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DELIVERY SERVICE PARTNER FULFILLMENT AND DISTRIBUTION AGREEMENT  
FOR MICROSOFT® PRODUCTS (ROYALTY DSP)  
# 500002134 dated May 1, 1998  
with TECH DATA PRODUCT MANAGEMENT, INC, a corporation of Florida

PLAINTIFF'S  
EXHIBIT  
2894  
Comes v. Microsoft

This Delivery Service Partner Fulfillment and Distribution Agreement for Microsoft Products (the "Agreement") is made and entered into as of the date first set forth above ("Effective Date"), by and between MICROSOFT LICENSING INC., a Nevada, U.S.A. corporation, ("MS"), and the company specified above ("COMPANY").

The parties agree as follows:

I. DEFINITIONS

The following terms shall have the following meanings:

- (a) "Authorized Replicator" shall mean MS or an entity licensed by MS to manufacture and fulfill COMPANY's orders for the Product. MS shall from time to time provide a list of such entities to COMPANY.
- (b) "Computer Hardware" shall mean a computer system or computer system component which meets the requirements of the SB Distribution Agreement for a particular Product.
- (c) "DSP Information Web Site" shall mean the web pages maintained by or for MS for communication of notices and general information, which is accessible through <http://oem.microsoft.com/dsp/> or such other URL address as MS may provide from time to time.
- (d) "Eligible Sub-Distributors" shall mean the entities as defined in Exhibit B.
- (e) "Government Procedures" shall mean any and all government approvals, registrations, filings and/or other actions, if any, as may be necessary for COMPANY's performance under this Agreement.
- (f) "Logo Usage Guidelines" shall mean the logo usage guidelines provided by MS, as may be updated from time to time. A copy of the current logo usage guidelines is delivered to COMPANY contemporaneously with this Agreement, and is available on the DSP Information Web Site.
- (g) "MSCORP" shall mean Microsoft Corporation, a Washington, U.S.A. corporation.
- (h) "Package" shall mean a container consisting of multiple units of Product to which a SB Distribution Agreement is attached or any other configuration as MS may provide.
- (i) "Principal Language Version(s)" shall mean the language version(s) specified in the Royalty and Price List.
- (j) "Product(s)" shall mean the DSP version of copyrighted and/or patented Microsoft® products made available to COMPANY from an Authorized Replicator, including where applicable the specified user documentation. Products listed on the Royalty and Price List may be ordered from an Authorized Replicator on an if and as available basis.
- (k) "Royalty and Price List(s)" shall mean the list(s) of Products and corresponding royalties and prices provided by MS, which MS may update from time to time. A sample copy

of the current Royalty and Price List is delivered to COMPANY contemporaneously with this Agreement. The actual Royalty and Price List for each month will be available on the DSP Information Web Site.

- (l) "Sales-Out Report Guidelines" shall mean the sales-out report guidelines provided by MS, which may be updated from time to time. A copy of the current sales-out report guidelines is delivered to COMPANY contemporaneously with this Agreement, and is available on the DSP Information Web Site.
- (m) "SB Distribution Agreement(s)" shall mean the license agreement(s) between MS and a SB, which shall govern the terms of use and distribution of Product by the SB. SB Distribution Agreement(s) may be in the form of break-the-seal agreements affixed to a Package, signed agreement(s), or in such other form as MS may provide, as may be updated from time to time. A copy of the current SB Distribution Agreement is delivered to COMPANY contemporaneously with this Agreement, and is available on the DSP Information Web Site.
- (n) "Suppliers" shall mean any and all entities (e.g., MSCORP) which license or otherwise supply MS with Products or portions thereof for redistribution and sublicense by MS.
- (o) "System Builder(s)" or "SB(s)" shall mean original equipment manufacturer(s), assembler(s) and/or reassembler(s) of Computer Hardware.
- (p) "Territory" shall mean the territory specified in the Royalty and Price List(s).
- (q) "Update Release" shall mean a release of Product which MS designates as an increase in the digit(s) to the right of the tenths digit in the Product version number [x.x(x)].
- (r) "Version Release" shall mean a release of Product which MS designates as an increase in the tenths digit in the Product version number [x.(x)x].

2. LICENSE GRANT AND CONDITIONS

- (a) (i) MS grants to COMPANY the non-exclusive limited rights (A) to acquire Packages of Product from Authorized Replicators, and to fulfill orders only from, and distribute Packages of Product only directly to, SB(s) located in the Territory. In addition, MS may authorize COMPANY to distribute Packages of Product to other entities as identified by MS upon notice.
- (ii) COMPANY shall not distribute Packages of Products to (A) any SB or whom COMPANY has reason to believe will redistribute or resell such Packages of Product in a manner not authorized by the SB Distribution Agreement, or (B) any SB or Eligible Sub-Distributor identified to COMPANY by MS whose right to acquire Product from COMPANY has been suspended or terminated.

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(b) If COMPANY is also a SB, COMPANY may distribute individual units of Product to subsequent SBs or end users, provided such individual units are distributed with Computer Hardware in compliance with all terms and conditions of the applicable SB Distribution Agreement. COMPANY shall obtain agreement from such subsequent SB to comply with all the terms and conditions of the SB Distribution Agreement.

(c) COMPANY's license shall extend to Update Releases and Version Releases of Products available on the Royalty and Price List, unless otherwise indicated on the Royalty and Price List.

(d) MS reserves all rights not expressly granted herein.

### 3. SPECIFIC DUTIES OF COMPANY

(a) COMPANY shall warehouse Product as necessary to timely fulfill orders placed by SB(s). COMPANY is responsible for preventing loss, disappearance, theft, damage or destruction of Product inventory. Royalties shall be due for all Packages of Product acquired from an Authorized Replicator which are lost, damaged, destroyed or unaccounted for, regardless of cause.

(b) COMPANY shall maintain an order tracking system allowing complete and accurate tracking of sales-out information for shipments to each SB as set forth in the Sales-Out Report Guidelines.

(c) COMPANY shall provide to SBs and other entities to which COMPANY is authorized to distribute Product a telephone number (which shall be toll-free if such service is available at a commercially reasonable cost), staffed with employees who shall provide full customer service during standard business hours on all business days. In addition, COMPANY shall maintain sufficient, properly functioning 24-hour fax lines.

(d) Other than providing a COMPANY warranty to the SB with respect to Product materials, COMPANY shall have no right to make any representations or warranties for Product(s). COMPANY shall also make no representations or warranties whatsoever on behalf of or in the name of MS or its Suppliers. COMPANY hereby agrees to indemnify and hold MS and its Suppliers harmless from any expenses which MS and/or its Suppliers may incur in connection with any warranty or representation by COMPANY.

(e) (i) COMPANY shall make its best effort to promote and encourage legal distribution and use of genuine MS or MSCORP software and hardware products in the Territory, and shall make its best effort to cooperate in the detection, suppression, prevention and prosecution of unlawful or unauthorized manufacture, distribution and/or use of MS or MSCORP products or any component thereof (e.g., Product software on external media, certificates of authenticity, etc.) in the Territory. COMPANY shall make its best effort to educate its employees, distributors, dealers and customers to prevent and discourage unlawful or unauthorized manufacturing, distribution and/or use of MS or MSCORP products. COMPANY also shall make its best effort to provide support for MS' and MSCORP's anti-piracy education efforts, including without limitation, distribution of anti-piracy

literature and other information that MS may provide, and endorsement of anti-piracy education events sponsored by MS or MSCORP or organizations of which MS or MSCORP is a member.

(ii) This Agreement only authorizes COMPANY to distribute genuine Products acquired from an Authorized Replicator. COMPANY shall not acquire or distribute any MS or MSCORP products or any component of such products that COMPANY knows, has reason to know, or suspects have been manufactured, assembled and/or distributed in a manner not authorized by MS or MSCORP.

(f) COMPANY shall develop, publish and maintain a COMPANY web site relating to COMPANY's participation in the Delivery Service Partner Program, unless Internet service is not available to COMPANY at a commercially reasonable cost. COMPANY shall publish a link to the MS OEM System Builder web site, located at <http://www.microsoft.com/oem>, on such COMPANY web site, if any. COMPANY hereby authorizes MS, its Suppliers and subsidiaries to publish direct link(s) to any pages of COMPANY's web site. COMPANY shall register on both the DSP Information Web Site and the Microsoft OEM System Builder web site. COMPANY shall appoint an employee ("Administrator") who shall be responsible for checking the information on the DSP Information Web Site. COMPANY shall provide an email address for the Administrator in Exhibit N, and COMPANY may change the email address of the Administrator upon notice to MS.

(g) COMPANY shall appoint an employee as the primary liaison between COMPANY and MS, responsible for internal and external promotion of Products during the term of the Agreement. COMPANY shall notify MS of the name of such person within 30 days of the Effective Date of this Agreement. If COMPANY appoints a different employee, COMPANY shall promptly notify MS of the name of such employee.

### 4. PRODUCT RETURNS

(a) MS will not accept any Product returns from COMPANY, except as directed by MS in connection with a Product recalled by MS or specifically provided in 4(b) below.

(b) (i) With respect to any Product that does not conform to the limited warranty in the SB Distribution Agreement or any Product recalled by MS, COMPANY shall accept only returns of complete units of such Product (e.g., all copies of the Product software, hardware, Certificates of Authenticity and other Product materials) from SBs, if and as directed by MS. In such event, COMPANY agrees to either, at MS' option and direction, issue a credit to the SB's account or replace any such Product. COMPANY shall (A) destroy the complete units of Product returned by SBs, and shall maintain records relating to such destruction as required by Section 15, or (B), at MS' option and direction, ship the returned Product units to MS or a third party designated by MS.

(ii) If COMPANY issues a credit to SBs for returned units of Product in accordance with 4(b)(i) above, COMPANY may claim a royalty offset equal to the royalty amount originally reported by COMPANY for such unit of Product, ~~03/14/98~~

COMPANY certifies on its royalty report that the returned Product units were destroyed or shipped to MS or its designee in compliance with 4(b)(i) above. The claimed royalty offset shall be separately identified on COMPANY's royalty report.

(iii) If COMPANY replaces Product returned by SBs in accordance with 4(b)(i) above, the replacement units of Product shall be supplied from COMPANY's Product inventory. No royalty shall accrue for replacement units of Product shipped to SBs, provided the replacement units are separately identified on COMPANY's royalty and inventory reports and COMPANY certifies on its royalty report that the returned Product units were destroyed or shipped to MS or its designee in compliance with 4(b)(i) above.

#### 5. LIMITED WARRANTY

(a) The only warranties made by MS or its Suppliers for the Product are those warranties provided in the SB Distribution Agreement, if any.

(b) Neither MS nor its Suppliers makes any warranties as to defects in media or materials of Product not manufactured by MS or its Suppliers. Such warranties, if any, shall be made by the Authorized Replicator that manufactured such Product.

**(c) THE ABOVE REFERENCED LIMITED WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, OR STATUTORY, INCLUDING IMPLIED WARRANTIES OF NON-INFRINGEMENT, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND OF ALL OTHER OBLIGATIONS OR LIABILITIES OF MS AND ITS SUPPLIERS.**

#### 6. COPYRIGHT AND TRADEMARK INFRINGEMENT

(a) MS agrees to defend COMPANY against, and pay the amount of any adverse final judgment (or settlement to which MS consents) resulting from third party claim(s) (hereinafter "Indemnified Claims") that: (i) the Product(s) infringe any copyright enforceable in any Included Jurisdictions (defined in Section 6(c), below); or (ii) the Product name(s) or trademark(s) ("Mark(s)") infringe any trademark rights enforceable in the Included Jurisdictions; provided MS is notified promptly in writing of the Indemnified Claim and has sole control over its defense or settlement, and COMPANY provides reasonable assistance in the defense of the same.

(b) Neither MS nor its Suppliers shall have any liability for any infringement claim (including, without limitation, Indemnified Claims) based on COMPANY's (i) distribution or use of any Product after MS' notice that COMPANY should cease distribution or use of such Product; except that MS shall remain obligated under this section with respect to Product distributed prior to COMPANY's receipt of notice; or (ii) combination of a Product with a non-MS product, program or data; or (iii) adaptation or modification of any Product. For all claims described in this Section 6(b), COMPANY agrees to indemnify and defend MS and its Suppliers from and against all damages, costs and expenses, including reasonable attorneys' fees.

(c) Neither MS nor its Suppliers shall have any obligation to COMPANY for any infringement claim which arises outside the geographical boundaries of the United States, Canada, Australia, Japan, the European Union, and Norway ("Included Jurisdictions").

#### 7. ADDITIONAL TERMS

(a) Except as specifically permitted by Section 2(b) above, COMPANY shall distribute Product only in unopened Packages as acquired from an Authorized Replicator. COMPANY shall not alter Products or Product Packages and shall not make, or cause to be made, copies of Product software or documentation.

(b) COMPANY agrees to comply with the provisions in the Royalty and Price Lists and the Exhibit(s) and other attachments(s), if any, to this Agreement as may be updated or incorporated into this Agreement from time to time.

(c) COMPANY shall not reverse engineer, decompile or disassemble any Product except as permitted by applicable law without the possibility of contractual waiver.

(d) (i) COMPANY acknowledges that MS may require the Authorized Replicator to refuse to fill orders for Product in quantities beyond those which, in MS' opinion, COMPANY will be able to distribute in compliance with the terms (including timely payment) of this Agreement. COMPANY further acknowledges that MS may suspend COMPANY's license rights hereunder and/or require Authorized Replicator to refuse to fill COMPANY's orders if COMPANY fails to comply with any provision of this Agreement or any other agreement between COMPANY and MS.

(ii) If MS has reasonable grounds for concern with respect to COMPANY's performance of any of its obligations under this Agreement or any other agreement(s) between COMPANY and MS (including without limitation, proper distribution of Product acquired under this Agreement, timely and compliant reporting and payment of Product royalties), MS may demand COMPANY to provide adequate written assurances of due performance. Until such written assurances are received by MS, MS may suspend COMPANY's license rights and/or require Authorized Replicator to refuse to fill COMPANY's orders.

(e) MS reserves the right, upon periodic review of COMPANY's financial condition, payment history and overall credit worthiness, to require COMPANY to provide a third party guarantee, performance bond, letter of credit, prepayment of royalties, or other security to ensure COMPANY's performance under this Agreement. COMPANY will provide, upon request from MS, periodic updated financial statements during the term of this Agreement.

(f) If MS recalls or suspends distribution of a Product, COMPANY shall immediately cease distribution of such Product upon notice from MS. COMPANY shall indemnify MS and its Suppliers from and against all damages, costs and expenses, including reasonable attorneys' fees, if COMPANY continues to distribute such Product after MS has notified COMPANY to cease distribution of such Product.

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(g) MS reserves the right to distribute Product directly to any SB at MS' sole discretion.

(h) COMPANY shall not distribute Product(s) to SBs and other entities other than in accordance with the provisions set forth in this Agreement (including Exhibits and Addenda).

(i) MS reserves the right to suspend or terminate a SB's authorization to acquire Product from COMPANY for any reason, in MS' sole discretion, including, without limitation, if such SB and/or any customer of such SB has violated a SB Distribution Agreement or any intellectual property right of MS. COMPANY shall not distribute Product to any SB identified by MS whose right to acquire Product has been suspended or terminated.

(j) MS may make available to COMPANY confidential lists of current or potential SBs in the Territory. Subject to applicable local data protection laws and regulations, such lists or any portion thereof may be used by COMPANY only in connection with promotion and sales of Products by COMPANY pursuant to this Agreement and for no other purpose.

## 8. INTELLECTUAL PROPERTY NOTICES

(a) COMPANY shall undertake no action that will infringe, interfere with or diminish MS' or its Suppliers' rights, title and/or interest in any intellectual property rights owned or held by MS or its Suppliers. Without limiting the generality of the preceding sentence, COMPANY shall not manufacture, reproduce, install or distribute, for itself or for a third party, any Product or Product component except as permitted pursuant to this Agreement or a current and valid license for such Product or Product component.

(b) COMPANY will not remove, modify, or obscure any copyright, trademark, patent, or mask work notices that appear on the Product as acquired by COMPANY. COMPANY recognizes that MS or its Suppliers may seek patent registration for the Product.

(c) COMPANY shall market the Product only under the Product name(s) and version number for such Product provided to COMPANY. COMPANY shall use the appropriate trademark, product descriptor and trademark symbol (either "TM" or "®"), and clearly indicate MS' or its Suppliers' ownership of its trademark(s) whenever the Product name is first mentioned in any advertisement, brochure or in any other manner in connection with the Product. COMPANY shall not, at any time, use any name or trademark confusingly similar to a MS or its Suppliers' trademark, trade name and/or product name. COMPANY shall undertake no action that will interfere with or diminish MS' or its Suppliers' right, title and/or interest in MS' or its Suppliers' trademark(s), trade name(s) or Product name(s). COMPANY shall, upon request, provide MS samples of all COMPANY marketing literature which uses Product name(s) or otherwise describes the Product.

(d) COMPANY may not use or display MS or MSCORP logos, except in the manner specifically described in the Logo Usage Guidelines. Any other usage of MS or Supplier logos requires specific authorization or a license from MS or its Suppliers.

(e) COMPANY hereby authorizes MS, its Suppliers and subsidiaries to publish COMPANY's name, trade names,

trademarks, and logos in connection with COMPANY's participation in the Delivery Service Partner Program. MS, its Suppliers and its subsidiaries shall not modify such names, trade names, trademarks and logos. COMPANY shall provide artwork for COMPANY's logos, in printed and/or electronic form, upon request from MS.

## 9. NONDISCLOSURE AGREEMENT

COMPANY shall keep confidential, the terms and conditions of the Agreement, any other non-public information (including, without limitation, any and all information made available on the DSP Information Web Site, information concerning current and potential SBs, any and all MS and MSCORP Product royalty and price information, the terms and conditions of any proposed (or actual) agreement concerning MS and MSCORP products, license negotiations, as well as any information or correspondence relating to released or unreleased MS and MSCORP software or hardware products, the marketing or promotion of any MS and MSCORP product, MS' and MSCORP's business policies or practices), know-how disclosed to COMPANY by MS or MSCORP or any of their subsidiaries. However, COMPANY may disclose the terms and conditions of the Agreement in confidence to its immediate legal and financial consultants as required in the ordinary course of COMPANY's business.

## 10. ROYALTY, PRICE, PAYMENT AND REPORTS

(a) (i) COMPANY agrees to pay to MS the applicable royalty or price as shown in the then current Royalty and Price List for each Package shipped by COMPANY. Royalties exclude any charges by the Authorized Replicator for Packages ordered by COMPANY. COMPANY may order Product on the then current Royalty and Price List from an Authorized Replicator. A Product is not available unless a royalty rate or price for such Product is stated on the Royalty and Price List. MS reserves the right to modify royalties and/or prices on the Royalty and Price List upon notice to COMPANY. Changes to the Royalty and Price List shall be effective as of the effective date specified on the Royalty and Price List.

(ii) If COMPANY distributes individual units of Product with Computer Hardware in accordance with Section 2(b), COMPANY shall report the per Package royalty on COMPANY's monthly royalty report for the month in which the Package is first opened by COMPANY. COMPANY shall separately indicate in its sales out reports, in the format described in the then current Sales-Out Report Guidelines, the data on each SB to which COMPANY distributed Product pursuant to Section 2(b).

(iii) Unless otherwise indicated by MS in the Royalty and Price List or by separate notice to COMPANY, if a Product is removed from the Royalty and Price List, COMPANY may, pursuant to the terms of this Agreement, distribute COMPANY's inventory of Product until the earlier of (A) ninety (90) days after the Product is removed from the Royalty and Price List; or (B) the date of termination or expiration of this Agreement. COMPANY may not place any new orders for such Product from Authorized Replicators, unless separately

authorized by MS. COMPANY shall report all such Product on COMPANY's monthly reports. The royalty rate for any such Product shall be as indicated on the last Royalty and Price List that included such Product.

(iv) COMPANY agrees to make payment, inventory and sales out reports in the English language to MS for all Packages and units of Product shipped by COMPANY during each calendar month, unless otherwise authorized by MS. COMPANY shall provide royalty and inventory reports in the form described in Exhibit R to this Agreement and electronic sales out reports as described in the then current Sales-Out Report Guidelines, or in such other form as MS may provide from time to time. COMPANY's royalty and inventory reports shall be certified as complete and correct by a duly authorized officer or director of COMPANY. COMPANY shall submit all reports to MS within ten (10) days after the end of each calendar month, unless otherwise notified by MS, and COMPANY shall submit final report within five (5) days of termination or expiration of this Agreement. COMPANY agrees to send all reports and make royalty payments to MS as specified in Exhibit N. Unless otherwise authorized by MS, COMPANY shall have thirty (30) days to implement changes required by any updates to the Sales-Out Report Guidelines.

(v) In the event that COMPANY's monthly reports are not received by MS within the above-specified period, COMPANY authorizes MS to bill COMPANY, and COMPANY agrees to pay MS, royalties on all Product in inventory and for all Product acquired based on reports submitted to MS by the Authorized Replicator(s) for the subject month. In such event and at MS' option, COMPANY shall pay MS based on reports submitted to MS by the Authorized Replicator(s) for all subsequent months during the term of this Agreement. MS' monthly billing of COMPANY based on reports submitted by the Authorized Replicator(s) shall not relieve COMPANY of any reporting or payment obligations under the Agreement.

(vi) COMPANY shall pay royalties to MS within thirty (30) days of the date of MS' invoice. A one percent (1%) monthly finance charge will be assessed on all amounts that are past due, including receipts for foreign taxes withheld in accordance with Section 10(d). COMPANY shall pay charges from Authorized Replicator in accordance with the terms and conditions offered by Authorized Replicator. COMPANY's obligations to pay MS royalties and charges from Authorized Replicator are unconditional. Failure by COMPANY to meet payment terms or reporting requirements may result in a hold of all pending COMPANY orders or termination of this Agreement.

(b) Upon notice to COMPANY, MS may require COMPANY to pay the Product royalties to an intermediary and/or upon delivery of Product to COMPANY.

(c) Royalties exclude any charges by Authorized Replicator for Packages of Product ordered by COMPANY. Royalties and prices also exclude any taxes, duties, fees, excises or tariffs imposed on any of COMPANY's activities in connection with this Agreement. Such charges, taxes, duties, fees, excises or tariffs, if any, shall be paid by COMPANY.

(d) In the event income taxes are required to be withheld by any non-U.S.A. government on payments to MS required hereunder, provided that COMPANY promptly delivers to MS

an official receipt for any such taxes withheld or other documents necessary to enable MS to claim a U.S.A. Foreign Tax Credit, COMPANY may deduct such taxes from the amount owed MS and shall pay them to the appropriate tax authority. COMPANY will make certain that any taxes withheld are minimized to the extent permitted by the applicable law.

(c) In addition to MS' other remedies, for each Package of Product(s) distributed by COMPANY in a manner inconsistent with the terms of this Agreement, MS may charge COMPANY an additional royalty or price equal to thirty percent (30%) of the highest royalty or price stated for the Product in the Royalty and Price List. COMPANY shall pay such additional royalty or price within thirty (30) days of receipt of MS' invoice.

## 11. TERM

(a) Provided this Agreement has been properly executed by COMPANY and by an officer of MS, the term of this Agreement shall run from the Effective Date through March 31, 1999, unless terminated earlier pursuant to Section 12.

(b) Prior to the date all necessary Government Procedures related to this Agreement have been completed, COMPANY may not order or take delivery of any Product from an Authorized Replicator, and may not distribute any Product to SBs. If COMPANY orders or takes delivery of any Product from an Authorized Replicator, or distributes any Product to SBs, such action shall constitute a representation and warranty from COMPANY that all Government Procedures necessary to realize the purposes of this Agreement, if any, have been completed.

(c) Provided (i) this Agreement is not terminated by COMPANY prior to the expiration date stated in Section 11(a) or by MS as a result of COMPANY's breach of the terms of the Agreement, and (ii) COMPANY's distribution rights have not been suspended, this Agreement shall be automatically extended for a period of thirty (30) days from the date of termination or expiration for the limited purpose of allowing COMPANY to distribute inventory of Product ("Limited Purpose Extension"). During the Limited Purpose Extension subject to applicable terms and restrictions in the Agreement, COMPANY may distribute licensed Package(s) of Product remaining in inventory as of the date of termination or expiration, provided, however, COMPANY shall not have rights to acquire Package(s) of Product or any Product component(s) from an Authorized Replicator during the Limited Purpose Extension. COMPANY shall comply with all payment and reporting requirements of the Agreement for all Packages of Product distributed during the Limited Purpose Extension.

## 12. DEFAULT AND TERMINATION

(a) MS may terminate the Agreement if any of the following events of default occur: (i) if COMPANY breaches Sections 2(a), 7(a), 7(b), 7(g), 8, 9, 10(a), 10(b), 10(d), 15, or 19(d); (ii) if COMPANY becomes insolvent, enters bankruptcy, reorganization, composition or other similar proceedings under

applicable laws, whether voluntary or involuntary, or admits in writing its inability to pay its debts, or makes or attempts to make an assignment for the benefit of creditors, or (iii) upon termination of any other agreement between MS and COMPANY due to COMPANY's default. Termination shall be effective upon notice to COMPANY, or, in case of termination pursuant to Section 12(a)(ii), as soon thereafter as is permitted by applicable law.

(b) Notwithstanding Section 12(a), MS or COMPANY may terminate this Agreement at any time, with or without cause, upon thirty (30) days prior notice.

(c) The rights and remedies of the parties provided herein shall not be exclusive and are in addition to any other rights and remedies provided by law or this Agreement.

(d) COMPANY hereby waives any right it may have under applicable law or regulation to require MS to seek the approval, order, decision or judgment of any court or government agency before MS may suspend or terminate any rights granted to COMPANY under this Agreement.

(e) COMPANY's distribution and other license rights hereunder immediately shall be suspended without further action by MS if and as of the day COMPANY becomes insolvent, enters bankruptcy, reorganization, composition or other similar proceedings under applicable laws, whether voluntary or involuntary, or admits in writing its inability to pay its debts, or makes or attempts to make an assignment for the benefit of creditors.

### 13. RIGHTS AND OBLIGATIONS UPON SUSPENSION, EXPIRATION OR TERMINATION

(a) Upon the expiration or termination of this Agreement (subject to the Limited Purpose Extension described in 11(c), if applicable), COMPANY shall cease distribution of Product and all of COMPANY's license rights herein shall cease. Sections 5, 6, 9, 14, 15, 17 and 18 of this Agreement shall survive termination or expiration of this Agreement.

(b) Upon the expiration or termination of this Agreement (subject to the Limited Purpose Extension described in 11(c), if applicable), COMPANY shall return to MS or its designee, or at MS's direction destroy, all Product inventory, papers, materials, and other property of MS received or held by COMPANY pursuant to this Agreement. Each party shall assist the other in effecting an orderly termination of the business affairs contemplated hereunder. There shall be no refund, credit, or adjustment for amounts paid for Product(s) returned to MS or destroyed by COMPANY in accordance with this Section 13(b).

(c) In the event COMPANY's distribution rights are suspended or the Agreement expires or is terminated, MS may take any such actions as may be advisable to prevent unauthorized distribution of Packages and/or units of Product(s) then in inventory and to ensure timely return or destruction of such Product(s).

### 14. LIMITATION OF LIABILITY

COMPANY AGREES THAT NEITHER MS NOR ITS SUPPLIERS SHALL BE LIABLE FOR ANY INDIRECT, CONSEQUENTIAL OR INCIDENTAL DAMAGES (INCLUDING DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, AND THE LIKE) ARISING OUT OF THE USE, DISTRIBUTION OR INABILITY TO USE OR DISTRIBUTE THE PRODUCT(S) EVEN IF MS AND/OR ITS SUPPLIERS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. IN NO EVENT SHALL MS' AND ITS SUPPLIERS' LIABILITY UNDER THIS AGREEMENT OR ANY TRANSACTION CONTEMPLATED BY THIS AGREEMENT EXCEED THE ROYALTIES PAID BY COMPANY TO MS HEREUNDER.

### 15. RECORDS, AUDITS AND INSPECTIONS

(a) During the term of this Agreement and for three years thereafter, COMPANY shall maintain at its principal administrative facilities all appropriate books and records relating to performance of this Agreement. MS may cause an audit and/or inspection to be made of the applicable COMPANY records and facilities in order to verify statements issued by COMPANY and COMPANY's compliance with the terms of this Agreement. Any audit and/or inspection shall be conducted during regular business hours at COMPANY's facilities, with or without notice. Any audit shall be conducted by an independent certified public accountant selected by MS (other than on a contingent fee basis).

(b) COMPANY shall provide the audit or inspection team with access to all records and/or facilities so that the team may complete a proper and thorough audit or inspection.

(c) Prompt adjustment shall be made to compensate for any errors or omissions disclosed by such audit or inspection. Any such audit shall be paid for by MS unless material discrepancies are disclosed. "Material" shall mean a breach of Section 2(a) or 7(a), or the lesser of Ten Thousand Dollars (US\$10,000.00) or five percent (5%) of the amount that was reported. If material discrepancies are disclosed, COMPANY agrees to pay MS for the costs associated with the audit. Further, COMPANY shall pay MS an additional royalty or price of thirty percent (30%) of the applicable royalty for each Package of Product COMPANY failed to report.

### 16. NOTICES AND REQUESTS

(a) All notices, authorizations and requests from MS, including but not limited to notification of suspension or termination of a SB's authorization to acquire Product, updated Royalty and Price List(s), and updated and new Exhibits and Addenda may be given, at MS' option, (i) by posting to the DSP Information Web Site, (ii) by electronic mail (email) to COMPANY at the email address listed in Exhibit N, (iii) by facsimile transmission at the fax number listed in Exhibit N, and/or (iv) in written form to COMPANY at the address listed for notices in Exhibit N. All notices and requests from COMPANY shall be given by facsimile transmission at the fax number listed in

Exhibit N, or in written form to COMPANY at the address(es) indicated in Exhibit N (or to such other address as the party to receive the notice or request so designates by notice to the other).

(b) All notices, updates, authorizations, requests and other communications sent pursuant to this Agreement shall be deemed given: (i) if by posting by MS on the DSP Information Web Site, on the first day of the calendar month following the first posting of such communication; (ii) if by facsimile transmission or email, on the day the facsimile or email was transmitted; or (iii) if in written form, on the day (A) deposited in the U.S.A. mail, postage prepaid, certified or registered, return receipt requested, or (B) sent by air express courier, charges prepaid.

(c) COMPANY shall check the DSP Information Web Site for updated information at least twice each month, one of which shall be on or after 12.01 a.m. Pacific time zone, U.S.A., on the 26<sup>th</sup> (twenty-sixth) calendar day of each month. Information posted on the DSP Information Web Site is subject to change until the effective date of such information.

(d) General sales and marketing correspondence should be sent by COMPANY to MSCORP at the email or other addresses listed in Exhibit N.

#### **17. CONTROLLING LAW; NO FRANCHISE; ATTORNEY'S FEES**

(a) This Agreement shall be construed and controlled by the laws of the State of Washington, U.S.A., and COMPANY consents to jurisdiction and venue in the state and federal courts sitting in the State of Washington, U.S.A. Process may be served on either party in the manner set forth in Section 16 (a)(iv) for the delivery of notices or by such other method as is authorized by applicable law or court rule.

(b) Neither this Agreement, nor any terms and conditions contained herein, shall be construed as creating a partnership, joint venture or agency relationship or as granting a franchise as defined under the laws of the State of Washington.

(c) If either MS or COMPANY employs attorneys to enforce any rights arising out of or relating to this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees, costs and other expenses.

#### **18. PROHIBITION AGAINST ASSIGNMENT AND SUBLICENSE**

This Agreement, and any rights or obligations hereunder, are personal and nontransferable. They shall not be assigned, sublicensed, or otherwise transferred (whether by contract or operation of law) without MS' prior written approval.

#### **19. GENERAL**

(a) This Agreement does not constitute an offer by MS and it shall not be effective until signed by both parties. Upon execution by both parties, this Agreement shall constitute the entire agreement between the parties with respect to the subject matter hereof and merges all prior and contemporaneous

communications. Except as expressly provided for updates to and incorporations of Exhibits and Addenda, the Agreement shall not be modified except by a written agreement signed on behalf of COMPANY and MS by their respective duly authorized representatives. Submission of Product orders to Authorized Replicator(s) or distribution of Product after the effective date of any updates to the Exhibits shall constitute COMPANY's acceptance of such updates. Unless agreed to in a separate writing signed by both parties, any statement appearing as a restrictive endorsement on a check or other document which purports to modify a right, obligation or liability of either party shall be of no force and effect.

(b) If any provision of this Agreement shall be held by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remaining provisions shall remain in full force and effect. If this Agreement as it relates to any Product(s) licensed hereunder shall be held by a court of competent jurisdiction to be invalid, illegal or unenforceable, or if this Agreement is terminated as to particular Product(s), this Agreement shall remain in full force and effect as to the remaining Product(s).

(c) No waiver of any breach of any provision of this Agreement shall constitute a waiver of any prior, concurrent or subsequent breach of the same or any other provisions hereof, and no waiver shall be effective unless made in writing and signed by an authorized representative of the waiving party.

(d) COMPANY agrees that it will not export or re-export Product to any country, person, or entity subject to U.S. export restrictions. COMPANY specifically agrees not to export or re-export Product (i) to any country to which the U.S. embargoes or restricts the export of goods or services, which as of December 31, 1997, includes, but is not necessarily limited to, Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria, or to any national of any such country who COMPANY knows intends to transmit or transport the products back to such country; (ii) to any person or entity who COMPANY knows will utilize Product in the design, development or production of nuclear, chemical or biological weapons; or (iii) to any person or entity who has been prohibited from participating in U.S. export transactions by any federal agency of the U.S. government.

(e) Any Product which COMPANY distributes or licenses to, or on behalf of, the United States of America, its agencies and/or instrumentalities, shall be provided by COMPANY with RESTRICTED RIGHTS in accordance with the SB Distribution Agreement and/or the end user license agreement provided with the Product.

(f) The Section headings used in this Agreement and the attached Exhibits are intended for convenience only and shall not be deemed to supersede or modify any provisions.

(g) COMPANY shall, at its own expense, promptly obtain and arrange for the maintenance of Government Procedures. If any Government Procedures have not been completed by COMPANY within sixty (60) days of the Effective Date, MS may immediately terminate this Agreement by providing notice to COMPANY in accordance with Section 15.

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20. PRIOR AGREEMENT

(a) As of its Effective Date, the Agreement shall supersede any prior Delivery Service Partner Fulfillment and Distribution Agreement and any Microsoft® OEM Product Delivery Service Partner Fulfillment and Distribution Agreement ("Prior Agreement") between MSCORP or MS and COMPANY for the same Territory

(b) Provided COMPANY has complied with all terms and conditions, including payment, under the Prior Agreement, any distribution of Product in COMPANY's inventory as of the Effective Date which was acquired by COMPANY under the Prior Agreement, shall be in accordance with the terms and conditions of this Agreement

21. EXHIBITS

The following Exhibits, if attached, are part of this Agreement.

- Exhibit(s) A Additional Product Provisions
- Exhibit B Sub-Distribution Program
- Exhibit(s) C Marketing and Promotional Programs
- Exhibit N Addresses
- Exhibit P Promissory Note, Bond, or other Financial Guarantee Instrument
- Exhibit R Report Form(s)
- Exhibit Z Additional Country/Region Provisions

The terms of the Exhibit(s) shall supersede any inconsistent terms contained in this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date set forth above. All signed copies of this Agreement shall be deemed originals. The individual signing on behalf of COMPANY below hereby represents and warrants that he or she has full authority to sign this Agreement and bind COMPANY to perform all duties and obligations contemplated by this Agreement. If COMPANY is located in a jurisdiction in which a corporate seal or "chop" is commonly used as an instrument of agreement execution, in addition to the individual signature provided below, COMPANY's seal or "chop" may be entered below COMPANY's signature block.

MICROSOFT LICENSING INC.

*Karen Hurlbut*  
By \_\_\_\_\_

**Karen Hurlbut**  
Name (Print) \_\_\_\_\_

**General Manager, OEM Operations, MSLI**  
Title \_\_\_\_\_

**May 10, 1998**  
Date \_\_\_\_\_

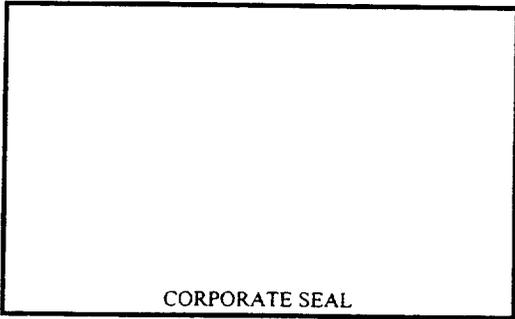
TECH DATA PRODUCT MANAGEMENT, INC.

*Peggy K. Caldwell*  
By \_\_\_\_\_

**Peggy K. Caldwell**  
Name (Print) \_\_\_\_\_

**SVP - Marketing**  
Title \_\_\_\_\_

**5/4/98**  
Date \_\_\_\_\_



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**EXHIBIT A**  
**ADDITIONAL PRODUCT PROVISIONS**

- (a) From time to time MS may elect to include supplemental or instructional software programs as part of Product(s) without additional royalty. The inclusion of such software programs will be indicated in the Product descriptions in the Royalty and Price List. Localized versions of Product(s) may contain English language components, if localized versions are not available.
- (b) From time to time MS may elect to offer combinations of Products that consist of two or more component Products. Some component Products may be available separately from an Authorized Replicator and are identified in the Royalty and Price List. Please contact your Account Manager for further information.
- (c) From time to time MS may offer promotional Product(s), royalties and/or prices. Such promotions and their duration will be indicated on the Royalty and Price List.
- (d) Office 97 Small Business Edition v. 1.x will load only on the DSP version of Windows 95 OEM Service Release 2 (OSR2), or later release(s), which have been preinstalled by the SB using the preinstallation tools in accordance with the SB Distribution Agreement.

**HARDWARE PRODUCTS**

- (a) Orders placed for hardware Products may be fulfilled with Packages of Product containing the immediately preceding version release of the Product until such time as the listed version is available in sufficient quantities to DSPs for distribution in the Territory.
- (b) The Authorized Replicator for hardware Products shall be Microsoft Licensing, Inc. Order processing and fulfillment services for licensed hardware Product, if any, are provided by UPS Worldwide Logistics as described in the MS OEM Hardware Delivery Service Partner Customer Service Guide. Hardware Product orders shall be made to the following address:

Continent/Region	Address:	Phone numbers	Fax numbers:
North America and Latin America	Microsoft Licensing, Inc. (Reno, NV U.S.A) c/o UPS Worldwide Logistics 9001 Sterling Street Irving, Texas 75063 U.S.A.	English: 1-800-877-6852 or (972) 621-3000 (USA/Canada) Spanish: (+1) (972) 915-6912	(+1) (972) 929 3607
Europe, Africa, India, and Middle East	Microsoft Licensing, Inc. (Reno, NV U.S.A) c/o UPS European Distribution Center De Dieze 17 5684 PR Best The Netherlands	(+31) 499 331660	(+31) 499 331659
Far East and Asia Pacific	Microsoft Licensing, Inc. (Reno, NV U.S.A.) c/o UPS Worldwide Logistics Asia Ptd. Ltd. 19 Loyang Way #02-10 Singapore 508724	English: (+65) 542-9557 Cantonese: (+65) 542-5997 Mandarin: (+65) 542-6801 Japanese: (+65) 542-2712 Korean: (+65) 542-5993	(+65) 542-7385

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(c) Notwithstanding anything to the contrary contained in the Agreement, full payment of the price indicated in the Royalty and Price List for Hardware Products shall be due on the date of order and paid in accordance with MS' invoice. Unless otherwise agreed to by MS, Product will not be distributed to COMPANY until full payment is received. COMPANY shall report all Packages of Product distributed on COMPANY's monthly royalty reports (with \$0 royalty due) and sales out reports.

Payments shall be made by wire transfer to:

**MICROSOFT LICENSING, INC**

c/o Nationsbank

Dallas, Texas 75202

ABA # 11100001-2

Account Number: #3750891058

SWIFT Code: NBKUS44DAL

or to such other address or account as MS may indicate by written notice.

Please reference invoice number on wire transfer instructions.

(d) Prices listed are given on a "FCA" ("Free Carrier") basis (per Incoterms, 1990) MS' shipping point and are exclusive of shipping charges, insurance, applicable sales or use taxes or other taxes, import and export fees, duties or tariffs, and any other taxes, duties or fees of any kind which may be levied in connection with the transactions covered hereby. Such charges shall be paid by COMPANY.

(e) Authorized Replicator will accept returns of hardware Product only as described below. All returns of hardware Products shall be made to the Authorized Replicator location from which such Product originally was ordered. All units of returned hardware Product are subject to inspection and approval by Authorized Replicator. Upon approval, Authorized Replicator will issue a credit (less applicable shipping and handling charges) for, or ship replacement for, the returned hardware Products. Authorized Replicator reserves the right to change the returns policy upon thirty (30) days notice.

(i) COMPANY may return a complete order of hardware Product that was either erroneously placed by COMPANY, or erroneously fulfilled to COMPANY by the Authorized Replicator.

(ii) COMPANY may (A) return complete units of hardware Products that were returned to COMPANY by SBs as defective, provided that each return shall consist of at least 50 units of each hardware Product or (B) advise SBs that hardware Product(s) claimed to be defective may be returned for replacement directly to Authorized Replicator by calling the numbers provided in this Exhibit A for detailed instructions. All hardware Product returns shall be received by the Authorized Replicator within sixty (60) days of the date of SB's purchase from COMPANY (or an Eligible Sub-Distributor) of such Product(s) and are subject to inspection and verification by the Authorized Replicator that the returned units of Product were defective.

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Delivery Service Partner Fulfillment and Distribution Agreement dated May 1, 1998 between MICROSOFT LICENSING, INC. and TECH DATA PRODUCT MANAGEMENT, INC.

**EXHIBIT B**  
**SUB-DISTRIBUTION PROGRAM**

- (a) "Eligible Sub-Distributors" shall mean entities identified by MS, if any, as "Eligible Sub-Distributor(s)" which have a valid license with MS to redistribute unopened Packages of Product to SBs as acquired from COMPANY. MS will identify such Eligible Sub-Distributors on the DSP Information Web Site.
- (b) In addition to rights granted in Section 2(a) of the Agreement, MS authorizes COMPANY to distribute Packages of Product to Eligible Sub-Distributors located in the Territory.
- (c) COMPANY shall separately indicate on its monthly royalty report the number of Packages distributed in accordance with this Exhibit C.

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**EXHIBIT C - COMPLIANT REPORTING DISCOUNT**

- (a) COMPANY may earn the discount amount described below for each Package of the listed Product(s) upon complying, to the satisfaction of MS, in the corresponding reporting period with the following:

Requirements	Per Package Discount Amount (US\$)	Product(s)
COMPANY is in full compliance with the terms and conditions of the Agreement and has met the compliancy standards described in the Sales-Out Report Guidelines	US\$10.00	Windows 9X Windows 9X & Plus!

- (b) COMPANY shall separately indicate on its monthly royalty report the number of Packages of each Product distributed in compliance with this Exhibit C and shall identify the discount amount as the "Compliant Reporting Discount".
- (c) In the event MS determines, in its sole discretion, that COMPANY has not accurately reported COMPANY's compliance with provision (a) of this Exhibit C, MS may invoice COMPANY for, and COMPANY shall promptly pay, an amount equal to the disallowed discount plus any applicable interest and late charges.

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**EXHIBIT N**  
**ADDRESSES**

**COMPANY:**

**NOTICES:**  
TECH DATA PRODUCT MANAGEMENT, INC.  
5350 Tech Data Drive  
Clearwater, FL 34620  
Attn: Steve Giese, VP Marketing Operations  
Telephone: (813) 539-7429  
Fax: (813) 538-7803

cc:  
Juan Logo, Contract Analyst  
David R. Vetter, VP General Counsel  
Jim Fish  
Email: [jfish@techdata.com](mailto:jfish@techdata.com)  
**BILL TO:**

TECH DATA PRODUCT MANAGEMENT, INC.  
5350 Tech Data Drive  
Clearwater, FL 34620  
Attn: Accounts Payable

**SHIP TO:**  
TECH DATA PRODUCT MANAGEMENT, INC.  
5350 Tech Data Drive  
Clearwater, FL 34620

**COMPANY Sales and Support Telephone:** 800-323-7983

**Royalty and Inventory Reports shall be made to:**  
Microsoft Licensing Inc.  
6100 Neil Road  
Reno, NV 89511-1132 U.S.A.  
**Attention:** OEM Finance  
**Fax:** +1-702-826-0531  
**Email Address:** [dsproy@mlicense.com](mailto:dsproy@mlicense.com)

or to such other address(es) as MS may specify from time to time.

**Payments shall be made by wire transfer to:**  
MICROSOFT LICENSING, INC.  
C/o Nationsbank  
Dallas, Texas  
ABA #11100001-2  
Account #3750891058  
Text: REF+LB+100430  
Regarding: OEM Collections

**MS:**

**NOTICES:**  
MICROSOFT LICENSING, INC.  
6100 Neil Road  
Reno, NV 89511-1132 U.S.A.  
Attn: General Manager

**With copies to:**  
MICROSOFT CORPORATION  
One Microsoft Way  
Redmond, WA 98052-6399 U.S.A.  
Attn: Law & Corporate Affairs  
Re: Microsoft Licensing, Inc. DSP Sales & Marketing  
Fax: +1-425-936-7329

MICROSOFT CORPORATION  
One Microsoft Way  
Redmond, WA 98052-6399 U.S.A.  
Attn: Vice-President OEM Sales & Marketing  
Re: Microsoft Licensing, Inc. DSP Sales & Marketing  
Fax: +1-425-936-7329

**Sales and Marketing Correspondence:**  
MICROSOFT CORPORATION  
One Microsoft Way  
Redmond, WA 98052-6399 U.S.A.  
Attn: OEM Sales & Marketing Department  
Re: Microsoft Licensing, Inc. DSP Sales & Marketing  
Fax: +1-425-936-7329  
Email address: [dpsales@microsoft.com](mailto:dpsales@microsoft.com)

**Reports:**

**Sales Out Reports:**  
Microsoft Corporation  
Delivery Service Partner (DSP) Group  
Attention: Point of Sale Report Analyst  
Email Address: [dpsell@microsoft.com](mailto:dpsell@microsoft.com)

**Royalty and Inventory Reports:**  
Microsoft Corporation  
Delivery Service Partner (DSP) Group  
Email Address: [a-shanbe@microsoft.com](mailto:a-shanbe@microsoft.com),  
[kathyrau@microsoft.com](mailto:kathyrau@microsoft.com)

**Payments:**

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or to such other address or account as MS may specify from time to time by email or other written notice. COMPANY agrees to ensure that the regarding line stated above, the MS license agreement number for the Agreement, and the MS invoice number (if any) are specified on each wire transfer payment made pursuant to the Agreement.

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Delivery Service Partner Fulfillment and Distribution Agreement dated May 1, 1998 between MICROSOFT LICENSING, INC. and TECH DATA PRODUCT MANAGEMENT, INC. **038460**

