATIONS AND WARRANTIES OF ACCOUNT.** Account hereby undertakes and warrants as follows:

(a) To use Account's best efforts to promote conscientiously and diligently the distribution of Products on a full-time basis through Account's Website described on Exhibit A. Account is required to comply fully with the prohibitions set forth in subparagraphs (i) and (ii) below, unless Account has obtained **Extreme Widgets'** prior written agreement to the contrary.

- (i) Account Website. Account shall not engage in the promotion, marketing or sale of Products on any Website different from that identified on Exhibit A.
- (ii) Account d/b/a. Account shall not engage in the promotion, marketing or sale or distribution of Products under any d/b/a different from that identified on Exhibit A.

(b) Account shall create a section in Account's Website which is linked externally only to **Extreme Widgets'** Website, which section shall be identified as Account's site for **Extreme Widgets** Consumer Widgets in a manner and with a name and URL (IP or Internet address) approved in advance by **Extreme Widgets** in writing (hereinafter "Account's **Extreme Widgets** Site"). Account's **Extreme Widgets** Site shall only contain images and information about the Products and how to purchase the Products from Account's Website (including "shopping cart" access through or from Account's **Extreme Widgets** Site). Account's **Extreme Widgets** Site will provide the ability to search for the Products by name, model number and product category within Account's **Extreme Widgets** Site. The Products must also be able to be located via any product or product category search tool or other locator tool provided in Account's Website. All such Product data and images may also be displayed with any competitive product offered by Account on Account's Website as part of any product category comparison or listing.

Account shall also meet the following additional criteria:

- (i) all prices for Products must be displayed in U.S. dollars only;
- (ii) Account must utilize software that will track "hits" on Account's **Extreme Widgets** Site; and
- (iii) Account must provide to **Extreme Widgets**, upon written request by **Extreme Widgets**, the full output of such software for such period of time as specified by **Extreme Widgets**, not to exceed a 6 month period.

**(c) Account shall only distribute, sell or offer to sell the Products:**

- (i) **to bonafide retail end-users;**
- (ii) from Account's Website, unless Account has a separate written agreement with **Extreme Widgets** authorizing the sale of the Products by other means (such as an **Extreme Widgets** Direct Dealer Agreement); and
- (iii) that Account currently has in its inventory, or which have been ordered from **Extreme Widgets** and which order has been accepted by **Extreme Widgets** as available for delivery.

(d) Account shall NOT purchase or otherwise acquire for consideration, distribute, sell, or offer for sale any **Extreme Widgets**-branded products other than the Products, unless done pursuant to a separately executed agreement such as an **Extreme Widgets** Direct Dealer Agreement. Nothing herein shall be deemed to authorize or grant Account the right to state or imply in any manner that Account is authorized to promote or sell **Extreme Widgets**-branded products other than the Products which Account is authorized to purchase and resell pursuant to this Agreement, and Account further agrees that it will not state or imply in any medium anything to the contrary with respect what **Extreme Widgets**-branded Products it is authorized to promote or sell on Account's **Extreme Widgets** Site.

(e) Account shall (i) ship the Products only to retail end-users and only to addresses within the fifty (50) states of the United States; and (ii) prominently state in Account's **Extreme Widgets** Site and at the point Account obtains customer shipping information that Products are available for sale only to residents of the United States and will only be shipped to addresses within the fifty (50) states of the United States.

(f) Account shall, for each model of the Products referenced in Account's Website, fully describe the features and benefits of each and provide a complete list of each model's specifications (which may be copied from **Extreme Widgets'** Website) and display a picture of each model of the Products offered or advertised by Account on Account's **Extreme Widgets** site if there is a picture of such model on **Extreme Widgets'** Website or if such a picture is otherwise made available to the Account by **Extreme Widgets**, provided, however, that the right to make and use all such copies and all such pictures of **Extreme Widgets** Products terminates upon the expiration or termination of this Agreement and Account hereby acknowledges and agrees that it has no ownership or other property interest in or to such pictures and specifications.

(g) Account shall cause Account's **Extreme Widgets** Site to meet the graphical, picture quality and resolution standards announced by **Extreme Widgets** from time to time within thirty (30) days of such announcements.

(h) Account shall display prominently on the first page of Account's Website (or on such other location within Account's Website as agreed in writing by **Extreme Widgets**) and on Account's **Extreme Widgets** Site any icon or image or graphic display provided by **Extreme Widgets** that signifies that Account is a **Extreme Widgets** authorized Internet Account for Consumer Widgets; provided further, however, that Account may not make any reference in Account's Website or in any advertising with regard to being an authorized **Extreme Widgets** Account for any **Extreme Widgets**-branded products other than the Products, which shall be identified in a clear and conspicuous manner.

(i) Account shall not, without **Extreme Widgets'** prior written approval, use, other than in Account's Website, or authorize others to use; (i) the **Extreme Widgets** name; (ii) any **Extreme Widgets** trademark or logo; or, (iii) any Product image, Product description, Product name or other Product reference anywhere on or in the Internet, including, without limitation on the foregoing, any internet marketing promotion, or any advertisement, including metatags, mass distribution email or other existing or yet to be created methods or systems. Further, if Account sponsors or operates an on-line affiliate/associate program (paying anything of value to another website owner or operator for sales made to customers linking from or referred from such other person's or entity's website), Account will prohibit, by written agreement, such third party affiliate/associate from using; (i) the **Extreme Widgets** name; (ii) any **Extreme Widgets** trademark or logo; or, (iii) any Product image, Product description, Product name or other Product reference anywhere on or in such third party's website or in any advertising in any medium for same and if such third party breaches such agreement, Account will promptly cancel any such affiliate's right to receive anything of value from Account in relation to Account's sales of the Products and will terminate its relationship to said affiliate with regard to the Products.

(j) Account shall provide at least the following customer services:

(i) a toll-free customer telephone number to answer customer inquiries regarding the Products, their use and related matters, for at least ten hours a day, six days a week, which is adequately staffed with enough individuals to meet anticipated demand and who, in the aggregate, have been trained in the operation, features and benefits of all Products then offered on Account's Website;

(ii) a clear and conspicuous statement of the Account's privacy and usage policies with regard to all customer information gathered via Account's Website;

(iii) a secure means of ordering Product(s) online, including a prominent statement of the level of security provided for such transactions displayed at least on the ordering page(s) of Account's Website;

(iv) order status information (acceptance or rejection) and product availability status within twelve hours of the submission of each order and, if not immediately available, provide the customer with the option of canceling the order;

(v) shipment of the Product so ordered within forty-eight hours of order acceptance;

(vi) use of one or more reliable delivery service providers capable of proper and safe delivery of the Products to all locations within the United States;

(vii) a written Product return policy, developed by Account, but approved in advance by **Extreme Widgets**, which policy is prominently displayed on Account's Website.

(viii) in addition for Car Widgets Products:

(aa) provide information for Fit/No-Fit, either directly on Account's **Extreme Widgets** Site, or by authorized link to another web site, which link and site has been approved in advance in writing by **Extreme Widgets**;

(bb) maintain adequate inventories of kits and installation accessories necessary for installation of Products in all vehicles for the most recent 10 model years; and

(cc) provide adequate installation support for customers, at no charge to the customer (via toll free telephone, Account's Web Site, or other methods approved in advance in writing by **Extreme Widgets**).

Account may not deviate from the foregoing requirements without prior written approval of **Extreme Widgets**.

(k) Account shall not conduct auctions of the Products nor sell the Product by auction or substantially similar means from Account's Website or through any third-party auction site or facility.

(l) As a knowledgeable sales and support staff is needed to provide information concerning the Products to the end-user customers, Account shall, from time to time, permit a representative of **Extreme Widgets** to provide product training at a mutually agreeable time and place, and shall cause its sales staff to attend said product training. **Extreme Widgets** and Account shall each bear its own costs related to such training.

(m) Account shall submit to **Extreme Widgets** for **Extreme Widgets'** review, Account's **Extreme Widgets** Site and any pages of Account's Website, referencing, depicting or describing the Products or Account's relationship to **Extreme Widgets**, in advance of initially placing said pages on-line to the general public. Any changes to such approved pages thereafter must be submitted to **Extreme Widgets** for review and approval unless the changes made by Account are only to incorporate, without change, material, data or pictures supplied to the Account by **Extreme Widgets**, in which event no submission for review and approval is required. In all cases in which this sub-article (m) requires review and approval of content by **Extreme Widgets**, **Extreme Widgets'** review and approval shall not be unreasonably withheld or delayed and shall be limited to a review of (i) proper usage of **Extreme Widgets** trademarks, logos and trade names; (ii) compliance with the graphical picture quality resolution standard referred to in subarticle 2(g) above; (iii) product performance claims; (iv) verification of offering of only the Products authorized hereby; and (v) any language or depictions which in the sole opinion of **Extreme Widgets** is potentially injurious to **Extreme Widgets'** good name, image or reputation.

(n) Account shall keep records of:

(i) all Authorized Product transactions with customers for at least three years, as well as archival records of all Account Website pages for at least ninety days, and make such records available to **Extreme Widgets** in the event of **Extreme Widgets/Account** or **Extreme Widgets/customer** disputes. At **Extreme Widgets'** request, Account agrees to work with **Extreme Widgets** to resolve customer complaints and problems; and

(ii) all sales of products sold via Account's Website by category and model, and within three (3) business days after the end of each calendar quarter Account will provide **Extreme Widgets** with a written report of the sales (without sales price data) of Products by category and model for such immediately preceding quarter.

(o) Account shall immediately forward to **Extreme Widgets** information concerning all charges, complaints, or claims of damage relating to any of the Products that may come to Account's attention.

(p) Account shall:

(i) not separate any software sold or bundled/packaged with any Product(s), from such Product(s) or sell, license or distribute such software on a standalone basis;

(ii) only distribute such software on those terms and conditions as the **Extreme Widgets** may, from time to time, require; and

(iii) not remove, translate or modify the contents of documentation of or related to such software, including, without limitation, any end user license agreements or warranty statements.

Without in any manner prejudicing the right of **Extreme Widgets** to claim that any other breach or default of this Agreement on the part of Account constitutes a material breach or default, it is understood and agreed that the failure of Account to comply with the provisions of the foregoing subdivisions of this Article shall constitute a material breach and default of this Agreement on the part of Account.

For the purpose of verifying compliance by Account with the provisions of the foregoing subdivisions of this Article, Account agrees that **Extreme Widgets** and its representatives will be permitted full access to, and will be permitted to make copies of or abstracts from, the books and records of Account relating to Products sold by **Extreme Widgets** to Account and will be permitted to audit such books and records at reasonable intervals. Pending the completion of any such audit, **Extreme Widgets** shall have the right to delay shipments of Product(s) to Account.

(q) Authorized Product Sources. To order and obtain its requirements of Products only from **Extreme Widgets** or the **Extreme Widgets** distributor authorized by **Extreme Widgets** in writing to serve Account. Products obtained from non-authorized sources may not carry warranties valid in the United States, may not be UL approved, and may not be FCC-certified, and the distribution of Products obtained from non-authorized sources may severely detract from the quality, image, and goodwill of **Extreme Widgets**, its Products and its authorized Accounts.

(r) No Retail Storefront. To distribute, sell and market **Extreme Widgets®** Products only through approved Internet website(s). If Account wishes to sell Products through a retail storefront, it must first execute an Authorized Direct Dealer Agreement with **Extreme Widgets**.

(s) Inventory. To maintain sufficient inventory during term of this agreement to meet current and anticipated demands for Products. Account shall purchase and stock such number of SKUs within each authorized Product Category as **Extreme Widgets** determines, from time to time, is adequate to represent the full range of products within the authorized Product Category.

(t) Personnel. To maintain sufficient personnel to sell and distribute Products to the satisfaction of customers. Account agrees to maintain information on authorized **Extreme Widgets** service centers, and to provide such information to customers in lieu of providing service directly.

(u) Financial Stability of Account. To maintain and employ in connection with Account's business under this Agreement such working capital and net worth as may be required in

the reasonable opinion of **Extreme Widgets** to enable Account to carry out and perform all of Account's obligations and responsibilities under this Agreement and, at any reasonable time and from time to time upon request by **Extreme Widgets**, to furnish such financial reports and other financial data as **Extreme Widgets** may reasonably request as necessary to determine Account's financial position. Account has represented to **Extreme Widgets** as an inducement to **Extreme Widgets** for entering into this Agreement that the financial statements of Account provided to **Extreme Widgets** as part of its application for this Account Agreement are complete and accurate, and that Account is not only solvent, but is in good, substantial and stable financial condition. Account does not possess any information which would indicate it will not continue to be in good, substantial financial condition in the future, and Account warrants that it will immediately advise **Extreme Widgets** in the event of any material adverse change in Account's financial condition. Account further acknowledges that its financial statements form part of the basis (together with personal guarantees, letters of credit and other forms of security) on which **Extreme Widgets** will establish Account's open account limits and payment terms, and that such terms and limits, but not the guarantees, letters of credit and other forms of security, form an integral part of this Agreement.

(v) **Customer Demands.** To have in place a system, satisfactory to **Extreme Widgets**, that will resolve customer complaints to the satisfaction of customers, to make reasonable efforts to handle to the satisfaction of the customer all matters relating to the Products, and to report promptly to **Extreme Widgets** each charge, complaint or claim received by Account from customers relating to any Product.

(w) **Car Widget Warranty Obligations.** With respect to car widgets, to provide consumers making warranty claims with new car widgets in accordance with the terms of **Extreme Widgets'** Car Widgets Warranty to consumers. Account warrants to **Extreme Widgets** that it will cooperate fully with consumers and with **Extreme Widgets** in implementing the warranty exchange program, and that it will only exchange car widgets that have a manufacturing defect and are covered by the **Extreme Widgets** warranty in effect at the time of retail sale.

(x) **Extreme Widgets and Account Reputation.** To conduct business in a manner that will reflect favorably at all times on Account, **Extreme Widgets** and **Extreme Widgets®** Products, and the good name, goodwill and reputation of **Extreme Widgets**. Account shall not itself or with others participate in any illegal, deceptive, misleading or unethical advertising or other practices, including but not limited to use of illegal "loss leader" or "bait and switch" techniques that are or might be detrimental to **Extreme Widgets**, **Extreme Widgets®** Products, or the public. Account shall indemnify and save **Extreme Widgets** harmless from all liability, loss, damage or injury to itself or its good reputation, including but not limited to reasonable attorneys' fees and litigation costs that arise in any manner out of violation of this subparagraph.

(y) **Compliance.** To comply with all applicable laws and with the terms of this Agreement in the distribution of Products including, without limitation, all record keeping and governmental reporting requirements. Account further agrees to permit **Extreme Widgets** reasonable access to all records of its distribution of Products (excluding information regarding Account's prices), upon two (2) days notice from **Extreme Widgets**, to enable **Extreme Widgets** to fulfill any reporting requirement imposed by law or regulation, and to monitor

Account's compliance with its obligations under this Agreement. Account and **Extreme Widgets** acknowledge the importance of compliance with the letter and spirit of United States export control laws and regulations, and Account agrees by the purchase of Products from **Extreme Widgets** to conform and abide by the export laws and regulations of the United States. Account further agrees that if it discards any items received from **Extreme Widgets** which are proscribed by such laws and regulations, it will do so in a manner consistent with such laws and regulations.

(z) **Retail Business.**

(i) Not to distribute Products to any account, group, organization, or individual where Account knows, or should know, that the recipient's purpose is to redistribute such Products, without the prior written authorization of the Vice President of Sales, or other designated officer of **Extreme Widgets**.

(ii) If products originally shipped to Account are located or identified by **Extreme Widgets** as available for distribution by any unauthorized source, such location or identification by **Extreme Widgets** shall be presumptive evidence of violation by Account of this subparagraph 2(z), and shall be grounds for termination.

(iii) **Compliance with Regulations:** To comply with all statutes, regulations and procedures of the United States Postal Service, the Federal Trade Commission, and other federal and state laws regarding the sale of products by mail or through the Internet.

(zz) **Distribution of Consumer Product.** Not to distribute Products identified for non-commercial consumer use to any individual or establishment that intends to use such Products commercially, and to make reasonable efforts to determine the manner in which individuals or establishments intend to use Products.

(zzz) **Indemnity and Insurance.** Account shall defend and indemnify **Extreme Widgets** from and against any claim arising out of or based on a breach of Account's obligations pursuant to this Agreement. Account shall maintain comprehensive general liability insurance with limits not less than two million dollars (\$2,000,000) combined single limit for bodily injury and property damage from a reputable insurer licensed in all states in which Account conducts business, and shall name **Extreme Widgets** as an additional insured. Such insurance does not limit Account's obligations under this Agreement including without limitation Account's obligation to indemnify **Extreme Widgets**.

3. **ACCOUNT'S ADVERTISED AND RETAIL PRICES.**

(a) **Minimum Advertised Prices.** Account represents and warrants that it has received the **Extreme Widgets** Minimum Advertised Price ("MAP") Policy, the MAP advertising guidelines and other MAP information. Account represents and warrants that it has read and understood the foregoing MAP Policy, the MAP advertising guidelines and other information. The MAP Policy and the MAP advertising guidelines are for advertised prices only

and do NOT apply to actual resale prices which, as set forth below, are set unilaterally by Account. Account acknowledges that **Extreme Widgets** enforces its MAP Policy. Account acknowledges that **Extreme Widgets** will impose penalties up to and including termination for violation of the MAP Policy.

\_\_\_\_\_  
Account Signature

(b) Retail Prices. Account is free to set its own retail prices unilaterally. No employee or representative of **Extreme Widgets** has any authority to tell Account what its prices must be nor to inhibit in any way Account's independent pricing decisions. **Extreme Widgets** will not give any favorable treatment to Account for its selection of prices, nor will it give any unfavorable treatment to Account for its selection of prices, unless such prices are part of the conduct prohibited by subparagraphs 2(x) or 2(z) above. In the event Account believes any employee or representative of **Extreme Widgets** has violated this Paragraph 3, Account warrants and represents that Account will immediately notify **Extreme Widgets** in writing of the particulars of any such violation (such notice to be sent by first class mail to the Legal Department at the **Extreme Widgets** address set forth above).

#### 4. TERMS AND TITLE.

(a) Payment. Payment for each Product delivered to Account shall be in accordance with the invoice therefor, notwithstanding any documents from Account to the contrary. A service charge equal to the lesser of 2% per month or the maximum amount permitted by law shall be assessed on each invoice remaining unpaid 30 days after its due date and Account shall be responsible for all costs and expenses, including attorneys' fees, incurred by **Extreme Widgets** in connection with collection of any delinquent invoice. **Extreme Widgets** may make partial shipments, and reserves the right to reject all or any portion of any order and ship only the balance of such order not rejected. Each shipment shall constitute a separate transaction obligating Account to pay therefor. If Account at any time fails to pay any invoice in accordance with its terms (as modified by any **Extreme Widgets** promotional program applied to such invoice), then **Extreme Widgets** at its option may by written notice to Account accelerate and declare immediately due and payable all sums owed by Account to **Extreme Widgets**, notwithstanding any credit terms previously extended by **Extreme Widgets** to Account, and service charges shall accrue and be payable on the outstanding accelerated balances until Account's entire indebtedness to **Extreme Widgets** is paid. Acceleration of payments pursuant to this provision shall not constitute termination or breach of this Agreement by **Extreme Widgets**. **Extreme Widgets** may also change its credit terms, or suspend Account's credit, until all amounts owing **Extreme Widgets** have been paid.

(b) Title and Risk of Loss. All deliveries of Products shall be FCA (Free CARRIER; see *Incoterms*, 2000) **Extreme Widgets'** warehouse. Title to all Products, except Software, shall pass to Account hereunder, and all risk of loss or damage as to all Products shall pass to Account, or to such financing institution or party as may have been designated to **Extreme Widgets** by Account, upon delivery by **Extreme Widgets** of such Products to the carrier or to the Account, whichever occurs first, regardless of any provision for payment of freight or insurance by **Extreme Widgets** or the form of the shipping documents.

(c) State and Local Taxes. Account represents and warrants that all Products purchased from **Extreme Widgets** are for resale or distribution in the ordinary course of Account's business, that Account has complied and will comply with applicable state and local laws relating to the collection and/or payment by Account of sales, use and similar taxes applicable to all such transactions and agrees to indemnify and to hold **Extreme Widgets** harmless from all costs whatsoever, including but not limited to reasonable attorneys' fees and litigation costs, for breach of this warranty and/or failure to so collect or pay any of the aforementioned taxes. Account will be charged sales tax by **Extreme Widgets** unless it has on file with **Extreme Widgets** a valid Resale Certificate.

#### 5. ORDERS.

(a) Acceptance. All orders by Account for Products shall be subject to acceptance by **Extreme Widgets** at the appropriate **Extreme Widgets** place of business at the time received. All purchase orders received by **Extreme Widgets** shall only be accepted and effective as to the type and quantity of Products to be purchased by Account. No other terms contained in any purchase order shall be part of this Agreement or of any force or effect. **Extreme Widgets** shall use its best efforts to make prompt deliveries of orders so accepted, but **Extreme Widgets** shall not be liable for any damages, direct, consequential, special, incidental or otherwise, to Account or any other person for **Extreme Widgets'** failure to fill any order or orders, or for any delay in delivery, or for any error in filling any orders for any reason whatsoever. Should orders for Products exceed inventory, **Extreme Widgets** may allocate available inventory among any or all of its customers, including Account, in such manner as **Extreme Widgets** in its sole discretion deems appropriate.

(b) Discontinuance. **Extreme Widgets** shall have the right to discontinue the sale, distribution, and/or availability of any or all Products at any time without further notice and without liability of any kind to Account or any other person. **Extreme Widgets** is at liberty to change its service policies, its financial requirements and the design of its Products at any time without notice, and Account shall have no claim against **Extreme Widgets** for damages by reason of such changes.

(c) Cancellation. In addition to any rights which **Extreme Widgets** might have under paragraph 7(c) of this Agreement, **Extreme Widgets** shall have the right to cancel any orders placed by Account or to refuse or to delay the shipment thereof, if Account (i) shall fail to meet any payment as provided for in subparagraph 4 of this Agreement or under the terms of payment set forth in any schedule agreed to by **Extreme Widgets** with Account, (ii) shall fail to meet the credit, financial or other obligations specified in paragraph 2, or (iii) Account has been notified of **Extreme Widgets'** intention not to renew Account pursuant to paragraph 7(c) hereof. No such cancellation, refusal or delay shall be deemed a termination or breach of this Agreement by **Extreme Widgets**.

#### 6. PROPRIETARY RIGHTS.

(a) Trademarks and Trade Names. Account concedes and recognizes the rights of **Extreme Widgets** to its trade names and trademarks, and acknowledges that Account has no rights to the trademark or trade names owned, used or claimed now or in the future by **Extreme**



**Widgets** or in the applicable trademarks or trade names used on or affixed to any Product. Subject to the provisions of paragraphs 6 and 7(d) of this Agreement, Account may refer to applicable trademarks or trade names in promoting the distribution of Products as long as such reference complies with **Extreme Widgets'** rules and policies, communicated to Account by **Extreme Widgets**, governing the use of any such trademarks or trade names.

(b) Copyright.

- (i) Account shall not acquire ownership of any software Product of which it acquires possession pursuant to this Agreement. Account acquires only the right to possess, and to transfer possession of, software Products acquired pursuant to this Agreement, in accordance with the terms of license set forth herein or in the case of bundled software in accordance with the terms of the license set forth therein.
- (ii) Account shall not represent to any consumer that Account is the owner of any software Product acquired hereunder or that it has the right or power to transfer ownership of any such software Product to any such consumer, or hold itself out to any consumer as having such ownership, right or power.
- (iii) Except to the extent expressly provided in paragraph (d) herein, **Extreme Widgets** reserves to itself as against Account and Account's sublicensees all of the exclusive rights set forth in Section 106 of the Copyright Act of 1976, 17 U.S.C. § 106, which Section is incorporated herein by reference, and Account concedes and recognizes such copyright interests on the part of **Extreme Widgets**.
- (iv) Account shall not alter or change in any manner the packaging of software Products or the labeling of software Products or their packages.

(c) Unauthorized Use of Software Products. Account will not alter, reverse-engineer, decompile, disassemble, rent, electronically distribute (including, but not limited to telephone, cable or broadcast signals), or market by interactive cable, remote processing services, micro-main frame linkups or multi-user local or wide area network machines any software Products, nor will Account reproduce software Products.

(d) License. **Extreme Widgets** hereby grants to Account a sublicense, subject to the terms and conditions of this Agreement, in the software Products delivered to Account hereunder, for the sole use and purpose of Account for distributing such software Products to consumers through its Internet business pursuant to a perpetual sublicense to such consumers, for the sole and exclusive purpose of non-commercial home exhibition by such consumers of such software Products.

7. DURATION AND TERMINATION.

- (a) (i) Probationary Term. Account acknowledges that the initial authorization granted by this Agreement is probationary in nature, and is intended to allow both Account and **Extreme Widgets** to determine if the sale of Products via Account's **Extreme Widgets** Site can be accomplished in accordance with all of the terms and conditions of this Agreement. Therefore, either Account or **Extreme Widgets** can terminate this Agreement, provided such notice of termination is given, in writing, within 90 days of the date that Account first begins to solicit Internet purchases for Products from Account's **Extreme Widgets** Site. Termination of this Agreement pursuant to this Paragraph is without cause, and Account expressly acknowledges that no representations have been made by **Extreme Widgets** that **Extreme Widgets** will permit this Agreement to extend beyond the Probationary Term.
- (ii) Term. The initial term of this Agreement shall commence from the date of acceptance by **Extreme Widgets** in accordance with paragraph 13. Assuming that neither Party has provided notice of termination as permitted under Paragraph 7(a)(i), this Agreement shall continue in force until December 31<sup>st</sup> of the same calendar year that the initial term commenced.
- (b) Termination by Account. Account may terminate this Agreement at will at any time, by written notice to **Extreme Widgets** not less than ten (10) days prior to the effective date of such notice.
- (c) Termination by **Extreme Widgets**.
  - (i) Notwithstanding paragraph 7(a), this Agreement shall not renew if **Extreme Widgets** notifies Account in writing of **Extreme Widgets'** intention not to renew Account. Such notice, to be effective, must be given to Account not later than December 31st. Upon notice of nonrenewal, **Extreme Widgets** may cancel orders or alter its terms of sale or distribution including credit terms, and take such other action as may be consistent with the nonrenewal of Seller as an authorized **Extreme Widgets** fulfillment company.
  - (ii) **Extreme Widgets** may terminate this Agreement by written notice to Account in the event that (aa) Account violates any of the obligations set forth in paragraphs 1, 2, 4, 6, 10, or 15; (bb) control of Account is acquired, directly or indirectly, by a third party, or Account is merged with a third party; or (cc) other good cause is shown. Such notice of termination is effective in accordance with the provisions of Paragraph 9, below.
  - (iii) In the event Account makes no purchases of Products for any 120 consecutive day period, (or in the case of software Products, takes no delivery for any 120 consecutive day period) **Extreme Widgets** will notify Account in writing of this fact, and Account will have 60

days within which to place an order with **Extreme Widgets** for Products. In the event no order is placed within the 60-day period, Account may be terminated without further notice or action, and may not thereafter obtain Products from **Extreme Widgets**.

- (iv) At the option of **Extreme Widgets**, this Agreement shall terminate immediately if (aa) a receiver is appointed for Account or its property; (bb) Account becomes insolvent or unable to pay its debts as they mature or ceases to pay its debts as they mature in the ordinary course of business, or makes an assignment for the benefit of creditors; (cc) any proceedings are commenced by or for Account under any bankruptcy, insolvency or debtors' relief law; (dd) any proceedings are commenced against Account under any bankruptcy, insolvency, or debtors' relief law, and such proceedings have not been vacated or set aside within 60 days from the date of commencement thereof; or (ee) Account is liquidated or dissolved.

(d) Termination/Expiration Accounting. Notwithstanding any prior agreements to the contrary, upon termination or expiration of this Agreement: (i) all amounts payable by Account to **Extreme Widgets** shall survive such termination and become immediately due and payable; (ii) **Extreme Widgets** shall have the option for thirty (30) days after the effective date of termination to repurchase or reacquire from Account any or all Products in Account's inventory at net prices at which such Products were originally invoiced to Account, less any allowances, discounts or rebates, upon the condition that **Extreme Widgets** pay all transportation and other costs connected with shipping such Products to **Extreme Widgets**, it being understood and agreed that promptly after receipt of notice of termination Account shall furnish **Extreme Widgets** with an inventory of such Products and that within ten (10) days after receipt of such inventory **Extreme Widgets** shall notify Account in writing whether or not **Extreme Widgets** shall exercise its option; and (iii) Account shall cease to use any of **Extreme Widgets'** trademarks or trade names in connection with any Account promotion or advertising of any Products.

(e) Continuing Obligations. Account's obligations under paragraphs 2, 4(a), 4(c), 6, 7(d), 10 and 15 shall survive termination or expiration of this Agreement.

8. ADVERTISING. Prices for Products displayed on Account's Website are considered by **Extreme Widgets** to constitute "advertising" within the meaning of **Extreme Widgets'** MAP Program, a copy of which has been separately provided by **Extreme Widgets** to Account.

9. NOTICES. All notices required or desired to be given under this Agreement shall be in writing and shall be delivered: in person; by first class mail, postage pre-paid; by any private courier service providing for proof of receipt; by facsimile with transmission receipt, at the addresses set forth in this Agreement, or at such other addresses as may be designated hereafter by the parties in writing. Notice is deemed effective upon receipt if delivered in person or, if mailed, upon the date deposited in the United States mail, or otherwise as of the date of delivery shown on the receipt.

10. NON-ASSIGNMENT. Account is appointed an authorized **Extreme Widgets**

Account by reason of **Extreme Widgets'** confidence in Account, which appointment is personal in nature. This Agreement shall not be assignable by Account, nor shall any of the rights granted hereunder be assignable in any manner whatsoever, without the prior written consent of **Extreme Widgets**. **Extreme Widgets** may, at any time and without the consent of Account, assign all or any part of this Agreement to any affiliated **Extreme Widgets**.

11. COMPLETE AGREEMENT. The terms of this Agreement, including all exhibits hereto, are intended by the parties as a final expression of their agreement with respect to such terms as are included herein. All prior and contemporaneous negotiations, correspondence, memoranda, or agreements, whether oral or written, are merged herein. No modification of any of the provisions of this Agreement shall be binding on **Extreme Widgets** unless such modification is in writing and signed by a duly authorized representative of **Extreme Widgets**. No terms contained in any memoranda, correspondence, proposed agreement or offer, including any terms contained in Purchase Orders sent by Account to **Extreme Widgets** pursuant to paragraph 5, above, shall be binding or of any effect, or shall be considered additional terms of this agreement, unless approved and accepted by **Extreme Widgets** pursuant to the terms of this paragraph. No course of dealing, usage of trade or course of performance shall modify or alter the terms of this agreement, nor shall such course of dealing, usage of trade or course of performance constitute an additional term hereof or become a part hereof.

Account Signature

12. DISCLAIMER OF PARTNERSHIP OR AGENCY. Account and **Extreme Widgets** are independent contractors and neither shall represent itself as having any power to bind the other or to assume or to create any obligation or responsibility, express or implied, on behalf of the other party to this agreement. Nothing contained in this Agreement shall be deemed to establish a relationship of principal and agent between **Extreme Widgets** and Account, nor any of their agents or employees for any purpose whatsoever. This Agreement shall not be construed as constituting Account and **Extreme Widgets** as partners, or to create any other form of legal association or arrangement which would impose liability upon one party for the act or failure to act of any other party.

13. EFFECTIVENESS OF AGREEMENT. This Agreement shall become effective only upon its execution and acceptance by the Executive Vice President or Senior Vice President Sales for **Extreme Widgets** at the Executive Offices of **Extreme Widgets, Inc.**, Los Angeles County, California.

14. GOVERNING LAW AND LITIGATION. THIS AGREEMENT SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA WITHOUT REGARD TO CALIFORNIA'S CONFLICTS OF LAW PRINCIPLES. IN THE EVENT OF ANY DISPUTE OR CONTROVERSY ARISING UNDER THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREIN, THE PARTIES MUTUALLY CONSENT TO THE JURISDICTION OF THE COURTS OF THE STATE OF CALIFORNIA, AND OF THE FEDERAL DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, AND AGREE THAT ANY AND ALL PROCESS DIRECTED TO ANY OF THEM IN ANY SUCH LITIGATION MAY BE SERVED OUTSIDE THE STATE OF CALIFORNIA WITH THE SAME FORCE AND EFFECT AS IF SERVICE HAD BEEN MADE WITHIN THE STATE OF CALIFORNIA. THE PARTIES FURTHER AGREE THAT VENUE

FOR LITIGATION ARISING UNDER THIS AGREEMENT OR FROM TRANSACTIONS CONTEMPLATED HEREIN SHALL BE EXCLUSIVELY IN THE CENTRAL DISTRICT OF CALIFORNIA, OR EQUIVALENT STATE COURT, IN RECOGNITION OF THE FACT THAT THIS AGREEMENT BY ITS TERMS CAN BE ACCEPTED ONLY IN CALIFORNIA, THE AGREEMENT IS GOVERNED BY THE LAWS OF CALIFORNIA, AND ORDERS FOR PRODUCTS MAY BE ACCEPTED BY **Extreme Widgets** ONLY IN CALIFORNIA. IN THE EVENT OF ANY SUIT OR OTHER PROCEEDING WITH RESPECT TO THE SUBJECT MATTER HEREOF, THE PREVAILING PARTY (WHICH SHALL BE DEEMED TO BE THE PARTY ENTITLED TO RECOVER COSTS OF SUIT, WHETHER OR NOT THE SUIT PROCEEDS TO FINAL JUDGMENT) SHALL BE ENTITLED TO RECOVER REASONABLE ATTORNEYS' FEES IN ADDITION TO SUCH OTHER RELIEF AS THE COURT MAY AWARD. IN THE EVENT ANY PROVISION OF THIS AGREEMENT OR THE APPLICABILITY OF ANY PROVISION TO **Extreme Widgets** OR ACCOUNT SHALL BE HELD BY A COURT OF COMPETENT JURISDICTION TO BE CONTRARY TO APPLICABLE STATE OR FEDERAL LAW, THE REMAINING PROVISIONS OF THIS AGREEMENT SHALL CONTINUE IN FULL FORCE AND EFFECT.

15. **WARRANTIES.** Account shall, at all times, comply with the provisions of the Magnuson-Moss Warranty Act and regulations thereunder, and comparable state laws and regulations relating to delivery of warranties to consumers. Account ACKNOWLEDGES THAT NO WARRANTIES WITH RESPECT TO PRODUCTS ARE CREATED BY THIS AGREEMENT, AND **Extreme Widgets** HEREBY DISCLAIMS IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

16. **LIMITATION OF LIABILITY.** Neither party hereto shall be liable to the other party for compensation or reimbursement or damages on account of present or prospective profits, expenditures, investments or commitments, whether made in the establishment, development or maintenance of the business goodwill of either party or for any other reason whatsoever. **With respect to any order, the performance thereof, or the Products covered thereby, Extreme Widgets' liability for negligence or otherwise shall not exceed Account's purchase price of the items pertaining thereto.** In no event shall **Extreme Widgets** be liable to Account for special, incidental, or consequential damages. Without limiting the foregoing, Account acknowledges that **Extreme Widgets**, under no circumstances, shall be liable to Account for Account's costs incurred in developing Account's **Extreme Widgets** Site, even if **Extreme Widgets** terminates this Agreement within the Probationary Term, as provided in Paragraph 7(a)(i), above.

16. **WAIVER OF JURY TRIAL. Deleted.**

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year specified on Exhibit A by affixing their signatures thereto, and to Paragraphs 3 and 11, above.

\_\_\_\_ New  
\_\_\_\_ Renewal

**Extreme Widgets**  
**AUTHORIZED DIRECT DEALER AGREEMENT**  
**EXHIBIT A**

Dealer Name: \_\_\_\_\_  
Authorized d/b/a: \_\_\_\_\_  
Owner/President: \_\_\_\_\_  
HQ Address: \_\_\_\_\_  
City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_  
Phone: ( ) \_\_\_\_\_ Fax: ( ) \_\_\_\_\_  
Social Security Number or Federal Tax Identification Number: \_\_\_\_\_

Authorized Products (Regional Director must initial for each):  
\_\_\_\_ Home Widgets \_\_\_\_ Car Widgets  
\_\_\_\_ Hand-held Widgets \_\_\_\_ Kiddie Widgets

Account Responsibility: \_\_\_\_\_ #: \_\_\_\_\_  
Sales Manager Name ID Number

Warehouse Locations (Street, City, State, Zip, Telephone)  
\_\_\_\_\_  
\_\_\_\_\_

(continue on back if necessary)  
Total Authorized Store Fronts: \_\_\_\_\_

**LIST ALL SELLING LOCATIONS BY COMPLETING EXHIBIT B**  
Additional locations may be authorized only by written agreement of all parties hereto.

THIS AGREEMENT CONSISTS OF EXHIBITS A, B, AND PARAGRAPHS 1-18; READ ALL PARAGRAPHS BEFORE SIGNING. ORIGINAL SIGNATURES ALSO REQUIRED ON EXHIBIT A AND PARAGRAPH 11.

Dealer Name/Authorized d/b/a: \_\_\_\_\_

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Title: (Owner/Officer)

Recommended for **Extreme Widgets** Corporate Approval:

By \_\_\_\_\_ Date: \_\_\_\_\_  
Vice President, Sales

Approved by **Extreme Widgets**:

By \_\_\_\_\_ Date: \_\_\_\_\_  
Executive Vice President or Senior Vice President, Sales



**Extreme Widgets**  
**AUTHORIZED DIRECT DEALER AGREEMENT**  
**EXHIBIT B**

Dealer Name/Authorized d/b/a:

\_\_\_\_\_

\_\_\_\_\_

Store d/b/a \_\_\_\_\_

Store d/b/a \_\_\_\_\_

Address \_\_\_\_\_

Address \_\_\_\_\_

City, State, Zip \_\_\_\_\_

City, State, Zip \_\_\_\_\_

Telephone # \_\_\_\_\_

Telephone # \_\_\_\_\_

Store Manager \_\_\_\_\_

Store Manager \_\_\_\_\_

-----

\_\_\_\_\_

Store d/b/a \_\_\_\_\_

Store d/b/a \_\_\_\_\_

Address \_\_\_\_\_

Address \_\_\_\_\_

City, State, Zip \_\_\_\_\_

City, State, Zip \_\_\_\_\_

Telephone # \_\_\_\_\_

Telephone # \_\_\_\_\_

Store Manager \_\_\_\_\_

Store Manager \_\_\_\_\_

-----

\_\_\_\_\_

Store d/b/a \_\_\_\_\_

Store d/b/a \_\_\_\_\_

Address \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_  
City, State, Zip

City, State, Zip

\_\_\_\_\_  
Telephone #

Telephone #

\_\_\_\_\_  
Store Manager

Store Manager

\_\_\_\_\_ Initials  
\_\_\_\_\_ Date

**Extreme Widgets'  
AUTHORIZED DIRECT DEALER AGREEMENT  
PARAGRAPHS 1-18**

This Authorized Direct Dealer Agreement is entered into between **Extreme Widgets, Inc.**, 555 West Street, California 90000 ("**Extreme Widgets**"), and

\_\_\_\_\_,  
(Dealer)  
d/b/a  
\_\_\_\_\_  
("Dealer").

WHEREAS, **Extreme Widgets** is the exclusive distributor in the United States of quality consumer widgets sold under the **Extreme Widgets** brand name and trademarks; and

WHEREAS **Extreme Widgets** products distributed under the **Extreme Widgets** brand name and trademarks have a valuable reputation and goodwill; and

WHEREAS it is **Extreme Widgets'** policy to sell **Extreme Widgets** products only through selected dealers that (1) are willing to sell and promote such products on a full-time, year-round basis; (2) have satisfactory display and demonstration facilities; (3) display such Products prominently and attractively, and demonstrate such products fairly under appropriate conditions for proper performance; (4) have a sales staff educated sufficiently to explain and demonstrate **Extreme Widgets** products; (5) have the ability to handle, to the satisfaction of the customers in the markets in which Dealer is located, all matters relating to the sale of **Extreme Widgets** products; and (6) are willing to assume in good faith the technical and marketing responsibilities of this Authorized Direct Dealer Agreement; and

WHEREAS **Extreme Widgets** spends and will continue to spend substantial sums of money in the promotion and advertising of **Extreme Widgets** products; and

WHEREAS Dealer wishes to become an authorized **Extreme Widgets** dealer for the categories of **Extreme Widgets** products as designated on Exhibit A ("Products");

NOW, therefore, in consideration of the premises and mutual covenants set forth herein, **Extreme Widgets** and Dealer hereby agree as follows:

1. **Appointment.** **Extreme Widgets** hereby appoints Dealer, and Dealer hereby accepts such appointment, as an authorized dealer for the resale of only those Products designated on Exhibit A, subject to the terms and conditions set forth in this Agreement including Exhibits and Attachments hereto. This appointment is solely for Dealer's retail outlet(s) described on Exhibit B, attached hereto, and Dealer shall not engage in the sale of Products at any other location(s) without first obtaining **Extreme Widgets'** written approval for such location(s), in the form of an amendment to Exhibit B. Dealer shall, upon request by **Extreme Widgets**, provide **Extreme Widgets** with a current list of retail locations using the d/b/a identified on Exhibit A/B. **Extreme Widgets** reserves the absolute right, for any reason whatever, to increase or decrease the number of authorized dealers at any time without notice to Dealer.

**M.Schwartz Comment (Dealer):**

Can we get a 2-mile blackout radius around Dealer's stores?

**B.Gaffaney Response (Extreme Widgets):**

No. **Extreme Widgets** does not authorize exclusive territories for the product lines being sold by Dealer. Exclusive territories may make sense for some high-end products and for distributors (due to logistics), but with standard products we want to incentivize entire dealer base to stay competitive. Also, **Extreme Widgets** could be considered as treating dealer base unequally\*\*?

**H. Feller Comment (Antitrust Issue):**

This provision illustrates a couple of significant antitrust issues relating to product distribution. Can a supplier decide to sell only certain products to a dealer or does it have to sell all of its products to an interested dealer? Can a supplier limit the retail locations from which a dealer can sell its products? In most cases, the answer to both questions is yes. A supplier normally can decide to sell only select products to a dealer and it can restrict the sale of its products to specific retail locations, provided that the supplier makes this decision unilaterally. In other words, the decision should not be the result of an agreement with another entity, such as a competitor of the supplier or another dealer.

2. **Obligations and Warranties of Dealer.** Dealer hereby undertakes and warrants as follows:
  - (a) **Marketing Obligations.** To use Dealer's best efforts to promote conscientiously and diligently the distribution of Products on a full-time, year-round basis within the market area immediately surrounding each of Dealer's authorized selling locations as identified on Exhibits A/B, attached hereto. Dealer is required to comply fully with the prohibitions set forth in subparagraphs (i) and (ii), below, unless Dealer has obtained **Extreme Widgets'** prior written agreement to the contrary.
    - (i) **200-Mile Radius & Electronic Promotions Prohibited.** Dealer shall not, directly or indirectly, promote the sale of Products at a distance of more than 200 miles from each authorized selling location. Also, by signing this Agreement, Dealer expressly agrees not to use any portion of the Internet, including the World Wide Web, or any other electronic network to promote the sale of Products. Without limiting the foregoing, Dealer is expressly prohibited, unless Dealer has entered into **Extreme Widgets'** separate agreement entitled Internet Account Agreement or unless Dealer has otherwise obtained the prior written authorization of **Extreme Widgets'** Senior Vice President of Sales or its Executive Vice President, from indicating on any Dealer web site that it sells, or is authorized to sell, **Extreme Widgets** Products, and any use of the **Extreme Widgets** name or logo on any such web site will be considered both trademark infringement and cause for termination.
    - (ii) Dealer d/b/a. Dealer shall not engage in the promotion, marketing or sale of Products under any d/b/a different from those identified on Exhibit A/B.

**H. Feller Comment (Antitrust Issue):**

This provision raises another antitrust issue. Can a supplier establish and restrict the territories in which a dealer can sell its products? Yes, a supplier normally can do this, provided that it is acting unilaterally and not pursuant to an agreement with another dealer or a competing supplier. Restrictions on competition among a supplier's dealers are normally permissible because they promote competition with other product brands.

- (b) **Authorized Product Sources.** To purchase its requirements of Products only from **Extreme Widgets** or the **Extreme Widgets** distributor authorized to serve Dealer's locations. Products purchased from non-authorized sources may not carry warranties valid in the United States, may not be UL approved, and may not be FCC certified, and the sale of Products obtained from non-authorized sources may severely detract from the quality, image, and goodwill of **Extreme Widgets**, its Products and its authorized dealers.
- (c) **Demonstration and Sales Facilities.** To maintain each authorized location in a manner that insures the attractive display and demonstration of Products. Dealer's promotional efforts and floor display and demonstration space for Products shall be subject to approval by **Extreme Widgets** personnel or representatives, and shall be at least equivalent to its promotional efforts and floor display and demonstration space devoted to competing products. Dealer agrees to maintain in good working order a separate audio or audio-video room at each authorized location for demonstration of such products to consumers under conditions that permit proper performance of such Products.

**M.Schwartz Comment (Dealer):**

- (1) Approval shall not be unreasonably or arbitrarily withheld; and (2) remove the "separate room" requirement.

**B.Gaffaney Response (Extreme Widgets):**

- (1) Okay; (2) **Extreme Widgets** insists upon some sort of "separate area" for widgets but does not require a dedicated room with four walls exclusively for **Extreme Widgets** Products. Competitor products can be co-located in this "separate area". Rationale is understandable: products present best when in suitable environment.

**H. Feller Comment (Antitrust Issue):**

This provision requires the dealer to devote as much floor space to the supplier's products as it devotes to competing products. This equal treatment provision should not be a problem under the antitrust laws. However, floor space provisions or the payment of slotting allowances can raise antitrust issues if they substantially reduce or eliminate the floor space or shelf space available to competing suppliers. For example, AMD recently filed an antitrust suit against Intel

and one of the alleged antitrust violations is based on Intel's shelf space promotional program for retailers. These types of programs can raise exclusive dealing or attempt to monopolize issues.

- (d) **Sales Personnel.** To train and maintain sufficient personnel to sell and service the demand and need for Products in the market area around each of Dealer's authorized location(s), and otherwise to carry out the obligations and responsibilities of this Agreement. Dealer shall have at least one full-time salesperson trained and capable of expert demonstration of all Products in each category for which Dealer is authorized as shown on Exhibit A.
- (e) **Inventory.** To maintain at least a 30-day inventory of Products, as measured by current and anticipated demand created by **Extreme Widgets'** and Dealer's advertising of Products.
- (f) **Financial Stability of Dealer.** To maintain and employ, in connection with Dealer's business under this Agreement, such working capital and net worth as may be required, in the reasonable opinion of **Extreme Widgets**, to enable Dealer to carry out and perform all of Dealer's obligations and responsibilities under this Agreement and, from time to time upon request by **Extreme Widgets**, to furnish such financial reports and other financial data as **Extreme Widgets** may reasonably request as necessary to determine Dealer's financial position. Dealer has represented to **Extreme Widgets**, as an inducement to **Extreme Widgets** for entering into this Agreement, that the financial statements of Dealer provided to **Extreme Widgets** as part of its application for this Authorized Direct Dealer Agreement are complete and accurate, and that Dealer is not only solvent but is in good, substantial and stable financial condition. Dealer does not possess any information indicating that it may not continue to be in good substantial financial condition in the future and Dealer warrants that it will immediately advise **Extreme Widgets** in the event of any material adverse change in Dealer's financial condition. Dealer further acknowledges that its financial statements form part of the basis (together with personal guarantees, letters of credit, and other forms of security) on which **Extreme Widgets** will establish Dealer's open account limits and payment terms, and that such terms and limits, but not the guarantees, letters of credit and other forms of security, form an integral part of this Agreement.

**M.Schwartz Comment (Dealer):**

Any financial information tendered under this provision should be subject to NDA-type confidentiality requirements. Proposed language is as follows:

\* \* \* \* \*

*All financial information tendered pursuant to this provision shall be deemed "Confidential Information." **Extreme Widgets** shall protect Dealer's Confidential Information with at least the same degree of care and confidentiality, but not less than a reasonable standard of care, which **Extreme Widgets** utilizes for its own information that it does not wish disclosed to the public. **Extreme Widgets** shall not disclose to third parties (except the parent*

company or the wholly owned subsidiaries of the disclosing party who have a need to know) Dealer's Confidential Information, or use it for any purpose not explicitly set forth herein, without the prior written consent of Dealer. The obligation of confidentiality shall survive for three (3) years after the termination of this Agreement.

This Agreement imposes no obligation upon **Extreme Widgets** with respect to Dealer's Confidential Information which **Extreme Widgets** can establish by legally sufficient evidence: (a) was rightfully possessed by **Extreme Widgets** without an obligation to maintain its confidentiality prior to receipt from the disclosing party; (b) is generally known to the public without violation of this Agreement; (c) is obtained by **Extreme Widgets** in good faith from a third party having the right to disclose it without an obligation with respect to confidentiality; or (d) was required to be disclosed by applicable law; provided that **Extreme Widgets** notifies Dealer of such requirement prior to disclosure, and provided further that **Extreme Widgets** undertakes diligent efforts to limit disclosure.

In the event **Extreme Widgets** receives a request to disclose Dealer's Confidential Information under the terms of a subpoena, order, civil investigative demand or similar process issued by a court of competent jurisdiction or other threat of liability by a regulatory or governmental body any portion of the Confidential Information, **Extreme Widgets** agrees to (i) promptly notify Dealer of the existence, terms and circumstances surrounding such a request, (ii) cooperate with Dealer in any efforts to limit or resist disclosure at Dealer's request and expense, and (iii) if disclosure of such information is required, furnish only that portion of the Confidential Information which **Extreme Widgets** is legally compelled to disclose.

Promptly upon request, **Extreme Widgets** shall endeavor to destroy all tangible records containing Dealer's Confidential Information and any other tangible material containing, prepared on the basis of, or reflecting Dealer's Confidential Information, and will not retain any copies, extracts or other reproductions in whole or in part of such tangible material. Any such destruction shall be certified in a writing under oath by an authorized officer with personal knowledge of said destruction, and **Extreme Widgets** shall promptly provide Dealer with the certification bearing the authorized officer's original signature.

**B.Gaffaney Response (Extreme Widgets):**  
NDA language needs to be two-way.

- (g) **Customer Demands.** To make reasonable efforts to handle, to the satisfaction of the customer, all matters relating to the sale of Products in the market area surrounding each of Dealer's authorized location(s), and to report promptly to **Extreme Widgets** each charge, complaint or claim received by Dealer from customers relating to any **Extreme Widgets** Products.

**M.Schwartz Comment (Dealer):**

Reporting requirements should be limited only to material complaints, and then, only to material complaints that cannot be resolved by Dealer's staff.

**B.Gaffaney Response (Extreme Widgets):**

**Extreme Widgets** needs to know immediately about all complaints or product returns involving health or safety issues. In addition, **Extreme Widgets** needs to know immediately about repetitive complaints (above, for example, 1.5% recurrence) for quality control purposes. Other types of complaints by end-users received by Dealer can be reported to **Extreme Widgets** on a quarterly or semi-annual basis.

- (h) **Extreme Widgets and Dealer Reputation.** To conduct business in a manner that will reflect favorably at all times on Dealer, **Extreme Widgets** and **Extreme Widgets** Products, and the good name, goodwill and reputation of **Extreme Widgets**. Dealer shall not itself or with others participate in any illegal, deceptive, misleading or unethical advertising or other practices, including, but not limited to, use of illegal "loss leader" or "bait and switch" techniques that are or might be detrimental to **Extreme Widgets**, **Extreme Widgets** Products, or the public. Dealer shall indemnify and save **Extreme Widgets** harmless from all liability, loss, damage or injury to itself or its good reputation, including, but not limited to, reasonable attorneys' fees and litigation costs that arise in any manner out of violation of this subparagraph.

**H. Feller Comment (Antitrust Issue):**

This provision does not control the dealer's resale price or set a minimum resale price, so it does not look like a typical resale price maintenance agreement. But it could possibly create resale price maintenance issues for the supplier because it prohibits "illegal loss leader" sales prices. A loss leader price is usually a price that is below the dealer's cost. As a practical matter, this could be difficult for the supplier to enforce because below cost "loss leader" sales prices usually are not illegal if they intended to meet a competitive price. From a legal standpoint, the supplier can unilaterally establish this policy and terminate the dealer if it offers a loss leader price. The termination needs to be automatic and not subject to the dealer's ability to cure the breach. Otherwise, if the supplier does not terminate the dealer but rather tells or requests the dealer to raise its prices in order to comply with

this provision, it could be accused of entering into an unlawful resale price maintenance agreement with the dealer.

- (i) **Compliance.** To comply with all applicable laws and with the terms of this Agreement in the distribution of Products, including, without limitation, all record keeping and governmental reporting requirements. Dealer further agrees to maintain all records of its sales of Products for at least 12 months, and to permit **Extreme Widgets** reasonable access to such records (excluding information regarding Dealer's resale prices), and to Dealer's authorized retail location(s), upon 2 days' notice from **Extreme Widgets**, to enable **Extreme Widgets** to fulfill any reporting requirements imposed by law or regulation, and to monitor Dealer's compliance with its obligations under this Agreement. Under no circumstances may Dealer sell Products where Dealer knows, or reasonably should know, that such Products are intended for use outside the United States.
- (j) **In-store Sales.** To sell or distribute Products only to consumers who visit Dealer's authorized retail location(s). Dealer acknowledges that it is to the advantage of Dealer and **Extreme Widgets** to present Products to consumers only in an environment where they can be properly displayed and demonstrated, and where their features, specifications and benefits can be explained by knowledgeable sales personnel. Dealer therefore agrees not to sell or distribute Products in response to orders received over the telephone, by mail or other form of courier delivery, or electronically (including e-mail), without the prior written approval of **Extreme Widgets'** Vice President of Sales.
- (k) **Sale for Resale.**
  - (i) Not to sell such Products to any dealer, group, organization or individual whose purpose it is to resell such Products, without the prior written authorization of **Extreme Widgets'** Senior Vice President of Sales, or other designated officer of **Extreme Widgets**.
  - (ii) If Products originally shipped to Dealer are located or identified by **Extreme Widgets** as available for resale by any unauthorized source, such location or identification by **Extreme Widgets** shall be presumptive evidence of violation by Dealer of this subparagraph 2(k), and shall be grounds for termination.

**M.Schwartz Comment (Dealer):**

Dealer would have a difficult time ascertaining the nature of buyers who intend to re-sell or distribute. Let's discuss a few objectively suspicious factors and resulting minimum burdens of investigation. Also, for Paragraph 2(l), let's carve out exceptions for small businesses.

**B.Gaffaney Response (Extreme Widgets):**

**Extreme Widgets** is not asking Dealer to become police officer; instead, **Extreme Widgets** wants to make sure that Dealer is not making "obvious sale" (i.e., a reasonable dealer would be on notice) to an entity that resells such products to end-users. An example of "obvious sale" would be to a person or entity Dealer knew (or should have known) to operate a website set up to sell widgets to consumers.

**H. Feller Comment (Antitrust Issue):**

Similar to the sales territory issue, a supplier normally can restrict the types of customers to whom a dealer can sell. This again needs to be a unilateral decision and policy of the supplier, not the result of an agreement with another dealer or competing supplier.

- 3. **Dealer's Retail Prices.** Dealer is free to set its own resale prices unilaterally. No employee or representative of **Extreme Widgets** has any authority to tell Dealer what its resale prices must be, nor to inhibit in any way Dealer's independent pricing decisions. **Extreme Widgets** will not give any favorable treatment to Dealer for its selection of resale prices, nor will it give any unfavorable treatment to Dealer for its selection of resale prices, unless such prices are part of the conduct prohibited by subparagraph 2(h) above. In the event Dealer believes any employee or representative of **Extreme Widgets** has violated this paragraph 3, Dealer warrants and represents that Dealer will immediately notify **Extreme Widgets**, in writing, of the particulars of any such alleged violation, such notice to be sent by first class mail to the Legal Department at the **Extreme Widgets** address set forth above.
- 4. **Terms and Title.**
  - (a) **Payment.** Payment for each Product purchased by Dealer shall be in accordance with the invoice therefor, notwithstanding any documents from Dealer to the contrary. A service charge equal to the lesser of 2% per month or the maximum amount permitted by law shall be assessed on each invoice remaining unpaid 30 days after its due date and Dealer shall be responsible for all costs and expenses, including attorneys' fees, incurred by **Extreme Widgets** in connection with collection of any delinquent invoice. **Extreme Widgets** may make partial shipments, and reserves the right to reject all or any portion of any order and ship only the balance of such orders not rejected. Each shipment shall constitute a separate sale obligating Dealer to pay therefor. If Dealer, at any time, fails to pay any invoice in accordance with its terms (as modified by any **Extreme Widgets** promotional program applied to such invoice), then **Extreme Widgets**, at its option, may, by written notice to Dealer, accelerate and declare immediately due and payable all sums owed by Dealer to **Extreme Widgets**, notwithstanding any credit terms previously extended by **Extreme Widgets** to Dealer, and service charges shall accrue and be payable on the outstanding accelerated balances until Dealer's entire indebtedness to **Extreme Widgets** is paid. Acceleration of payments pursuant to this provision shall not constitute termination or breach of this Agreement by **Extreme Widgets**. **Extreme Widgets** may also change its open account terms, or suspend Dealer's open account purchasing privileges, until all amounts owing **Extreme Widgets** have been paid.

**M.Schwartz Comment (Dealer):**

This attorneys' fee provision in this paragraph would probably be construed as reciprocal under CA Civil Code Section 1717, but it is worth mentioning that in a state where this is not the case, I would ask for the provision to be made expressly reciprocal.



**B.Gaffaney Response (Extreme Widgets):**

Okay to change such that reasonable attorneys' fees are only available to prevailing party in a collection action.

- (b) **Title and Risk of Loss.** All deliveries of Products shall be FCA (Free CArrier; see *Incoterms*, 2000) **Extreme Widgets'** warehouse. Title to all Products shall pass to Dealer hereunder and all risk of loss or damage shall pass to Dealer, or to such financing institution or party as may have been designated to **Extreme Widgets** by Dealer, upon delivery by **Extreme Widgets** of such Products to the first carrier or to Dealer, whichever occurs first, regardless of any provision for payment of freight or insurance by **Extreme Widgets** or the form of the shipping documents.
- (c) **State and Local Taxes.** Dealer represents and warrants that all Products purchased from **Extreme Widgets** are for resale in the ordinary course of Dealer's business, that Dealer has complied, and will comply, with applicable state and local laws relating to the collection and/or payment by Dealer of sales, use and similar taxes applicable to all such resale transactions and agrees to indemnify and hold **Extreme Widgets** harmless from all costs whatsoever, including, but not limited to, reasonable attorneys' fees and litigation costs, for any breach of this warranty and/or failure to so collect or pay any of the aforementioned taxes. Dealer will be charged sales tax by **Extreme Widgets** unless it has on file with **Extreme Widgets** a valid Resale Certificate.

5. **Orders.**

- (a) **Acceptance.** All orders by Dealer for Products shall be subject to acceptance by **Extreme Widgets** at the appropriate **Extreme Widgets** place of business at the time received. All purchase orders received by **Extreme Widgets** shall only be accepted and effective as to the type and quantity of Products to be purchased by Dealer. No other terms contained in any such purchase order shall be a part of this Agreement or of any force or effect. **Extreme Widgets** shall use its best efforts to make prompt deliveries of orders so accepted, but **Extreme Widgets** shall not be liable for any damages, direct, consequential, special, incidental or otherwise, to Dealer or any other person for **Extreme Widgets'** failure to fill any order or orders, or for any delay in delivery, or for any error in filling any orders for any reason whatsoever. Should orders for Products exceed inventory, **Extreme Widgets** may allocate available inventory among any or all of its customers, including Dealer, in such manner as **Extreme Widgets**, in its sole discretion, deems appropriate.

**M.Schwartz Comment (Dealer):**

Although no liability for **Extreme Widgets** in the event of a late shipment, Dealer should be relieved of minimum inventory obligations arising under Paragraph 2(e).

**B.Gaffaney Response (Extreme Widgets):**

Okay with language providing that to the extent late shipment causes Dealer's non-compliance with minimum inventory obligation, Dealer is relieved of liability/enforcement due to non-compliance with minimum inventory obligation.

- (b) **Discontinuance.** **Extreme Widgets** shall have the right to discontinue the sale and/or availability of any or all Products, at any time, without further notice and without liability of any kind to Dealer or any other person. **Extreme Widgets** is at liberty to change its service policies, its financial requirements and the design of its Products, at any time, without notice, and Dealer shall have no claim against **Extreme Widgets** for damages by reason of such changes.

**M.Schwartz Comment (Dealer):**

Dealer requests 90 days notice for any discontinuance. Dealer doesn't want to get caught with an outdated product and be forced to sell it at a discounted rate which would obviously affect our expected margins. If the notice comes after the ninety day window, we should have a right to return all of the discontinued products we have remaining in our inventory at the time the product is discontinued.

**B.Gaffaney Response (Extreme Widgets):**

**Extreme Widgets** cannot agree to this, as it needs to control its own product line up without liability. Dealer is in control of what it purchases from **Extreme Widgets**. A product does not immediately become obsolete when **Extreme Widgets** announces that it is discontinuing the product.

- (c) **Cancellation.** In addition to any rights which **Extreme Widgets** may have under paragraph 7(c) of this Agreement, **Extreme Widgets** shall have the right to cancel any orders placed by Dealer, or to refuse or delay the shipment thereof, if Dealer (i) fails to meet any payment as provided for in subparagraph 4(a) of this Agreement or under the terms of payment set forth in any schedule agreed to by **Extreme Widgets** with Dealer, or (ii) fails to meet the credit, financial or other obligations specified in paragraph 2, or (iii) has been notified of **Extreme Widgets'** intention not to renew Dealer pursuant to paragraph 7(c) hereof. No such cancellation, refusal or delay shall be deemed a termination or breach of this Agreement by **Extreme Widgets**.

6. **Intellectual Property**

- (a) **Ownership.** Dealer acknowledges and agrees that except as may be expressly and specifically set forth in this paragraph 6 of this Agreement, **Extreme Widgets** does not grant Dealer any rights in any of its intellectual property, including without limitation patents, trade secrets, trade names, trademarks and copyrights. Dealer will not reverse-engineer, disassemble or attempt otherwise to reproduce or to produce **Extreme Widgets** Products.
- (b) **Trademarks and Trade Names.** Dealer concedes and recognizes the rights of **Extreme Widgets** to its trade names and trademarks, and acknowledges that Dealer has no rights to the trademark or trade names owned, used or claimed now or in the future by **Extreme Widgets** or in the applicable trademarks or trade names used on or affixed to any Product. Subject to the provisions of paragraphs 6 and 7 of this Agreement, Dealer may refer to applicable trademarks or trade names in promoting the distribution of Products as long as such reference complies with **Extreme Widgets'** rules and

policies, communicated to Dealer by **Extreme Widgets**, governing the use of any such trademarks or trade names.

(c) **Copyright.**

- (i) Dealer shall not acquire ownership of any software Product pursuant to this Agreement. Dealer acquires only the right to possess and to transfer possession of software Products acquired pursuant to this Agreement, in accordance with the terms of license set forth herein.
- (ii) Dealer shall not represent to any consumer that Dealer is the owner of any software Product acquired hereunder or that it has the right or power to transfer ownership of any such software Product to any such consumer, or hold itself out to any consumer as having such ownership, right or power.
- (iii) Except to the extent expressly provided in paragraph 6 herein, **Extreme Widgets** reserves to itself as against Dealer and Dealer's sublicensees all of the exclusive rights set forth in Section 106 of the Copyright Act of 1976, 17 U.S.C. § 106, which Section is incorporated herein by reference, and Dealer concedes and recognizes such copyright interests on the part of **Extreme Widgets**.
- (iv) Dealer shall not alter or change in any manner the packaging of software Products or the labeling of software Products or their packages.

- (d) **Limited License.** Subject to the provisions of this paragraph 6, **Extreme Widgets** hereby grants to Dealer a limited license in the software Products solely to distribute such software Products as incorporated into or bundled with hardware Products by **Extreme Widgets**. Dealer warrants and represents that it will not use or authorize the use of software Products in any other manner whatsoever.

*as delivered and maintained by **Extreme Widgets** become, or in **Extreme Widgets**' reasonable opinion be likely to become, the subject of any such claim, **Extreme Widgets** may at its option: i) procure for Dealer the right to continue to use the affected Products as contemplated hereunder; ii) replace or modify the affected Products to make its use non-infringing; or iii) should such options not be available at reasonable expense, terminate this Agreement with respect to the affected Products upon thirty (30) days prior written notice to Dealer. In such event of termination, Dealer shall be entitled to a pro-rata refund of all fees paid to **Extreme Widgets** for the affected Products.*

\* \* \* \* \*

Furthermore, we ask for an indemnification provision that is specifically tailored for product liability claims. Here is the above provision so modified:

\* \* \* \* \*

***Extreme Widgets** agrees to indemnify Dealer and to hold it harmless from and against any and all claims, costs, fees and expenses (including reasonable legal fees) relating to allegations that **Extreme Widgets** Products caused damage(s) as a result of negligent design, failure to warn or product defect, provided that: i) **Extreme Widgets** is given prompt written notice of any such claim and has sole control over the investigation, preparation, defense and settlement of the monetary elements of such claims; and, ii) Dealer reasonably cooperates with **Extreme Widgets** in connection with the foregoing and provides **Extreme Widgets** with all information in Dealer's possession related to such claim and any further assistance as reasonably requested by **Extreme Widgets**.*

**M.Schwartz Comment (Dealer):**

We request an indemnity obligation on the part of **Extreme Widgets** in the event Dealer is sued by a third party for allegedly infringing its IP rights. Here is my proposed language:

\* \* \* \* \*

***Extreme Widgets** agrees to indemnify Dealer and to hold it harmless from and against any and all claims, costs, fees and expenses (including reasonable legal fees) relating to actual or alleged infringement of U.S. patents, trademarks, trade secrets and/or copyrights asserted against Dealer by virtue of Dealer's use and/or sales of **Extreme Widgets**' Products, provided that: i) **Extreme Widgets** is given prompt written notice of any such claim and has sole control over the investigation, preparation, defense and settlement of the monetary elements of such claims; and, ii) Dealer reasonably cooperates with **Extreme Widgets** in connection with the foregoing and provides **Extreme Widgets** with all information in Dealer's possession related to such claim and any further assistance as reasonably requested by **Extreme Widgets**. Should any or all of Products*

**B.Gaffaney Response (Extreme Widgets):**

Okay in general concept but **Extreme Widgets** needs to have usual carve outs for unauthorized product modifications and false advertisements/representations about product. In addition, **Extreme Widgets** needs indemnity from Dealers for the same. Also, need qualifier saying that a third party must bring or threaten to bring lawsuit to trigger indemnity liability/obligations.

7. **Duration and Termination.**

- (a) **Term.** The initial term of this Agreement shall be from the date of acceptance by **Extreme Widgets** in accordance with paragraph 13, until December 31 of the same

year. Thereafter, the Agreement shall renew automatically for successive 1-year terms, unless terminated by operation of subparagraphs (b) or (c) hereof or superseded by a new form of Agreement. It is expressly agreed that **Extreme Widgets** is not obligated to permit this Agreement to renew from year to year.

- (b) **Termination by Dealer.** Dealer may terminate this Agreement, at will, at any time, by written notice to **Extreme Widgets**, not less than 10 days prior to the effective date of such notice.
- (c) **Termination by Extreme Widgets.**
- (i) Notwithstanding paragraph 7(a), this Agreement shall not renew if **Extreme Widgets** notifies Dealer, in writing, of **Extreme Widgets's** intention not to renew Dealer. Such notice, to be effective, must be given to Dealer not later than November 30. Upon notice of non-renewal, **Extreme Widgets** may cancel orders or alter its terms of sale, including credit terms, and take such other action as may be consistent with the non-renewal of Dealer as an authorized **Extreme Widgets** dealer.
- (ii) **Extreme Widgets** may terminate this Agreement, by written notice to Dealer, not less than 10 days prior to the effective date of termination, at will or in the event that (i) Dealer violates any of the obligations set forth in paragraphs 1, 2, 4, 6, 10, or 16; or (ii) control of Dealer is acquired, directly or indirectly, by a third party, or Dealer is merged with a third party; or (iii), other good cause is shown.

**M.Schwartz Comment (Dealer):**

**Extreme Widgets's** right to terminate should be limited to material, uncured breaches. Also, with respect to mergers and acquisitions, the right to terminate should not arise unless 51% or more of the control of the company has changed hands – and even then, **Extreme Widgets** must exercise the right to terminate within 30 days of actual notice of said change of control (i.e., this should not be an everlasting right to terminate at any time just because there has been a change in control). Finally, the notion of “good cause” to terminate is rather ambiguous. Can we flesh that out a little?

**B.Gaffaney Response (Extreme Widgets):**

**Extreme Widgets** agrees that breaches must be material, however, the cure period won't work. For example, if we are trying to recover product from a non-paying or a in-financial-turmoil dealer, we need to act promptly and without notice to recover product or proceeds from dealer before it's too late. In addition, cure period does not work if dealer is violating Minimum Advertised Price (“MAP”) policy or is cross selling to another dealer – you cannot “unring the bell.” I am sure that there are other situations where a cure period would be problematic.

Also, as to “control”, we are okay with 51% threshold but **Extreme Widgets** does need to retain ability to terminate each time because it needs to control who is selling its products (product/brand image).

Finally, **Extreme Widgets** needs flexibility inherent in “good cause” because, again, it needs to control who is selling its products (product/brand image).

- (iii) In the event Dealer makes no purchases of Products for any 120 consecutive day period, **Extreme Widgets** will notify Dealer, in writing, of this fact, and Dealer will have 60 days within which to place an order with **Extreme Widgets** for Products. In the event no order is placed within the 60-day period, Dealer will be terminated without further notice or action, and may not thereafter obtain Products from **Extreme Widgets**.
- (iv) At the option of **Extreme Widgets**, this Agreement shall terminate immediately if (A) a receiver is appointed for Dealer or its property; (B) Dealer becomes insolvent or unable to pay its debts as they mature or ceases to pay its debts as they mature in the ordinary course of business, or makes an assignment for the benefit of creditors; (C) any proceedings are commenced by or for Dealer under any bankruptcy, insolvency or debtors' relief law; (D) any proceedings are commenced against Dealer under any bankruptcy, insolvency, or debtors' relief law, and such proceedings have not been vacated or set aside within 60 days from the date of commencement thereof; or (E) Dealer is liquidated or dissolved.
- (d) **Termination/Expiration Accounting.** Notwithstanding any prior agreements to the contrary, upon termination or expiration of this Agreement: (i) all amounts payable by Dealer to **Extreme Widgets** shall survive such termination and become immediately due and payable; (ii) **Extreme Widgets** shall have the option, for 30 days after the effective date of termination, to repurchase from Dealer any or all Products unsold by Dealer at net prices at which such Products were originally invoiced to Dealer, less any allowances that **Extreme Widgets** may have given Dealer on account of such Products, upon the condition that **Extreme Widgets** pay all transportation and other costs connected with shipping such Products to **Extreme Widgets**, it being understood and agreed that promptly after receipt of notice of termination, Dealer shall furnish **Extreme Widgets** with an inventory of such Products and that within 10 days after receipt of such inventory **Extreme Widgets** shall notify Dealer, in writing, whether or not **Extreme Widgets** shall exercise its option; and (iii) Dealer shall cease to use any of **Extreme Widgets'** trademarks or trade names in connection with any Dealer promotion or advertising of any Products.
- (e) **Continuing Obligations.** Dealer's obligations under paragraphs 2, 4, 6, 7(d), 10 and 16 shall survive termination or expiration of this Agreement.

**M.Schwartz Comment (Dealer):**

The following sub-provisions of Paragraph 2 should not survive termination: (c), (d), (e) and (f)

**B.Gaffaney Response (Extreme Widgets):**



Okay with respect to 2(e) and 2(f), however, 2(c) and 2(d) need to survive termination until such time as Dealer completes sell through of any and all Products.

8. **Advertising.** Dealer is expected to advertise in reasonable amounts to promote the sale of Products to the greatest extent possible in the market areas around each of its authorized location(s).
9. **Notices.** All notices required or desired to be given under this Agreement shall be in writing and shall be delivered in person, by certified U.S. mail, return receipt requested, or by express courier with delivery confirmation, to the respective addresses of the parties appearing herein or to such other address as the receiving party shall designate, in writing, pursuant to this paragraph. Notice shall be deemed effective upon receipt or refusal.
10. **Non-assignment.** Dealer is appointed an authorized **Extreme Widgets** dealer by reason of **Extreme Widgets'** confidence in Dealer, which appointment is personal in nature. This Agreement shall not be assignable by Dealer, nor shall any of the rights granted hereunder be assignable in any manner whatsoever, without the prior written consent of **Extreme Widgets**. **Extreme Widgets** may, at any time and without the consent of Dealer, assign all or any part of this Agreement to any affiliated company.

**M.Schwartz Comment (Dealer):**

The right to assign to an affiliated company should be reciprocal

**B.Gaffaney Response (Extreme Widgets):**

Not agreeable because **Extreme Widgets** needs control who is selling its products (product/brand image).

11. **Complete Agreement.** This Agreement, including all exhibits hereto, is intended by the parties as a final expression of their agreement with respect to Dealer's purchase and resale of Products, superseding all prior and contemporaneous negotiations, correspondence, memoranda, or agreements, whether oral or written. No modification of any of the provisions of this Agreement shall be binding on **Extreme Widgets** unless such modification is in writing and signed by a duly authorized representative of **Extreme Widgets**. No terms contained in any memoranda, correspondence, proposed agreement or offer, including without limitation any terms contained in purchase orders sent by Dealer to **Extreme Widgets** pursuant to paragraph 5, above, shall be binding or of any effect, or shall be considered to be additional terms to this Agreement, unless approved of and accepted by **Extreme Widgets** pursuant to the terms of this paragraph. No course of dealing, usage of trade or course of performance shall modify or alter the terms of this Agreement, nor shall such course of dealing, usage of trade or course of performance constitute an additional term hereto or become a part hereof.

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Dealer Signature

12. **Disclaimer of Partnership or Agency.** Dealer and **Extreme Widgets** are independent contractors and neither shall represent itself as having any power to bind the other or to assume or to create any obligation or responsibility, express or implied, on behalf of the other

party. Nothing contained in this Agreement shall be deemed to establish a relationship of principal and agent between **Extreme Widgets** and Dealer, nor any of their agents or employees for any purpose whatsoever. This Agreement shall not be construed as constituting Dealer and **Extreme Widgets** as partners, or to create any other form of legal association or arrangement that would impose liability upon one party for the act or failure to act of any other party.

13. **Effectiveness of Agreement.** This Agreement shall become effective only upon its execution and acceptance by the President or Sr. Vice President, for **Extreme Widgets** at the Executive Offices of **Extreme Widgets**, in Los Angeles County, California.
14. **GOVERNING LAW AND LITIGATION.** THIS AGREEMENT SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA. IN THE EVENT OF ANY DISPUTE OR CONTROVERSY ARISING UNDER THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED HEREIN, THE PARTIES MUTUALLY CONSENT TO THE JURISDICTION OF THE COURTS OF THE STATE OF CALIFORNIA, AND OF THE FEDERAL DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, AND AGREE THAT ANY AND ALL PROCESS DIRECTED TO ANY OF THEM IN ANY SUCH LITIGATION, MAY BE SERVED OUTSIDE THE STATE OF CALIFORNIA WITH THE SAME FORCE AND EFFECT AS IF SERVICE HAD BEEN MADE WITHIN THE STATE OF CALIFORNIA. THE PARTIES FURTHER AGREE THAT VENUE FOR LITIGATION ARISING UNDER THIS AGREEMENT OR FROM TRANSACTIONS CONTEMPLATED HEREIN SHALL BE EXCLUSIVELY IN THE CENTRAL DISTRICT OF CALIFORNIA OR ITS COUNTERPART STATE COURT, IN RECOGNITION OF THE FACT THAT THIS AGREEMENT BY ITS TERMS CAN BE ACCEPTED ONLY IN CALIFORNIA, THE AGREEMENT IS GOVERNED BY THE LAWS OF CALIFORNIA, AND ORDERS FOR PRODUCT MAY BE ACCEPTED BY **Extreme Widgets** ONLY IN CALIFORNIA. IN THE EVENT OF ANY SUIT OR OTHER PROCEEDING WITH RESPECT TO THE SUBJECT MATTER HEREOF, THE PREVAILING PARTY (WHICH SHALL BE DEEMED TO BE THE PARTY ENTITLED TO RECOVER COSTS OF SUIT, WHETHER OR NOT THE SUIT PROCEEDS TO FINAL JUDGMENT) SHALL BE ENTITLED TO RECOVER REASONABLE ATTORNEYS' FEES AND COSTS AND DISBURSEMENTS ACTUALLY INCURRED, INCLUDING FOR EXPERT WITNESSES, INVESTIGATORS, IN ADDITION TO SUCH OTHER RELIEF AS THE COURT MAY AWARD. IN THE EVENT ANY PROVISION OF THIS AGREEMENT, OR THE APPLICABILITY OF ANY PROVISION TO **Extreme Widgets** OR DEALER, IS HELD BY A COURT OF COMPETENT JURISDICTION TO BE CONTRARY TO APPLICABLE STATE OR FEDERAL LAW, THE REMAINING PROVISIONS OF THIS AGREEMENT SHALL CONTINUE IN FULL FORCE AND EFFECT.

15. **[WAIVER OF RIGHT TO JURY – Deleted].**

**B.Gaffaney Comment (Extreme Widgets):**

Jury trial waiver provision was deleted due to very recent change in California law that renders unenforceable pre-dispute jury trial waivers (See *Grafton Partners L.P. v. Superior Court*, (Cal. S. Ct., August 4, 2005)).

16. **Warranties.** Dealer shall, at all times, comply with the provisions of the Magnuson-Moss Warranty Act and regulations thereunder, and comparable state laws and regulations relating



**INTERNET ACCOUNT AGREEMENT**

Recommended for **Extreme Widgets** Corporate Approval:

By \_\_\_\_\_ Date: \_\_\_\_\_  
 Vice President, Sales

Approved by **Extreme Widgets**:

By \_\_\_\_\_ Date: \_\_\_\_\_  
 Executive Vice President or  
 Senior Vice President, Sales

This Internet Account Agreement is entered into between **Extreme Widgets, Inc.**, 555 West Street, California 90000 ("**Extreme Widgets**"), and \_\_\_\_\_, d/b/a \_\_\_\_\_ ("**Account**").

WHEREAS **Extreme Widgets** is the exclusive authorized distributor in the United States of quality consumer widgets under the **Extreme Widgets** brandname and trademarks; and

WHEREAS **Extreme Widgets** products distributed under the **Extreme Widgets** brandname and trademarks have a valuable reputation and goodwill; and

WHEREAS it is **Extreme Widgets'** policy to sell certain of its consumer widgets from time to time on an Internet basis through specialty Internet distribution companies that are capable of presenting the benefits of **Extreme Widgets'** products in comparison to competing products; and

WHEREAS Account wishes to become an authorized **Extreme Widgets** Internet Account and desires to sell certain categories of **Extreme Widgets** products designated on Exhibit A (the "Products"), as the same may be modified from time to time by written amendment;

NOW, THEREFORE, IN CONSIDERATION OF the promises and mutual covenants set forth herein, **Extreme Widgets** and Account hereby agree as follows:

1. APPOINTMENT; SCOPE OF AUTHORIZATION. **Extreme Widgets** hereby appoints Account, and Account hereby accepts such appointment, as a non-exclusive authorized account for the distribution of only those Products designated on Exhibit A, including amendments thereto, subject to the terms and conditions set forth in this Agreement including Exhibits and Attachments hereto. This appointment is solely for Account's Internet business described on Exhibit A, attached hereto, and Account shall not engage in the sale or distribution of Products, retail or wholesale, at or through any other location or outlet in which Account has or hereafter acquires any direct or indirect interest without first obtaining **Extreme Widgets'** prior written approval, such as, for example, in the form of an Authorized Direct Dealer Agreement. **Extreme Widgets** reserves the absolute right to determine whether later-developed products shall be "Products" or not within the scope of Account's authorization. **Extreme Widgets** reserves the absolute right for any reason whatever to increase or decrease the number of authorized accounts at any time without notice to Account.

2. OBLIGATIONS AND WARRANTIES OF ACCOUNT. Account hereby undertakes and warrants as follows:

(a) To use Account's best efforts to promote conscientiously and diligently the distribution of Products on a full-time basis through Account's Website described on Exhibit A. Account is required to comply fully with the prohibitions set forth in subparagraphs (i) and (ii) below, unless Account has obtained **Extreme Widgets'** prior written agreement to the contrary.

(i) Account Website. Account shall not engage in the promotion, marketing

**Extreme Widgets**

or sale of Products on any Website different from that identified on Exhibit A.

- (ii) Account d/b/a. Account shall not engage in the promotion, marketing or sale or distribution of Products under any d/b/a different from that identified on Exhibit A.

(b) Account shall create a section in Account's Website which is linked externally only to **Extreme Widgets'** Website, which section shall be identified as Account's site for **Extreme Widgets** Consumer Widgets in a manner and with a name and URL (IP or Internet address) approved in advance by **Extreme Widgets** in writing (hereinafter "Account's **Extreme Widgets** Site"). Account's **Extreme Widgets** Site shall only contain images and information about the Products and how to purchase the Products from Account's Website (including "shopping cart" access through or from Account's **Extreme Widgets** Site). Account's **Extreme Widgets** Site will provide the ability to search for the Products by name, model number and product category within Account's **Extreme Widgets** Site. The Products must also be able to be located via any product or product category search tool or other locator tool provided in Account's Website. All such Product data and images may also be displayed with any competitive product offered by Account on Account's Website as part of any product category comparison or listing.

Account shall also meet the following additional criteria:

- (i) all prices for Products must be displayed in U.S. dollars only;
- (ii) Account must utilize software that will track "hits" on Account's **Extreme Widgets** Site; and
- (iii) Account must provide to **Extreme Widgets**, upon written request by **Extreme Widgets**, the full output of such software for such period of time as specified by **Extreme Widgets**, not to exceed a 6 month period.

(c) Account shall only distribute, sell or offer to sell the Products:

- (i) to bonafide retail end-users;

**M.Schwartz Comment (Account/Dealer):**

This is a similar issue to the one in the Direct Dealer Agreement: the prohibition should be against knowingly selling to people other than bona fide retail end-users.

**B.Gaffaney Response (Extreme Widgets):**

**Extreme Widgets** suggests adding the following to the end of the provision: ", where Account/Dealer knew or should have known that purchaser of Products resells consumer widgets."

- (ii) from Account's Website, unless Account has a separate written agreement with **Extreme Widgets** authorizing the sale of the Products by other means (such as an **Extreme Widgets** Direct Dealer Agreement); and
- (iii) that Account currently has in its inventory, or which have been ordered from **Extreme Widgets** and which order has been

accepted by **Extreme Widgets** as available for delivery.

(d) Account shall NOT purchase or otherwise acquire for consideration, distribute, sell, or offer for sale any **Extreme Widgets**-branded products other than the Products, unless done pursuant to a separately executed agreement such as an **Extreme Widgets** Direct Dealer Agreement. Nothing herein shall be deemed to authorize or grant Account the right to state or imply in any manner that Account is authorized to promote or sell **Extreme Widgets**-branded products other than the Products which Account is authorized to purchase and resell pursuant to this Agreement, and Account further agrees that it will not state or imply in any medium anything to the contrary with respect what **Extreme Widgets**-branded Products it is authorized to promote or sell on Account's **Extreme Widgets** Site.

(e) Account shall (i) ship the Products only to retail end-users and only to addresses within the fifty (50) states of the United States; and (ii) prominently state in Account's **Extreme Widgets** Site and at the point Account obtains customer shipping information that Products are available for sale only to residents of the United States and will only be shipped to addresses within the fifty (50) states of the United States.

(f) Account shall, for each model of the Products referenced in Account's Website, fully describe the features and benefits of each and provide a complete list of each model's specifications (which may be copied from **Extreme Widgets'** Website) and display a picture of each model of the Products offered or advertised by Account on Account's **Extreme Widgets** site if there is a picture of such model on **Extreme Widgets'** Website or if such a picture is otherwise made available to the Account by **Extreme Widgets**, provided, however, that the right to make and use all such copies and all such pictures of **Extreme Widgets** Products terminates upon the expiration or termination of this Agreement and Account hereby acknowledges and agrees that it has no ownership or other property interest in or to such pictures and specifications.

(g) Account shall cause Account's **Extreme Widgets** Site to meet the graphical, picture quality and resolution standards announced by **Extreme Widgets** from time to time within thirty (30) days of such announcements.

(h) Account shall display prominently on the first page of Account's Website (or on such other location within Account's Website as agreed in writing by **Extreme Widgets**) and on Account's **Extreme Widgets** Site any icon or image or graphic display provided by **Extreme Widgets** that signifies that Account is a **Extreme Widgets** authorized Internet Account for Consumer Widgets; provided further, however, that Account may not make any reference in Account's Website or in any advertising with regard to being an authorized **Extreme Widgets** Account for any **Extreme Widgets**-branded products other than the Products, which shall be identified in a clear and conspicuous manner.

(i) Account shall not, without **Extreme Widgets'** prior written approval, use, other than in Account's Website, or authorize others to use; (i) the **Extreme Widgets** name; (ii) any **Extreme Widgets** trademark or logo; or, (iii) any Product image, Product description, Product name or other Product reference anywhere on or in the Internet, including, without limitation on the foregoing, any internet marketing promotion, or any advertisement, including metatags, mass distribution email or other existing or yet to be created methods or systems.

Further, if Account sponsors or operates an on-line affiliate/associate program (paying anything of value to another website owner or operator for sales made to customers linking from or referred from such other person's or entity's website), Account will prohibit, by written agreement, such third party affiliate/associate from using; (i) the **Extreme Widgets** name; (ii) any **Extreme Widgets** trademark or logo; or, (iii) any Product image, Product description, Product name or other Product reference anywhere on or in such third party's website or in any advertising in any medium for same and if such third party breaches such agreement, Account will promptly cancel any such affiliate's right to receive anything of value from Account in relation to Account's sales of the Products and will terminate its relationship to said affiliate with regard to the Products.

**M.Schwartz Comment (Account/Dealer):**

From a practical standpoint, while this provision is quite understandable, it is also a bit austere. We plan to do a great deal of promotional work, and it would be very burdensome if we had to acquire written consent for every promotional piece we seek to disseminate. Can **Extreme Widgets** provide **specific guidelines** that we agree to follow for electronic promotions, postcards, mailers and banners? We anticipate that such guidelines would govern use of **Extreme Widgets'** marks in connection with promotional pieces that are exclusively dedicated to **Extreme Widgets**, and we would of course agree to acquire written consent for any advertising that simultaneously promotes sales of any competing widget products. However, we are seeking to expedite our promotional measures because oftentimes we work with narrow windows of opportunity.

**B.Gaffaney Response (Extreme Widgets):**

Unfortunately, at this time no general guidelines have been developed for accounts/dealers. **Extreme Widgets** suggests that Account/Dealer submits with as much detail as possible its proposed marketing plans (specific e-promotions, mailers, banners, etc.; how it will be disseminated; Products to be promoted; other **Extreme Widgets** content requested (logo, product images, product descriptions, etc.); general ad layout; etc.). **Extreme Widgets** can respond to Account/Dealer's proposed marketing plans by saying, for instance, that certain types of ads are okay within defined parameters (i.e., categorical approval). As you can understand, we have a strong interest in controlling how accounts/dealers market the **Extreme Widgets** brand/image, even in non-exclusive promotional pieces.

(j) Account shall provide at least the following customer services:

(i) a toll-free customer telephone number to answer customer inquiries regarding the Products, their use and related matters, for at least ten hours a

day, six days a week, which is adequately staffed with enough individuals to meet anticipated demand and who, in the aggregate, have been trained in the operation, features and benefits of all Products then offered on Account's Website;

(ii) a clear and conspicuous statement of the Account's privacy and usage policies with regard to all customer information gathered via Account's Website;

(iii) a secure means of ordering Product(s) online, including a prominent statement of the level of security provided for such transactions displayed at least on the ordering page(s) of Account's Website;

(iv) order status information (acceptance or rejection) and product availability status within twelve hours of the submission of each order and, if not immediately available, provide the customer with the option of canceling the order;

(v) shipment of the Product so ordered within forty-eight hours of order acceptance;

(vi) use of one or more reliable delivery service providers capable of proper and safe delivery of the Products to all locations within the United States;

(vii) a written Product return policy, developed by Account, but approved in advance by **Extreme Widgets**, which policy is prominently displayed on Account's Website.

(viii) in addition for Car Widgets Products:

(aa) provide information for Fit/No-Fit, either directly on Account's **Extreme Widgets** Site, or by authorized link to another web site, which link and site has been approved in advance in writing by **Extreme Widgets**;

(bb) maintain adequate inventories of kits and installation accessories necessary for installation of Products in all vehicles for the most recent 10 model years; and

(cc) provide adequate installation support for customers, at no charge to the customer (via toll free telephone, Account's Web Site, or other methods approved in advance in writing by **Extreme Widgets**).

Account may not deviate from the foregoing requirements without prior written approval of **Extreme Widgets**.

(k) Account shall not conduct auctions of the Products nor sell the Product by auction or substantially similar means from Account's Website or through any third-party auction site or facility.

(l) As a knowledgeable sales and support staff is needed to provide information concerning the Products to the end-user customers, Account shall, from time to time, permit a representative of **Extreme Widgets** to provide product training at a mutually agreeable time and place, and shall cause its sales staff to attend said product training. **Extreme Widgets** and Account shall each bear its own costs related to such training.

(m) Account shall submit to **Extreme Widgets** for **Extreme Widgets'** review, Account's **Extreme Widgets** Site and any pages of Account's Website, referencing, depicting or describing the Products or Account's relationship to **Extreme Widgets**, in advance of initially placing said pages on-line to the general public. Any changes to such approved pages thereafter must be submitted to **Extreme Widgets** for review and approval unless the changes made by Account are only to incorporate, without change, material, data or pictures supplied to the Account by **Extreme Widgets**, in which event no submission for review and approval is required. In all cases in which this sub-article (m) requires review and approval of content by **Extreme Widgets**, **Extreme Widgets'** review and approval shall not be unreasonably withheld or delayed and shall be limited to a review of (i) proper usage of **Extreme Widgets** trademarks, logos and trade names; (ii) compliance with the graphical picture quality resolution standard referred to in subarticle 2(g) above; (iii) product performance claims; (iv) verification of offering of only the Products authorized hereby; and (v) any language or depictions which in the sole opinion of **Extreme Widgets** is potentially injurious to **Extreme Widgets'** good name, image or reputation.

(n) Account shall keep records of:

(i) all Authorized Product transactions with customers for at least three years, as well as archival records of all Account Website pages for at least ninety days, and make such records available to **Extreme Widgets** in the event of **Extreme Widgets**/Account or **Extreme Widgets**/customer disputes. At **Extreme Widgets'** request, Account agrees to work with **Extreme Widgets** to resolve customer complaints and problems; and

(ii) all sales of products sold via Account's Website by category and model, and within three (3) business days after the end of each calendar quarter Account will provide **Extreme Widgets** with a written report of the sales (without sales price data) of Products by category and model for such immediately preceding quarter.

(o) Account shall immediately forward to **Extreme Widgets** information concerning all charges, complaints, or claims of damage relating to any of the Products that may come to Account's attention.

(p) Account shall:

(i) not separate any software sold or bundled/package with any Product(s), from such Product(s) or sell, license or distribute such software on a standalone basis;

(ii) only distribute such software on those terms and conditions as the **Extreme Widgets** may, from time to time, require; and

(iii) not remove, translate or modify the contents of documentation of or related to such software, including, without limitation, any end user license agreements or warranty statements.

Without in any manner prejudicing the right of **Extreme Widgets** to claim that any other breach or default of this Agreement on the part of Account constitutes a material breach or default, it is understood and agreed that the failure of Account to comply with the provisions of the foregoing subdivisions of this Article shall constitute a material breach and default of this Agreement on the part of Account.

For the purpose of verifying compliance by Account with the provisions of the foregoing subdivisions of this Article, Account agrees that **Extreme Widgets** and its representatives will be permitted full access to, and will be permitted to make copies of or abstracts from, the books and records of Account relating to Products sold by **Extreme Widgets** to Account and will be permitted to audit such books and records at reasonable intervals. Pending the completion of any such audit, **Extreme Widgets** shall have the right to delay shipments of Product(s) to Account.

**M.Schwartz Comment (Account/Dealer):**

The audits should be limited to once per year, and be conducted at the sole expense of **Extreme Widgets**. A confidentiality provision similar or identical to the one proposed for the Account/Dealer agreement should apply to and protect information gleaned from such audits.

**B.Gaffaney Response (Extreme Widgets):**

**Extreme Widgets** is okay with addition of a two-way NDA as discussed in Direct Dealer Agreement. **Extreme Widgets** is also okay with language stating that it will pay for its own auditing expenses (but not Account/Dealer's), however, in the event that the audit reveals a breach of this provision of the Agreement by Account/Dealer, **Extreme Widgets** will be entitled to recover from Account/Dealer its reasonable costs incurred in conducting the audit.

(q) **Authorized Product Sources.** To order and obtain its requirements of Products only from **Extreme Widgets** or the **Extreme Widgets** distributor authorized by **Extreme Widgets** in writing to serve Account. Products obtained from non-authorized sources may not carry warranties valid in the United States, may not be UL approved, and may not be FCC-certified, and the distribution of Products obtained from non-authorized sources may severely detract from the quality, image, and goodwill of **Extreme Widgets**, its Products and its authorized Accounts.

(r) **No Retail Storefront.** To distribute, sell and market **Extreme Widgets®** Products only through approved Internet website(s). If Account wishes to sell Products through a retail storefront, it must first execute an Authorized Direct Dealer Agreement with **Extreme**



**Widgets.**

(s) Inventory. To maintain sufficient inventory during term of this agreement to meet current and anticipated demands for Products. Account shall purchase and stock such number of SKUs within each authorized Product Category as **Extreme Widgets** determines, from time to time, is adequate to represent the full range of products within the authorized Product Category.

**M.Schwartz Comment (Account/Dealer):**

**Extreme Widgets** should not have sole discretion to determine stocking purchases of Account/Dealer. Sales histories and/or other objective data should be used for this determination.

**B.Gaffaney Response (Extreme Widgets):**

**Extreme Widgets** is okay with adding qualification that it must "reasonably determine based on objective data" what is sufficient inventory.

(t) Personnel. To maintain sufficient personnel to sell and distribute Products to the satisfaction of customers. Account agrees to maintain information on authorized **Extreme Widgets** service centers, and to provide such information to customers in lieu of providing service directly.

(u) Financial Stability of Account. To maintain and employ in connection with Account's business under this Agreement such working capital and net worth as may be required in the reasonable opinion of **Extreme Widgets** to enable Account to carry out and perform all of Account's obligations and responsibilities under this Agreement and, at any reasonable time and from time to time upon request by **Extreme Widgets**, to furnish such financial reports and other financial data as **Extreme Widgets** may reasonably request as necessary to determine Account's financial position. Account has represented to **Extreme Widgets** as an inducement to **Extreme Widgets** for entering into this Agreement that the financial statements of Account provided to **Extreme Widgets** as part of its application for this Account Agreement are complete and accurate, and that Account is not only solvent, but is in good, substantial and stable financial condition. Account does not possess any information which would indicate it will not continue to be in good, substantial financial condition in the future, and Account warrants that it will immediately advise **Extreme Widgets** in the event of any material adverse change in Account's financial condition. Account further acknowledges that its financial statements form part of the basis (together with personal guarantees, letters of credit and other forms of security) on which **Extreme Widgets** will establish Account's open account limits and payment terms, and that such terms and limits, but not the guarantees, letters of credit and other forms of security, form an integral part of this Agreement.

**M.Schwartz Comment (Account/Dealer):**

Once again, a confidentiality provision similar or identical to the one proposed for the Account/Dealer agreement should apply to and protect information divulged pursuant to this provision.

**B.Gaffaney Response (Extreme Widgets):**

**Extreme Widgets** is okay with addition of a two-way NDA as

discussed in Direct Dealer Agreement.

(v) Customer Demands. To have in place a system, satisfactory to **Extreme Widgets**, that will resolve customer complaints to the satisfaction of customers, to make reasonable efforts to handle to the satisfaction of the customer all matters relating to the Products, and to report promptly to **Extreme Widgets** each charge, complaint or claim received by Account from customers relating to any Product.

**M.Schwartz Comment (Account/Dealer):**

Reporting burden should be limited to material complaints/claims.

**B.Gaffaney Response (Extreme Widgets):**

**Extreme Widgets** needs to know immediately about all complaints or product returns involving health or safety issues. In addition, **Extreme Widgets** needs to know immediately about repetitive complaints (above, for example, 1.5% recurrence) for quality control purposes. Other types of complaints by end-users received by Account/Dealer can be reported to **Extreme Widgets** on a quarterly or semi-annual basis.

(w) Car Widget Warranty Obligations. With respect to car widgets, to provide consumers making warranty claims with new car widgets in accordance with the terms of **Extreme Widgets'** Car Widgets Warranty to consumers. Account warrants to **Extreme Widgets** that it will cooperate fully with consumers and with **Extreme Widgets** in implementing the warranty exchange program, and that it will only exchange car widgets that have a manufacturing defect and are covered by the **Extreme Widgets** warranty in effect at the time of retail sale.

(x) Extreme Widgets and Account Reputation. To conduct business in a manner that will reflect favorably at all times on Account, **Extreme Widgets** and **Extreme Widgets**® Products, and the good name, goodwill and reputation of **Extreme Widgets**. Account shall not itself or with others participate in any illegal, deceptive, misleading or unethical advertising or other practices, including but not limited to use of illegal "loss leader" or "bait and switch" techniques that are or might be detrimental to **Extreme Widgets**, **Extreme Widgets**® Products, or the public. Account shall indemnify and save **Extreme Widgets** harmless from all liability, loss, damage or injury to itself or its good reputation, including but not limited to reasonable attorneys' fees and litigation costs that arise in any manner out of violation of this subparagraph.

(y) Compliance. To comply with all applicable laws and with the terms of this Agreement in the distribution of Products including, without limitation, all record keeping and governmental reporting requirements. Account further agrees to permit **Extreme Widgets** reasonable access to all records of its distribution of Products (excluding information regarding Account's prices), upon two (2) days notice from **Extreme Widgets**, to enable **Extreme Widgets** to fulfill any reporting requirement imposed by law or regulation, and to monitor Account's compliance with its obligations under this Agreement. Account and **Extreme**

**Widgets** acknowledge the importance of compliance with the letter and spirit of United States export control laws and regulations, and Account agrees by the purchase of Products from **Extreme Widgets** to conform and abide by the export laws and regulations of the United States. Account further agrees that if it discards any items received from **Extreme Widgets** which are proscribed by such laws and regulations, it will do so in a manner consistent with such laws and regulations.

(z) Retail Business.

- (i) Not to distribute Products to any account, group, organization, or individual where Account knows, or should know, that the recipient's purpose is to redistribute such Products, without the prior written authorization of the Vice President of Sales, or other designated officer of **Extreme Widgets**.

**M.Schwartz Comment (Account/Dealer):**

Again, Account/Dealer should be prohibited from knowingly selling products to resellers.

**B.Gaffaney Response (Extreme Widgets):**

**Extreme Widgets** cannot agree to a reporting threshold below "knows or should know". A "knows" threshold alone is too low, as it would allow Account/Dealer to be intentionally blind to some evidence, even though a reasonable account/dealer would be on notice that the purchaser resells products.

- (ii) If products originally shipped to Account are located or identified by **Extreme Widgets** as available for distribution by any unauthorized source, such location or identification by **Extreme Widgets** shall be presumptive evidence of violation by Account of this subparagraph 2(z), and shall be grounds for termination.

**M.Schwartz Comment (Account/Dealer):**

This should only be "presumptive evidence" if the account has been identified as a reseller by **Extreme Widgets** to Account/Dealer before it has shipped these products.

**B.Gaffaney Response (Extreme Widgets):**

**Extreme Widgets** wants to make sure that Account/Dealer is not making "obvious sale" (i.e., a reasonable dealer would be on notice) to an entity that resells such products to end-users. An example of "obvious sale" would be to a person or entity Dealer knew (or should have known) to operate a website set up to sell widgets to consumers.

- (iii) Compliance with Regulations: To comply with all statutes, regulations and procedures of the United States Postal Service, the Federal Trade Commission, and other federal and state laws regarding the sale of

products by mail or through the Internet.

(zz) Distribution of Consumer Product. Not to distribute Products identified for non-commercial consumer use to any individual or establishment that intends to use such Products commercially, and to make reasonable efforts to determine the manner in which individuals or establishments intend to use Products.

**M.Schwartz Comment (Account/Dealer):**

This language is fairly problematic because Account/Dealer should not be burdened with an obligation to conduct investigations of all of its customers. We need to come up with standard, minimal and easy investigatory practices that are triggered only upon the discovery of information that would lead the average person to suspect a reseller operation is involved with a particular purchase.

**B.Gaffaney Response (Extreme Widgets):**

**Extreme Widgets** is agreeable to certain investigatory practices that are triggered upon the discovery of information that would lead the average account/dealer to suspect a reseller operation is involved with a particular purchase.

(zzz) Indemnity and Insurance. Account shall defend and indemnify **Extreme Widgets** from and against any claim arising out of or based on a breach of Account's obligations pursuant to this Agreement. Account shall maintain comprehensive general liability insurance with limits not less than two million dollars (\$2,000,000) combined single limit for bodily injury and property damage from a reputable insurer licensed in all states in which Account conducts business, and shall name **Extreme Widgets** as an additional insured. Such insurance does not limit Account's obligations under this Agreement including without limitation Account's obligation to indemnify **Extreme Widgets**.

**M.Schwartz Comment (Account/Dealer):**

There should be an indemnity obligation on the part of **Extreme Widgets** that covers product liability claims as well as intellectual property claims regarding Account/Dealer's permitted uses of **Extreme Widgets'** trademarks and any software embedded in sold products.

**B.Gaffaney Response (Extreme Widgets):**

Okay in general concept but **Extreme Widgets** needs to have usual carve outs for unauthorized product modifications and false advertisements/representations about product. In addition, **Extreme Widgets** needs indemnity from Dealers for the same. Also, need qualifier saying that a third party must bring or threaten to bring lawsuit to trigger indemnity liability/obligations.



### 3. ACCOUNT'S ADVERTISED AND RETAIL PRICES.

(a) Minimum Advertised Prices. Account represents and warrants that it has received the **Extreme Widgets** Minimum Advertised Price ("MAP") Policy, the MAP advertising guidelines and other MAP information. Account represents and warrants that it has read and understood the foregoing MAP Policy, the MAP advertising guidelines and other information. The MAP Policy and the MAP advertising guidelines are for advertised prices only and do NOT apply to actual resale prices which, as set forth below, are set unilaterally by Account. Account acknowledges that **Extreme Widgets** enforces its MAP Policy. Account acknowledges that **Extreme Widgets** will impose penalties up to and including termination for violation of the MAP Policy.

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Account Signature

(b) Retail Prices. Account is free to set its own retail prices unilaterally. No employee or representative of **Extreme Widgets** has any authority to tell Account what its prices must be nor to inhibit in any way Account's independent pricing decisions. **Extreme Widgets** will not give any favorable treatment to Account for its selection of prices, nor will it give any unfavorable treatment to Account for its selection of prices, unless such prices are part of the conduct prohibited by subparagraphs 2(x) or 2(z) above. In the event Account believes any employee or representative of **Extreme Widgets** has violated this Paragraph 3, Account warrants and represents that Account will immediately notify **Extreme Widgets** in writing of the particulars of any such violation (such notice to be sent by first class mail to the Legal Department at the **Extreme Widgets** address set forth above).

### 4. TERMS AND TITLE.

(a) Payment. Payment for each Product delivered to Account shall be in accordance with the invoice therefor, notwithstanding any documents from Account to the contrary. A service charge equal to the lesser of 2% per month or the maximum amount permitted by law shall be assessed on each invoice remaining unpaid 30 days after its due date and Account shall be responsible for all costs and expenses, including attorneys' fees, incurred by **Extreme Widgets** in connection with collection of any delinquent invoice. **Extreme Widgets** may make partial shipments, and reserves the right to reject all or any portion of any order and ship only the balance of such order not rejected. Each shipment shall constitute a separate transaction obligating Account to pay therefor. If Account at any time fails to pay any invoice in accordance with its terms (as modified by any **Extreme Widgets** promotional program applied to such invoice), then **Extreme Widgets** at its option may by written notice to Account accelerate and declare immediately due and payable all sums owed by Account to **Extreme Widgets**, notwithstanding any credit terms previously extended by **Extreme Widgets** to Account, and service charges shall accrue and be payable on the outstanding accelerated balances until Account's entire indebtedness to **Extreme Widgets** is paid. Acceleration of payments pursuant to this provision shall not constitute termination or breach of this Agreement by **Extreme Widgets**. **Extreme Widgets** may also change its credit terms, or suspend Account's credit, until all amounts owing **Extreme Widgets** have been paid.

(b) Title and Risk of Loss. All deliveries of Products shall be FCA (Free Carrier;

see *Incoterms*, 2000) **Extreme Widgets'** warehouse. Title to all Products, except Software, shall pass to Account hereunder, and all risk of loss or damage as to all Products shall pass to Account, or to such financing institution or party as may have been designated to **Extreme Widgets** by Account, upon delivery by **Extreme Widgets** of such Products to the carrier or to the Account, whichever occurs first, regardless of any provision for payment of freight or insurance by **Extreme Widgets** or the form of the shipping documents.

#### M.Schwartz Comment (Account/Dealer):

If **Extreme Widgets** chooses the carrier, the risk of loss should remain with **Extreme Widgets** until carrier unloads the product.

#### B.Gaffaney Response (Extreme Widgets):

**Extreme Widgets** does not choose the carrier. Rather, FCA obligates Account/Dealer to arrange for its own carrier from **Extreme Widgets'** warehouse.

(c) State and Local Taxes. Account represents and warrants that all Products purchased from **Extreme Widgets** are for resale or distribution in the ordinary course of Account's business, that Account has complied and will comply with applicable state and local laws relating to the collection and/or payment by Account of sales, use and similar taxes applicable to all such transactions and agrees to indemnify and to hold **Extreme Widgets** harmless from all costs whatsoever, including but not limited to reasonable attorneys' fees and litigation costs, for breach of this warranty and/or failure to so collect or pay any of the aforementioned taxes. Account will be charged sales tax by **Extreme Widgets** unless it has on file with **Extreme Widgets** a valid Resale Certificate.

### 5. ORDERS.

(a) Acceptance. All orders by Account for Products shall be subject to acceptance by **Extreme Widgets** at the appropriate **Extreme Widgets** place of business at the time received. All purchase orders received by **Extreme Widgets** shall only be accepted and effective as to the type and quantity of Products to be purchased by Account. No other terms contained in any purchase order shall be part of this Agreement or of any force or effect. **Extreme Widgets** shall use its best efforts to make prompt deliveries of orders so accepted, but **Extreme Widgets** shall not be liable for any damages, direct, consequential, special, incidental or otherwise, to Account or any other person for **Extreme Widgets'** failure to fill any order or orders, or for any delay in delivery, or for any error in filling any orders for any reason whatsoever. Should orders for Products exceed inventory, **Extreme Widgets** may allocate available inventory among any or all of its customers, including Account, in such manner as **Extreme Widgets** in its sole discretion deems appropriate.

(b) Discontinuance. **Extreme Widgets** shall have the right to discontinue the sale, distribution, and/or availability of any or all Products at any time without further notice and without liability of any kind to Account or any other person. **Extreme Widgets** is at liberty to change its service policies, its financial requirements and the design of its Products at any time without notice, and Account shall have no claim against **Extreme Widgets** for damages by reason of such changes.

(c) Cancellation. In addition to any rights which **Extreme Widgets** might have under paragraph 7(c) of this Agreement, **Extreme Widgets** shall have the right to cancel any orders placed by Account or to refuse or to delay the shipment thereof, if Account (i) shall fail to meet any payment as provided for in subparagraph 4 of this Agreement or under the terms of payment set forth in any schedule agreed to by **Extreme Widgets** with Account, (ii) shall fail to meet the credit, financial or other obligations specified in paragraph 2, or (iii) Account has been notified of **Extreme Widgets'** intention not to renew Account pursuant to paragraph 7(c) hereof. No such cancellation, refusal or delay shall be deemed a termination or breach of this Agreement by **Extreme Widgets**.

#### 6. PROPRIETARY RIGHTS.

(a) Trademarks and Trade Names. Account concedes and recognizes the rights of **Extreme Widgets** to its trade names and trademarks, and acknowledges that Account has no rights to the trademark or trade names owned, used or claimed now or in the future by **Extreme Widgets** or in the applicable trademarks or trade names used on or affixed to any Product. Subject to the provisions of paragraphs 6 and 7(d) of this Agreement, Account may refer to applicable trademarks or trade names in promoting the distribution of Products as long as such reference complies with **Extreme Widgets'** rules and policies, communicated to Account by **Extreme Widgets**, governing the use of any such trademarks or trade names.

#### (b) Copyright.

- (i) Account shall not acquire ownership of any software Product of which it acquires possession pursuant to this Agreement. Account acquires only the right to possess, and to transfer possession of, software Products acquired pursuant to this Agreement, in accordance with the terms of license set forth herein or in the case of bundled software in accordance with the terms of the license set forth therein.
- (ii) Account shall not represent to any consumer that Account is the owner of any software Product acquired hereunder or that it has the right or power to transfer ownership of any such software Product to any such consumer, or hold itself out to any consumer as having such ownership, right or power.
- (iii) Except to the extent expressly provided in paragraph (d) herein, **Extreme Widgets** reserves to itself as against Account and Account's sublicensees all of the exclusive rights set forth in Section 106 of the Copyright Act of 1976, 17 U.S.C. § 106, which Section is incorporated herein by reference, and Account concedes and recognizes such copyright interests on the part of **Extreme Widgets**.
- (iv) Account shall not alter or change in any manner the packaging of software Products or the labeling of software Products or their packages.

(c) Unauthorized Use of Software Products. Account will not alter, reverse-engineer, decompile, disassemble, rent, electronically distribute (including, but not limited to telephone, cable or broadcast signals), or market by interactive cable, remote processing services, micro-main frame linkups or multi-user local or wide area network machines any software Products, nor will Account reproduce software Products.

(d) License. **Extreme Widgets** hereby grants to Account a sublicense, subject to the terms and conditions of this Agreement, in the software Products delivered to Account hereunder, for the sole use and purpose of Account for distributing such software Products to consumers through its Internet business pursuant to a perpetual sublicense to such consumers, for the sole and exclusive purpose of non-commercial home exhibition by such consumers of such software Products.

#### 7. DURATION AND TERMINATION.

- (a) (i) Probationary Term. Account acknowledges that the initial authorization granted by this Agreement is probationary in nature, and is intended to allow both Account and **Extreme Widgets** to determine if the sale of Products via Account's **Extreme Widgets** Site can be accomplished in accordance with all of the terms and conditions of this Agreement. Therefore, either Account or **Extreme Widgets** can terminate this Agreement, provided such notice of termination is given, in writing, within 90 days of the date that Account first begins to solicit Internet purchases for Products from Account's **Extreme Widgets** Site. Termination of this Agreement pursuant to this Paragraph is without cause, and Account expressly acknowledges that no representations have been made by **Extreme Widgets** that **Extreme Widgets** will permit this Agreement to extend beyond the Probationary Term.
- (ii) Term. The initial term of this Agreement shall commence from the date of acceptance by **Extreme Widgets** in accordance with paragraph 13. Assuming that neither Party has provided notice of termination as permitted under Paragraph 7(a)(i), this Agreement shall continue in force until December 31<sup>st</sup> of the same calendar year that the initial term commenced.
- (b) Termination by Account. Account may terminate this Agreement at will at any time, by written notice to **Extreme Widgets** not less than ten (10) days prior to the effective date of such notice.

(c) Termination by **Extreme Widgets**.

- (i) Notwithstanding paragraph 7(a), this Agreement shall not renew if **Extreme Widgets** notifies Account in writing of **Extreme Widgets'** intention not to renew Account. Such notice, to be effective, must be given to Account not later than December 31st. Upon notice of nonrenewal, **Extreme Widgets** may cancel orders or alter its terms of sale or distribution including credit terms, and take such other action as may be consistent with the nonrenewal of Seller as an authorized **Extreme Widgets** fulfillment company.
- (ii) **Extreme Widgets** may terminate this Agreement by written notice to Account in the event that (aa) Account violates any of the obligations set forth in paragraphs 1, 2, 4, 6, 10, or 15; (bb) control of Account is acquired, directly or indirectly, by a third party, or Account is merged with a third party; or (cc) other good cause is shown. Such notice of termination is effective in accordance with the provisions of Paragraph 9, below.
- (iii) In the event Account makes no purchases of Products for any 120 consecutive day period, (or in the case of software Products, takes no delivery for any 120 consecutive day period) **Extreme Widgets** will notify Account in writing of this fact, and Account will have 60 days within which to place an order with **Extreme Widgets** for Products. In the event no order is placed within the 60-day period, Account may be terminated without further notice or action, and may not thereafter obtain Products from **Extreme Widgets**.
- (iv) At the option of **Extreme Widgets**, this Agreement shall terminate immediately if (aa) a receiver is appointed for Account or its property; (bb) Account becomes insolvent or unable to pay its debts as they mature or ceases to pay its debts as they mature in the ordinary course of business, or makes an assignment for the benefit of creditors; (cc) any proceedings are commenced by or for Account under any bankruptcy, insolvency or debtors' relief law; (dd) any proceedings are commenced against Account under any bankruptcy, insolvency, or debtors' relief law, and such proceedings have not been vacated or set aside within 60 days from the date of commencement thereof; or (ee) Account is liquidated or dissolved.

(d) Termination/Expiration Accounting. Notwithstanding any prior agreements to the contrary, upon termination or expiration of this Agreement: (i) all amounts payable by Account to **Extreme Widgets** shall survive such termination and become immediately due and payable; (ii) **Extreme Widgets** shall have the option for thirty (30) days after the effective date of termination to repurchase or reacquire from Account any or all Products in Account's inventory at net prices at which such Products were originally invoiced to Account, less any allowances, discounts or rebates, upon the condition that **Extreme Widgets** pay all transportation and other costs connected with shipping such Products to **Extreme Widgets**, it being understood and agreed that promptly after receipt of notice of termination Account shall furnish **Extreme**

**Widgets** with an inventory of such Products and that within ten (10) days after receipt of such inventory **Extreme Widgets** shall notify Account in writing whether or not **Extreme Widgets** shall exercise its option; and (iii) Account shall cease to use any of **Extreme Widgets'** trademarks or trade names in connection with any Account promotion or advertising of any Products.

(e) Continuing Obligations. Account's obligations under paragraphs 2, 4(a), 4(c), 6, 7(d), 10 and 15 shall survive termination or expiration of this Agreement.

**M.Schwartz Comment (Account/Dealer):**

Confidentiality and indemnification obligations should survive any termination of the agreement, and Paragraph 2 should survive only as to products remaining in inventory that Account/Dealer will be selling through.

**B.Gaffaney Response (Extreme Widgets):**

Agreed as to confidentiality and indemnification obligations. With respect to Paragraph 2, **Extreme Widgets** agrees that the selling-related, inventory-related, and financial-condition-related provisions of Paragraph 2 should not survive, however, there are many provisions that need to survive sell-through that relate to archival requirements, reporting of complaints, customer service obligations, etc.

8. ADVERTISING. Prices for Products displayed on Account's Website are considered by **Extreme Widgets** to constitute "advertising" within the meaning of **Extreme Widgets'** MAP Program, a copy of which has been separately provided by **Extreme Widgets** to Account.

9. NOTICES. All notices required or desired to be given under this Agreement shall be in writing and shall be delivered: in person; by first class mail, postage pre-paid; by any private courier service providing for proof of receipt; by facsimile with transmission receipt, at the addresses set forth in this Agreement, or at such other addresses as may be designated hereafter by the parties in writing. Notice is deemed effective upon receipt if delivered in person or, if mailed, upon the date deposited in the United States mail, or otherwise as of the date of delivery shown on the receipt.

10. NON-ASSIGNMENT. Account is appointed an authorized **Extreme Widgets** Account by reason of **Extreme Widgets'** confidence in Account, which appointment is personal in nature. This Agreement shall not be assignable by Account, nor shall any of the rights granted hereunder be assignable in any manner whatsoever, without the prior written consent of **Extreme Widgets**. **Extreme Widgets** may, at any time and without the consent of Account, assign all or any part of this Agreement to any affiliated **Extreme Widgets**.

**M.Schwartz Comment (Account/Dealer):**

Account/Dealer may assign to an entity over which it maintains 51% or more control and/or ownership, and in all other cases, the consent for an assignment shall not be unreasonably

withheld.

**B.Gaffaney Response (Extreme Widgets):**

Not agreeable because **Extreme Widgets** needs control who is selling its products (product/brand image).

11. COMPLETE AGREEMENT. The terms of this Agreement, including all exhibits hereto, are intended by the parties as a final expression of their agreement with respect to such terms as are included herein. All prior and contemporaneous negotiations, correspondence, memoranda, or agreements, whether oral or written, are merged herein. No modification of any of the provisions of this Agreement shall be binding on **Extreme Widgets** unless such modification is in writing and signed by a duly authorized representative of **Extreme Widgets**. No terms contained in any memoranda, correspondence, proposed agreement or offer, including any terms contained in Purchase Orders sent by Account to **Extreme Widgets** pursuant to paragraph 5, above, shall be binding or of any effect, or shall be considered additional terms of this agreement, unless approved and accepted by **Extreme Widgets** pursuant to the terms of this paragraph. No course of dealing, usage of trade or course of performance shall modify or alter the terms of this agreement, nor shall such course of dealing, usage of trade or course of performance constitute an additional term hereof or become a part hereof.

\_\_\_\_\_  
Account Signature

12. DISCLAIMER OF PARTNERSHIP OR AGENCY. Account and **Extreme Widgets** are independent contractors and neither shall represent itself as having any power to bind the other or to assume or to create any obligation or responsibility, express or implied, on behalf of the other party to this agreement. Nothing contained in this Agreement shall be deemed to establish a relationship of principal and agent between **Extreme Widgets** and Account, nor any of their agents or employees for any purpose whatsoever. This Agreement shall not be construed as constituting Account and **Extreme Widgets** as partners, or to create any other form of legal association or arrangement which would impose liability upon one party for the act or failure to act of any other party.

13. EFFECTIVENESS OF AGREEMENT. This Agreement shall become effective only upon its execution and acceptance by the Executive Vice President or Senior Vice President Sales for **Extreme Widgets** at the Executive Offices of **Extreme Widgets, Inc.**, Los Angeles County, California.

14. GOVERNING LAW AND LITIGATION. THIS AGREEMENT SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA WITHOUT REGARD TO CALIFORNIA'S CONFLICTS OF LAW PRINCIPLES. IN THE EVENT OF ANY DISPUTE OR CONTROVERSY ARISING UNDER THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREIN, THE PARTIES MUTUALLY CONSENT TO THE JURISDICTION OF THE COURTS OF THE STATE OF CALIFORNIA, AND OF THE FEDERAL DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, AND AGREE THAT ANY AND ALL PROCESS DIRECTED TO ANY OF THEM IN ANY SUCH LITIGATION MAY BE SERVED OUTSIDE THE STATE OF CALIFORNIA WITH THE SAME FORCE AND EFFECT AS IF SERVICE HAD BEEN MADE WITHIN THE STATE OF CALIFORNIA. THE PARTIES FURTHER AGREE THAT VENUE

FOR LITIGATION ARISING UNDER THIS AGREEMENT OR FROM TRANSACTIONS CONTEMPLATED HEREIN SHALL BE EXCLUSIVELY IN THE CENTRAL DISTRICT OF CALIFORNIA, OR EQUIVALENT STATE COURT, IN RECOGNITION OF THE FACT THAT THIS AGREEMENT BY ITS TERMS CAN BE ACCEPTED ONLY IN CALIFORNIA, THE AGREEMENT IS GOVERNED BY THE LAWS OF CALIFORNIA, AND ORDERS FOR PRODUCTS MAY BE ACCEPTED BY **Extreme Widgets** ONLY IN CALIFORNIA. IN THE EVENT OF ANY SUIT OR OTHER PROCEEDING WITH RESPECT TO THE SUBJECT MATTER HEREOF, THE PREVAILING PARTY (WHICH SHALL BE DEEMED TO BE THE PARTY ENTITLED TO RECOVER COSTS OF SUIT, WHETHER OR NOT THE SUIT PROCEEDS TO FINAL JUDGMENT) SHALL BE ENTITLED TO RECOVER REASONABLE ATTORNEYS' FEES IN ADDITION TO SUCH OTHER RELIEF AS THE COURT MAY AWARD. IN THE EVENT ANY PROVISION OF THIS AGREEMENT OR THE APPLICABILITY OF ANY PROVISION TO **Extreme Widgets** OR ACCOUNT SHALL BE HELD BY A COURT OF COMPETENT JURISDICTION TO BE CONTRARY TO APPLICABLE STATE OR FEDERAL LAW, THE REMAINING PROVISIONS OF THIS AGREEMENT SHALL CONTINUE IN FULL FORCE AND EFFECT.

15. WARRANTIES. Account shall, at all times, comply with the provisions of the Magnuson-Moss Warranty Act and regulations thereunder, and comparable state laws and regulations relating to delivery of warranties to consumers. Account ACKNOWLEDGES THAT NO WARRANTIES WITH RESPECT TO PRODUCTS ARE CREATED BY THIS AGREEMENT, AND **Extreme Widgets** HEREBY DISCLAIMS IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

16. LIMITATION OF LIABILITY. Neither party hereto shall be liable to the other party for compensation or reimbursement or damages on account of present or prospective profits, expenditures, investments or commitments, whether made in the establishment, development or maintenance of the business goodwill of either party or for any other reason whatsoever. With respect to any order, the performance thereof, or the Products covered thereby, **Extreme Widgets'** liability for negligence or otherwise shall not exceed Account's purchase price of the items pertaining thereto. In no event shall **Extreme Widgets** be liable to Account for special, incidental, or consequential damages. Without limiting the foregoing, Account acknowledges that **Extreme Widgets**, under no circumstances, shall be liable to Account for Account's costs incurred in developing Account's **Extreme Widgets** Site, even if **Extreme Widgets** terminates this Agreement within the Probationary Term, as provided in Paragraph 7(a)(i), above.

**M.Schwartz Comment (Account/Dealer):**

The damages limitation should not apply to indemnification obligations or breaches of confidentiality obligations.

**B.Gaffaney Response (Extreme Widgets):**

Okay so long as we add no limit on liability arising out of Account/Dealer's false advertising or unauthorized product modifications.

16. [WAIVER OF JURY TRIAL. Deleted.]

**B.Gaffaney Comment (Extreme Widgets):**

Jury trial waiver provision was deleted due to very recent change

in California law that renders unenforceable pre-dispute jury trial waivers (See *Grafton Partners L.P. v. Superior Court*, (Cal. S. Ct., August 4, 2005)).

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year specified on Exhibit A by affixing their signatures thereto, and to Paragraphs 3 and 11, above.

# ASSOCIATION OF CORPORATE COUNSEL

## Antitrust Considerations Relating to Distribution and Sales Practices

October 17, 2005

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## General Considerations

1. Legality of distribution and sales policies may depend on analysis of market share and competitive conditions
2. Markets can be narrow or broad
3. Need to analyze policies separately for each relevant geographic market - answers may vary

### **Hypothetical Market Scenarios**

1. Can a supplier prohibit its dealers from promoting or selling its products over the Internet or through 800 numbers?
  - (a) Can a supplier allow its dealers to advertise its products on the Internet without any prices, but require that all purchase orders be funneled to the supplier through an Internet link?

2. Can a supplier sell at a lower price to an Internet retailer than to a “bricks and mortar” retailer?

3. A retailer in California starts selling on the Internet at prices that are much lower than the prices charged by any other retailers. This causes problems for a retailer in Virginia because its customers see the other retailer’s lower prices on the Internet and want those prices. The Virginia retailer complains to the supplier. Can the supplier then establish a policy that prohibits its retailers from selling on the Internet? And can the supplier terminate retailers which sell on the Internet?



4. A supplier starts selling direct to end-use customers over the Internet, competing with its traditional retailers. Can any of the retailers talk to the supplier about this?

(a) Can a retailer ask a supplier to stop selling over the Internet?

(b) Can a retailer refuse to deal with and refuse to purchase products from suppliers who compete directly against them?

5. Can a supplier ask customers what its competitors are charging so that it can set its prices or assess market conditions?

(a) If you receive a copy of a competitor's price list or price offer from a customer, what should you do with it?

6. Your Senior Vice President of Sales is at a trade show and an employee of one of your competitors comes up to him and says – “We are going to raise our prices next week. Prices in this market are way too low. What are you going to do? Will you support us?” – What should your employee do in this situation?

(a) Aside from price, what are the kinds of things that you should not discuss with a competitor?

7. One of your managers is invited to go to a meeting with a major customer. The customer also invites your competitors because it wants to talk about some things that relate to all of its suppliers. At the meeting, the customer talks about problems it is having with deliveries from all of the suppliers. Can your manager and your competitors discuss these things jointly at the meeting with the customer?

(a) What if the customer says it wants each of you to reduce your price by 5% if it purchases above a certain volume. The discount will be based on each company's regular price. Can you discuss that jointly?

(b) What if the customer wants each supplier to increase its early payment discount. Can your manager discuss that with the other competitors?

8. Can you agree to sell a particular product or product line exclusively to one dealer in a market area?

(a) Can you agree to produce a product with special features on it only for one customer?

(b) What if a customer asks you to sell a product only to that customer and not to one of its specific competitors. Can you agree to do that?

(c) You go to lunch with one of your longstanding, good dealers. The dealer starts talking about which dealers you should sell to in that market area and which you should not. Can you discuss that with the dealer?

9. Can you decide not to sell certain products to some customers, but sell them to other customers?

10. Here is an actual recent case. An appliance manufacturer, Salton, developed a hot new product, an indoor grill, which it called the George Foreman indoor grill. Salton invested heavily in a large advertising campaign. Other appliance manufacturers quickly developed their own indoor grill products to compete with the George Foreman grill, but the George Foreman grill clearly was the market leader. In fact, it was the No. 1 selling product in the small appliance category. Based on the popularity of this product, Salton told Wal-Mart that it could have the George Foreman grill only if Wal-Mart agreed to sell this indoor grill exclusively. Wal-Mart had to agree not to sell any other indoor grills in order to get the George Foreman grill. Is this lawful?

11. What if, in addition to Wal-Mart, Salton also entered into other exclusive contracts with Target, K-Mart and Sears which prohibited each of them from selling competing indoor grills. Is that legal?

12. At this year's Consumer Electronics Show, the talk of the Show is a hot new video game player that is coming out. An employee of the supplier comes up to a major retailer at the Show and says "We are going to come out at \$399 on this product. We can make a lot of money at that price. Will you guys go along?" Is that a problem?

13. A dealer approaches you and wants to buy product from you. The dealer has been in business a long time, is successful and has a good credit rating. But you don't like the way the dealer does business. Can you refuse to sell to the dealer?

14. Can you require customers to buy at least two different products or a full line of your products? Consistent with that requirement, can you refuse to sell to customers which will not buy more than one product or a full line of your products?

15. A leading golf equipment manufacturer has a limited quantity of golf clubs remaining because its clubs are superior in quality to other clubs and have been selling extremely well. On the other hand, the manufacturer's golf balls are not very good and have not been selling very well. Can the manufacturer decide to sell only to customers which are willing to also buy its golf balls and refuse to sell to customers which will only buy its clubs?

16. Can you offer a lower price if a dealer buys multiple product lines and a higher price if it only buys one product line?

17. You have been selling to a retailer for many years. But the retailer changed its marketing strategy and doesn't feature or promote your products. Can you terminate the retailer?



18. One of your retail customers starts to offer really low prices for your products, substantially undercutting its competitors. The discounter's competitors complain and want you to lower your cost to them. Can you terminate the discounting retailer because it is disrupting your customer group?

(a) Before you terminate a discounting retailer, can you talk to the retailer about its low prices?

19. Can you talk to a competing supplier about the credit history or credit worthiness of a prospective customer?

20. Can you give a lower price to dealers which buy a higher volume annually?

21. Can you give a lower price or better credit terms to a customer which tells you that it received a lower price offer or longer payment terms, such as 60 days, from one of your competitors?

22. You offer a MAP program that is tied to advertising by your customers. One of your customers doesn't run any ads to qualify for the cooperative advertising allowance but wants to get the allowance anyway. It is a very good customer and its prices have been above the MAP price. Can you give them the allowance anyway?

23. You offer a promotional program in which you agree to give dealers a 10% discount off of their wholesale cost for all of their sales of your products during a specific 2-week period. You offer this discounted price to induce dealers to promote and sell more of your products during that 2-week period. One of your dealers, however, wants to apply this promotional program differently. The dealer instead wants to use one of the promotional days each month over the course of the year and get the discounted price for all sales of your product on that one day each month. Can you agree to that?

24. Can you develop promotional or advertising programs for specific customers?

(a) You have a large retail customer who purchases a substantial amount each year. Can you create a special performance allowance just for them?

25. In setting your own prices, can you monitor your competitor's prices and charge identical prices?

26. Your largest competitor announces a 5% price increase on October 1, effective January 1. You analyze the situation and determine that there is a substantial amount of demand for the product, you should be able to sell out your production and see this as an opportunity to make higher profits. Can you also announce an identical 5% price increase effective on the same day?

27. If a customer asks you to meet a competitor's price in order to keep the business but refuses to give you a copy of the competitor's price offer, can you call the competitor to verify its price?

(a) Can you have an employee make a disguised "undercover" call to a competitor to verify its price?

(b) If you can't get a hard copy of the competitive offer, can you offer a lower price?

28. Can you sell at different prices to dealers located in different geographic areas?

(a) Can you sell at different prices to dealers located in the same area?

29. You have a regular price list which contains volume discounts. A good, loyal and long-standing customer asks you for a lower price even though it doesn't quite meet the volume requirement. It just falls a little short. Can you give that customer the lower volume discount?

30. One of your salespeople was at a recent trade show and talked to a sales rep for a competitor about selling a specific product at the same price point. The Senior VP of Sales finds out about this and tells the salesperson that he can't do that under the antitrust laws. But your company and the competitor have been selling the product at the same price for one month. The Senior VP corrects this by making sure that your company's price going forward is different than the competitor's price. He then writes an e-mail to the CEO of the company reporting what happened and that he corrected it. He also sends a copy of the e-mail to the company's General Counsel. Is that e-mail an attorney-client communication which is protected from discovery by the government or private litigants?