

**FSMA RECOMMENDED CONTRACT
BETWEEN AGENCY AND CLIENT**
(Amended 10/14/15)

THIS AGREEMENT is entered into this ____ day of _____, 20__, by and between _____ (“CLIENT”) and _____ (“AGENCY”).

WHEREAS, CLIENT is the supplier, manufacturer or processor of certain merchandise or products and desires to secure the services of AGENCY, and

WHEREAS, AGENCY maintains a local market expertise as a provider of sales and marketing services in the territory hereinafter described and desires to provide such services to CLIENT;

NOW THEREFORE, in consideration of the undertakings contained herein, the parties hereto agree as follows:

1. Representation/Territory. CLIENT hereby appoints AGENCY as its sole and exclusive representative to provide sales and marketing services for the merchandise or products within the territory and for the compensation as described in Attachment No. 1.

2. Service Policies. All sales negotiations and marketing services provided by AGENCY for the account of CLIENT shall be conducted in accordance with such prices, terms and conditions as specified by CLIENT’s Policy Statement.

3. Compensation. CLIENT agrees to compensate AGENCY on all gross sales accepted by CLIENT in the territory. Such Compensation shall be computed on the price of the merchandise or products sold after discounts and allowances are calculated. Compensation shall be made promptly by Client within thirty (30) days after the end of each month together with a commission reconciliation statement in electronic format of all AGENCY sales invoices for products shipped by CLIENT into AGENCY’s Territory for the prior month. A delinquency charge of 1.5 percent per month (but not in excess of the lawful maximum) may be added on any amount past due.

4. Sales and Promotional Policies. CLIENT agrees to keep AGENCY fully informed on all sales and promotional policies and programs affecting the products or merchandise in the territory. The cost of AGENCY’s attendance at CLIENT’s sales meetings shall be borne by CLIENT.

5. Purchase Order Reports & Negotiations. AGENCY agrees to promptly report to CLIENT all negotiations and purchase orders for acceptance by CLIENT. Approval of all sales orders and extension of Customer credit are at the sole discretion of CLIENT.

6. Collections & Deduction Responsibilities. AGENCY agrees to assist CLIENT in the research of all deductions and in communication of the need for prompt and full payment by

Customers for all deliveries of merchandise and products sold. AGENCY is not responsible for the payments of any Customer and CLIENT shall not deduct commissions of AGENCY for such nonpayment.

7. **Shipments.** AGENCY agrees to promptly notify CLIENT of required shipments to Customers. CLIENT agrees to promptly ship merchandise or products sold for all accepted orders.

8. **Competitive Products.** Both parties agree to abide by FSMA Policy Statement #1 on Competitive Products/Conflicts and not to declare another product represented by AGENCY as “competitive” and “in conflict” with their own as long as AGENCY satisfied the responsibilities and goals as contained therein.

9. **Diverting.** Both parties agree to abide by FSMA Policy Statement #2 on Diverting Product. If AGENCY orders any product proven to be knowingly distributed into another territory, all commission will be forfeited and AGENCY will be responsible for breach of contract. If CLIENT diverts product into AGENCY’s territory, CLIENT shall be responsible for all commission to AGENCY and will be deemed to be in breach of contract to all associated fees.

10. **Consolidations.** In the event that CLIENT acquires the rights to a product serviced by a competitive AGENCY in the territory, CLIENT will follow the procedures as developed in FSMA Policy Statement #3 on Consolidations.

11. **Product Liability Indemnification.** CLIENT agrees to defend, hold harmless and indemnify AGENCY from any and all loss or damage, costs and expenses, including legal fees, incurred by any claim or action made or filed against AGENCY, claiming loss or injury of any nature whatsoever, as a result of defect in any merchandise, purchase or use of any product supplied, manufactured, or processed by CLIENT.

12. **Agency.** AGENCY shall act as an independent contractor or agent of CLIENT, and neither AGENCY nor its employees shall be considered employees of CLIENT, and neither party shall in any event be held liable or accountable for any obligations incurred by either party other than as specified herein, it being specifically understood that the respective businesses of each of the parties shall be operated separate and apart from each other.

13. **Confidentiality/Employees.** AGENCY and CLIENT shall cause its officers, directors, employees, and agents to maintain as confidential any trade secrets, technology, processes or proprietary business information which may be disclosed or acquired by either party in connection with this Agreement. During the term of this Agreement, each party agrees not to employ individuals from the other’s organization.

14. **Term.** This Agreement shall continue in full force and effect for a one-year period from the date this Agreement is entered into as listed in the first paragraph hereof. It will be

automatically renewed for an additional one-year period unless the other party notifies its intention not to renew 30 days prior to the end of the term.

15. Termination. Either party may terminate this Agreement for any reason by giving thirty (30) days written notice of such intention to the other party. In the event CLIENT terminates this Contract for reasons other than AGENCY's breach, CLIENT agrees to abide by FSMA Policy Statement #4 on Terminations and shall pay AGENCY severance compensation (based on the average monthly commissions for the previous 12 months) equal to one month's payment for each year of representation.

16. Arbitration. Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the rules of the American Arbitration Association held at a location close to an office of CLIENT's nearest an office of AGENCY. Judgment may be entered in any court having jurisdiction thereof.

17. Applicable Law. The laws of the state of CLIENT's headquarters shall govern the application and interpretation of this Agreement.

18. Prior Agreements/Amendments. This Agreement cancels and supersedes any and all prior agreements, oral or written, made between the parties hereto. It can only be modified by an agreement in writing signed by all applicable parties.

19. Binding. This Agreement shall be binding on the parties hereto and their successors and assigns.

CLIENT:

AGENCY:

By: _____

By: _____

(Title)

(Title)

[OPTIONAL LONG-TERM CONTRACTS – REPLACEMENTS FOR ITEMS 14 & 15]

14. Term. This Agreement is a guaranteed one year contract and shall continue in full force and effect for a one year period from the date this Agreement is entered into as listed in the first paragraph hereof. It will be automatically renewed for an additional one year periods unless either party notifies the other in writing of its intention not to renew sixty (60) days prior to the end of each one year term.

15. Termination. In the event either party fails to renew this Agreement for reasons other than breach of this Contract, the non-renewing party shall pay the other party severance compensation (based on the average monthly commissions for the previous 12 months) equal

to one month's average commission for each year of representation or portion thereof up to a maximum of six months of commissions.

FSMA

FSMA – POLICY #1
(Adopted 2/17/04)

CLIENT/AGENCY POLICY ON COMPETITIVE PRODUCTS/CONFLICTS

Client will review potential conflicts on a market-by-market basis. Agency will be permitted to represent competitive products where marketing and promotion decisions are made on a category management best practices basis provided Agency adheres to the following:

- 1) Agency will give Client advance written notification of potential competitive product representation.
- 2) Agency will use different Account Executives within its organization, whenever possible, for competitive brands.
- 3) Agency will agree to a 12-month trial representation period for representation of the competing brand.
- 4) Agency will establish with Client the brand objectives and points for evaluation on a quarterly basis. If sales objectives are met, Agency understands the representation of this competing brand will be acceptable to Client.
- 5) Agency will maintain confidentiality as required by the Agency/Client Contract. Agency will not communicate Client's proprietary prices, systems, processes, capabilities, training or business evaluations.

FSMA – POLICY #2
(Adopted 2/17/04)

CLIENT/AGENCY POLICY ON DIVERTING PRODUCT

Client's Responsibility

- 1) Client will establish maximum orders on deals for a given market or Customer.
- 2) Client will match any diverted offering in Agency's territory on a timely response basis.
- 3) Client will terminate its personnel who knowingly participate in diverting product.
- 4) Client will train its personnel to recognize trade dealing practices that may encourage diverting.
- 5) Client will coordinate its sales activities to prevent product from being diverted from one class of trade to another.
- 6) Client will determine the source of any product diverted into Agency's territory and pay Agency the standard commissions on such product.

Agency's Responsibility

- 1) Agency will not knowingly divert any product to a market area inconsistent with Client's plan. When requested by Client, Agency shall request Customer to sign a contract on promotions that requires the product purchased by Customer to remain in a specific geographic area.
- 2) Agency will develop a system for monitoring Customers' volumes and will request Customers to explain orders that substantially exceed historical ranges. Agency will advise Client to limit or turn down orders exceeding reasonable volumes, to prevent product from being diverted.
- 3) Agency will recommend to Client the promotional practices which will work best in the territory to avoid both incoming and outgoing diverting.
- 4) Agency will train its personnel to recognize trade dealing practices that may encourage diverting.
- 5) Agency will notify Client of any product diverted out of the territory and forfeit its standard commission.
- 6) Agency will terminate its personnel who knowingly participate in diverting products.

FSMA – POLICY #3
(Adopted 2/17/04)

CLIENT /AGENCY POLICY ON CONSOLIDATION

- a) The process of evaluation shall involve ample notification to all involved Agencies, which will be clearly communicated when the consolidation is pending.
- b) The evaluation will be objective and involve a minimum of one scheduled meeting with each Agency.
- c) Agencies will have ample time to prepare for the evaluation meeting. Client will notify the Agencies participating immediately after completing the final evaluation and decision.
- d) Individual market evaluations will be made crossfunctionally between corporate and local market management.
- e) Each Agency's attributes will be analyzed impartially.
- f) Appointments across an area or region will take into consideration local market issues and dynamics.
- g) Due process will be followed for a transition period after the consolidation decision has been agreed to.
- h) Appropriate severance will be considered based on market development and length of service before termination.

FSMA POLICY STATEMENT #4

(Adopted 1/26/09)

PRINCIPLES OF FAIRNESS IN TERMINATING SMA CONTRACTS

Sales and marketing agencies (“SMA’s”) generally operate under 30- to 90-day agreements with their client suppliers and manufacturers (“Clients”). SMA’s operating under such short term contracts are motivated in their Client representation to perpetuate a long term relationship, especially if principles of fairness exist to govern an unexpected possible contract termination.

In order to properly service a Client, an agency retains a sales and marketing staff and organizational infrastructure dedicated to meet Client’s needs on a long term basis. These involve significant capital commitments in personnel and infrastructure. Because of these long term commitments, it is important that the parties have a legally binding contract and engage in an annual evaluation of the contract terms and performance thereunder to assure all responsibilities and objectives are being upheld. These periodic reviews are important to avoid misunderstandings and to reinforce commitments.

However, if a Client is considering replacing its sales and marketing agency, the Board of Directors of FSMA recommends principles of fairness be followed to permit the Client and SMA to meet in advance of any final decision to discuss the issues and permit SMA a reasonable period of time to negotiate the issues in order to satisfy Client’s concerns.

Such a first step meeting should involve decision making principals of each organization and be held at location where privacy and constructive conversation can take place to enable issues to be discussed on a confidential basis.

For example, at such a meeting issues like conflicts and competitive products could be reconciled by adopting the fairness principles established in FSMA Policy Statement #1. Performance and commission related issues may involve the mutual development of a plan, with timelines and scorecard, to meet the Client’s goals. Other issues like consideration of creating a direct sales force may be analyzed by reviewing various research studies on the efficiencies and effectiveness of SMA’s over a direct sales force.

FSMA Board of Directors stress that industry partnerships require reasonable dealings between the parties in light of the material commitment of SMA’s on short term contracts. However, in the event a Client concludes, after its exercise of the above principles of fairness, that it will terminate the SMA, then Client should pay reasonable termination compensation consistent with the industry standard of one month’s average compensation for each year of SMA’s service to Client (See FSMA industry standard contract paragraph 15).