

IMDA
Specimen Only

Warning: Professional advice may be required before using this Specimen Contract. The Association is not engaged in rendering legal advice, and strongly suggests you consult your attorney before entering into any agreements.

Independent Medical Distributors Association **DISTRIBUTOR SELLING AGREEMENT**

THIS AGREEMENT, effective the last date it is executed by one of the parties hereto, is between _____, a corporation whose address is: _____, hereinafter called "MANUFACTURER," and _____, a corporation hereinafter called "DISTRIBUTOR," whose address is: _____.

1. **Appointment of Distributor**

Manufacturer hereby appoints Distributor for exclusive distribution of the products of Manufacturer set forth in the attached Exhibit A ("Product"), which is hereby made a part of this Agreement, together with other products, trademarks and product modifications as may be added in the future. Distributor shall have the right of first refusal to serve as distributor of all additional medical products that Manufacturer may manufacture in the future.

2. **Territory**

The territory covered by this Agreement is described in the attached Exhibit B ("Territory"), which is hereby made a part of this Agreement. The Manufacturer agrees not to appoint other distributors within the territory, or to sell direct within the territory.

3. **Parties' Obligations**

A. Manufacturer will provide effective advertising, convention participation, catalogues and literature at no cost to Distributor to enhance Distributor's sales efforts as Manufacturer reasonably deems necessary.

B. Manufacturer will keep Distributor informed of promotional activities, new products and policies of Manufacturer.

C. Manufacturer will refer all product inquiries from the Distributor's territory to Distributor.

D. Manufacturer will provide assistance and pertinent sales and technical information to the Distributor organization by holding periodic sales seminars, meetings and training programs. When possible, such sessions will be held within a reasonable distance of Distributor's place of business.

E. Manufacturer will do all that is necessary in order to keep its products current with or ahead of the state of the art.

F. Manufacturer will provide Distributor with representative samples, marketing and technical information, brochures, instructional material, advertising literature, other product data and instruments (if any are needed) at no charge to Distributor.

G. Manufacturer will make its products available in quantities to meet Distributor's reasonable requirements in Distributor's territory. Shipment of accepted orders is subject to reasonable delays due to labor troubles, transportation difficulties, government regulations, inability to obtain raw materials, and other circumstances beyond Manufacturer's reasonable control.

H. Manufacturer will extend its technical expertise to Distributor and Distributor's sales people and customers, for the mutual benefit of Manufacturer and Distributor. Manufacturer agrees to provide to Distributor and its staff and sales and service representatives adequate training regarding the use and operation of the Products and any updates, modifications, or improvements to the Products.

I. Manufacturer may periodically sponsor special incentive programs for Distributors to promote various of Manufacturer's products. Such programs will be held at Manufacturer's discretion. Guidelines, quotas and accounting of such incentive programs will be conducted by Manufacturer.

J. Manufacturer will immediately notify the Distributor of any customer complaint Manufacturer receives from the Distributor's territory, and advise Distributor of the customer making such complaint, and the nature of the complaint to permit Distributor to respond to said complaint.

K. The Manufacturer and Distributor agree not to employ or engage, or allow its agents or distributors to employ or engage, the services of any employee or agent of the other during the term of this Agreement, and for two years from the effective date of termination or nonrenewal, nor for two years from the effective date of termination or nonrenewal to employ or engage or allow its representative or distributors to employ or engage anyone who has left, during the one year period prior to termination or nonrenewal, the other's employment or has ceased being its representative.

L. Manufacturer shall repair or replace (within the limitations of such applicable express written warranty as may be issued by it) any products or parts thereof that prove to be defective in workmanship or material.

M. Manufacturer will accept full responsibility and liability for its products that are distributed by Distributor and will furnish the Distributor with an appropriate rider on Manufacturer's liability policy.

N. Manufacturer will pay the cost of freight for all orders over \$ _____ on all lesser orders, freight will be paid by Distributor. Risk of loss on all orders will be on manufacturer until delivered to Distributor or, if Distributor requests, to customer.

O. During the pendency of this Agreement, Manufacturer will accept for credit at Distributor's cost, all inventory that Distributor returns provided that the product is sealed or subject to sterilization and is in the current catalog. Distributor shall pay the freight charges for any returned inventory. Manufacturer shall not charge any handling, restocking or similar fees.

P. Manufacturer shall be responsible for obtaining FDA and any other approvals necessary to distribute the Products in the United States. Manufacturer shall provide Distributor with marketing and technical information concerning the Products as well as reasonable quantities of brochures, instructional material, advertising literature, demonstration product, and other Product data at no charge.

Q. Distributor agrees to aggressively promote the sale of Manufacturer's products in the territory and shall take no action that might invalidate any of Manufacturer's trademarks.

R. Distributor shall promptly submit to Manufacturer, for Manufacturer's attention and handling, the originals of all inquiries received by Distributor from customers outside the Territory.

S. Distributor agrees to meet and/or exceed mutually agreed-upon annual quotas. Such quotas are to be established by mutual agreement after the first six months of the contract period and annually thereafter and attached as an addendum to this Agreement. Manufacturer shall disclose to Distributor the projected annual sales for Manufacturer in the Continental United States and the percentage of Manufacturer's sales represented by sales in Distributor's territory for the preceding year. Any annual quota must be fair and reasonable, taking in to account factors including but not limited to sales in prior years, the competitive and economic situation in the marketplace, and Manufacturer's market share in the continental United States.

T. Distributor will provide Manufacturer with an annual forecast for each forthcoming year in order to enable Distributor to properly service all accounts, insure prompt service to customers and avoid out-of-stock conditions.

U. Distributor retains the right to select its own customers and to sell at such prices and on such terms and conditions as it may elect. Title shall pass and risk of loss shall be on Distributor from time of delivery to Distributor.

V. The parties agree to set up and implement any control procedures required to conform to existing state or federal laws or regulations.

W. Distributor will give fair representation and sales efforts to products at trade shows. Distributor's costs of exhibiting at local trade shows are to be shared equally between Manufacturer and Distributor. Distributor shall invoice Manufacturer for such costs.

X. Distributor agrees to maintain a level of expertise necessary to promote and service Manufacturer's products.

Y. Distributor shall not make any false or misleading representations to customers or others regarding Manufacturer or the Products. Distributor shall not make any representations, warranties or guarantees with respect to the specifications, features or capabilities of the Products that are not consistent with Manufacturer's documentation accompanying the Products or Manufacturer's literature describing the Products.

4. **Competitive Products**

Distributor agrees that Distributor will not sell directly competitive products during the pendency of this Agreement. If the Manufacturer, after the date of this Agreement, adds products to its product that are competitive with products of a company that Distributor already represents, then Distributor can continue to sell such competitive products. If a company that Distributor already represents adds products to its product line that compete with those of Manufacturer then if Distributor can contractually refuse to sell such product(s), Distributor will do so; otherwise, Distributor shall be entitled to sell said products or product lines. Manufacturer recognizes that Distributor's representation of the following companies may involve some competition between certain products, but recognizes the advantage of Distributor carrying all of these lines:

(List Companies)

Similarly, if Manufacturer produces a limited number of products with very limited sales potential ("Courtesy Products"), Distributor may represent companies that have products that compete with such Courtesy Products.

5. **National Contracts**

If Manufacturer enters into agreements with national accounts or buying groups, Distributor shall, at its sole option, service said entities that purchase pursuant to such agreements and that are located in Distributor's territory. If Distributor elects to participate in servicing these customers, Distributor shall be paid by Manufacturer a commission as follows: Distributor shall receive the difference between Manufacturer's hospital list price and its

wholesale price to distributors less 50 percent of the difference between the hospital list price and the price the customer pays to Manufacturer, but in no event shall Distributor be paid less than 75 percent of the difference between Manufacturer's hospital list price and its wholesale price to distributors. Freight charges and taxes will not be included in the calculation of commissions due Distributor. Commissions will be paid within 30 days of the date Manufacturer invoices customer. Commissions paid to Distributor on any product later validly returned to Manufacturer by customer will be repaid to Manufacturer by Distributor within 30 days of receipt of notice in writing of entitlement to such payment.

[Note: In paragraph 6, the gross margin as a percentage of hospital list must be filled in.]

6. Prices to Distributor and Ongoing Contract

Prices to Distributor shall be Manufacturer's list prices in effect at the time of acceptance of Distributor's orders less any applicable Distributor discounts. Discounts off list to Distributor shall in no event be less than ___ percent. Manufacturer's current terms and conditions shall be applicable to all orders placed pursuant to this Agreement, so long as those terms and conditions do not conflict with any of the provisions of this Agreement. Manufacturer will exert its best efforts to meet all orders in whole or in part placed by Distributor. Manufacturer shall give the Distributor at least 30 days' advance notice of a price increase. Moreover, if Distributor has entered into a supply contract at set or formula pricing that Manufacturer has approved, Manufacturer will not increase prices to Distributor during the pendency of that supply contract for goods to be sold to that customer. Manufacturer agrees that its list prices will, at all times, reasonably reflect actual prices being paid by customers. In the event that Distributor has blanket or requirements orders or contracts or contracts for the sale of products that extend beyond the date of termination or expiration of this Agreement but which were executed during the pendency of this Agreement, Distributor shall continue to sell to that customer until the contract or order has expired or is no longer in effect.

7. Payment

Terms of payment shall be discount of two percent for payment within 10 days, net 30 days, unless longer terms are specified on the invoice. A separate invoice will be issued for each shipment. If Distributor is delinquent, without basis, or without mutual written agreement, subsequent shipments may be on a C.O.D. basis. Delinquency in excess of 90 days shall be cause for termination of this Agreement.

8. Legal Relationship

Distributor is an independent contractor and the relationship between Manufacturer and Distributor is that of vendor and vendee. Nothing herein is intended or shall be construed to authorize Distributor or Manufacturer to create or assume any liability or obligation of any kind for or on behalf of the other. Neither Distributor nor Manufacturer is the agent of the other for any purpose.

9. **Assignment**

Distributor shall have the right to assign this Agreement with Manufacturer's written consent, which will not unreasonably be withheld.

10. **Applicable Law**

Any controversy or claim relating to this Agreement, or its breach, or the relationship created by this Agreement shall be settled by any appropriate court in the state where the Distributor has its principal place of business. The laws of that state shall control as to all such matters. If any portion of this Agreement itself is contrary to law, the remaining provisions shall remain valid.

[Note: In paragraph 11, the length of this Agreement is subject to negotiation.]

11. **Duration of Agreement**

This Agreement shall continue in full force and effect for five years from date of execution and shall be binding upon and inure to the benefit of the parties hereto and their successors and assigns including purchasers of Manufacturer's assets constituting a bulk sale of assets pursuant to the provisions of the Uniform Commercial Code. The Agreement will automatically renew for successive five-year periods unless terminated as specified below.

A. The Agreement may be terminated by Manufacturer if Distributor fails to meet its quota as set in accordance with this Agreement, provided such failure was not caused by Manufacturer's actions or failure to act.

B. The Agreement may be terminated by one party if the other party commits an act of bankruptcy, files a voluntary petition for bankruptcy or reorganization, is the subject of an involuntary petition for bankruptcy, has its affairs placed in the hands of a receiver, enters into a composition for the benefit of creditors, or is insolvent.

C. Should either party be in material breach of or material non-compliance with any of the terms of this Agreement, the other party may terminate this Agreement by giving of written notice of such breach or noncompliance and the right to correct the breach. If the breach is not corrected or compliance not made within 60 days of the date of such notice, this Agreement may be terminated immediately at the end of said sixty 60 day period.

[Note: The following additional paragraph should only be added if you are willing to agree to termination without cause.]

D. In the event that Manufacturer terminates the Agreement without cause as set forth herein, Manufacturer shall pay Distributor an amount equal to the total gross margins and commissions earned by Distributor during the 18-month period immediately prior to such termination. If this Agreement has not been in effect for 12 months, then the amount paid on termination shall be 18 times the average monthly gross margins and commissions earned by Distributor during the effective period of this Agreement. Gross margins are defined as the difference between the price Distributor paid to Manufacturer and the price paid to Distributor by its customer for the products.

12. Obligations Upon Termination or Nonrenewal

Upon termination or nonrenewal of this Agreement, Distributor will promptly return to Manufacturer all inventory (including, but not limited to instruments) of Manufacturer's products and all samples and literature relating to Manufacturer's products. Manufacturer shall promptly pay Distributor for all such inventory, samples and literature at Distributor's cost with no reduction for shipping, handling or restocking or any other cause.

13. Stock Options

Distributor is hereby granted options on _____ shares of the common stock of Manufacturer on the terms and conditions set forth in the agreement attached hereto as Exhibit C. In the event that the shares can be registered, and as soon as they can be registered, Manufacturer will register said shares at its sole cost and expense.

14. Indemnification

The Manufacturer shall be solely responsible for the design, development, supply, production and performance of its products and the protection of its trade names and patents. The Manufacturer agrees to indemnify, hold the Distributor harmless against and pay all losses, costs, damages or expenses, whatsoever, including counsel fees, which the Distributor may sustain or incur on account of infringement or alleged infringements of patents, trademarks or trade names resulting from the sale of the Manufacturer's products, or arising on account of warranty claims, negligence claims, product liability claims or similar claims by third parties. The Distributor shall promptly deliver to the Manufacturer any notices or papers served upon it in any proceeding covered by this Indemnification Agreement, and the Manufacturer shall defend such litigation at its expense. The Distributor shall, however, have the right to participate in the defense at its own expense unless there is a conflict of interest, in which case, the Manufacturer shall indemnify the Distributor for the expenses of such defense including counsel fees. The Manufacturer shall provide the Distributor with a certificate of insurance evidencing the Distributor as an additional insured on the Manufacturer's product liability insurance policy. This provision shall survive and remain in full force and effect after the termination or nonrenewal of this Agreement.

15. Trademarks

During the term of this Agreement, Distributor shall have the right to indicate to the public that it is an authorized representative of the Products and to advertise (within the Territory) such Products under the trademarks, marks, and trade names that Manufacturer may adopt from time to time ("Trademarks"). Distributor shall not alter or remove any Trademark applied to the Products. Except as set forth in this Article, nothing contained in this Agreement shall grant to Distributor any right, title or interest in the Trademarks.

16. Compliance With Law

Distributor and Manufacturer agree that they will comply with all governmental laws, regulations and requirements applicable to the duties conducted hereunder and applicable medical devices, including, without limitation, the federal Stark law, federal false claims act, federal anti-kickback statute, federal Health Insurance Portability and Accountability Act

provisions, federal civil monetary penalties statute, and similar laws; and will keep accurate records of consigned inventory.

Distributor and Manufacturer represent and warrant that at present and during the term of the Agreement they and their owners, principals, employees and/or contractors (1) have not been and will not be sanctioned within the meaning of Social Security Act Section 1128A or any amendments thereof; (2) have not been and will not be convicted of violating the federal Stark law, federal false claims act, federal anti-kickback statute, federal Health Insurance Portability and Accountability Act provisions, federal civil monetary penalties statute, or similar state laws; (3) have not been and will not be debarred, excluded or suspended from participation in any federal or state health care program; (4) have not had and will not have a complaint filed against Sales Agent by any enforcement agency; (5) have not engaged and will not engage in any conduct that could give rise to sanctions, convictions, or violations of any of the identified laws; and (6) are free to enter into this relationship and that by doing so, are not violating and will not violate any agreement or understanding, written or unwritten, with any third party.

The parties represent and warrant that they shall have in effect at all times during the Initial Term and any Renewal Terms of this Agreement all licenses, permits, and authorizations from all federal, state, and local authorities necessary to the performance of their obligations under this Agreement and all necessary authorization to enter patient care areas of each hospital in its Territory where such access is necessary.

The parties represent and warrant that during the term of this Agreement neither nor any of their individual owners, principals, employees and/or contractors shall market or sell any of Company's products to any physician who is his or her "immediate family member." For purposes of this Agreement, "immediate family member" means husband or wife; birth or adoptive parent, child, or sibling; stepparent, stepchild, stepbrother, or stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; grandparent or grandchild; and spouse of grandparent or grandchild.

17. Complete Agreement

This Agreement constitutes the entire contract between the Distributor and Manufacturer. No modifications of its terms or conditions shall be binding on either party unless made in writing and signed by both parties. This Agreement supersedes and cancels any and all previous contracts, arrangements, or understandings that may have existed or may exist between the parties. There are no understandings, representations or warranties of any kind expressed or implied between the parties that are not expressly set forth herein.

18. Severability

If any provision(s) of this Agreement shall be held invalid, illegal or unenforceable by a court of competent jurisdiction, the remainder of the Agreement shall be valid and enforceable and the parties shall negotiate in good faith a substitute, valid and enforceable provision which most nearly effects the parties' intent in entering into this Agreement.

19. **Notices**

All notices required under this Agreement shall be sent registered mail, return receipt requested, as follows:

If to Manufacturer:

If to Distributor:

Either party may change its address for notice purposes by notifying the other party of such change of address, such notice to be as required herein.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year indicated below.

Distributor

Manufacturer

By _____

By _____

Title _____

Title _____

Date _____

Date _____

EXHIBIT A
List of Products and Trademarks

EXHIBIT B
Exclusive Territory

EXHIBIT C
Terms and Conditions of Stock Options