

**BIOTECHNOLOGY, PHARMACEUTICAL AND CHEMICALS MASTER DISTRIBUTION AGREEMENT
SAMPLE TERM SHEET: DEAL POINTS**

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I. Executive Summary.

The Biotechnology, Pharmaceutical and Chemicals sectors are increasingly innovating in the supply and distribution of life sciences products and their elements. Even the largest industry players frequently turn to horizontal competitors for the distribution and outsourcing of manufacture and supply functions for certain classes of products, often called “SKUs” (pronounced “Skews” in the industry, short for “Stock Keeping Units” and referring to product line groups by catalog identification codes by which inventory can be maintained and orders placed). The commercial frame, or Master Distribution Agreements (“MDAs”) embodying these relationships often have multi-year terms and hundreds of millions of dollars in value, and the terms are often heavily negotiated.

This sample Term Sheet is derived from several prepared by our firm to negotiate and document MDAs in the Biotechnology, Pharmaceutical and Chemicals sectors. As with any business transaction, the principal business terms and goals should be agreed to, at least broadly, before documenting them in the Term Sheet and subsequently in the MDA. These are sample terms only to give an idea of the parameters of negotiation; any of them may be altered to meet the parties’ and the transaction’s needs. Following the sample Term Sheet are “Deal Points,” that address the broader structure of an MDA transaction, and which should be considered before starting to negotiate, outline and draft the Term Sheet and the MDA.

II. Sample Term Sheet.

Issue	Terms
Supplier	[Party] (“Supplier”)
Distributor	[Party] (“Distributor”)
Appointment	Distributor is appointed as [non-exclusive][the exclusive] distributor of Supplier for all Supplier current and future products both as listed in Schedule “A” annexed hereto, as amended from time to time, for the Territory (as defined below) during the Term (as defined below) and otherwise. Distributor may exercise its appointment through scheduled Affiliates and Sub-Distributors.
Territory	[Global] [Defined Limited Territory: Country, Region, etc.]

Issue	Terms
Term	<ul style="list-style-type: none"> I. “Initial Term” of [X] months commencing [Date] II. Automatic successive renewals of [12] months each (each, a “Renewal Term”) unless notice of intent not to renew is given pursuant to termination provisions (alternatively, no automatic renewals; renewals on notice or only by mutual agreement).
Transition Milestones	<p>The following transition milestones shall be adopted for the exclusive distribution appointment:</p> <ul style="list-style-type: none"> I. By [Date]: Master Distribution Agreement and schedules (collectively, “MDA”) executed. II. [Date]: MDA effective date; e-commerce content online; external communication; Supplier will supply all systems load data by [Date prior to Effective Date].
Pricing for Product Purchased from Supplier	<p>Initial and Subsequent Pricing for Products:</p> <ul style="list-style-type: none"> I. [X]% discount on Supplier’s FY [Year] U.S. list price. II. If no FY [Year] U.S. list price is available, [X]% off the YTD Average Selling Price for the territory with the lowest Average Selling Price for that period. III. Supplier will provide an updated price list each calendar year during the Term by [Month/Day], which will become effective on January 1 of the following calendar year. The prices that become effective each new calendar year will not exceed a [X]% increase over the following calendar year for any product under the MDA.
Pricing for Product Sold to End Customers	<p>The Distributor has the right to change prices charged to end customers at any time without notice to the Supplier.</p>
Inventory Ordering and Shipping	<p>Supplier shall supply Distributor with its Product catalog and list prices periodically during the Term; the parties shall establish in the MDA a standard inventory purchase ordering protocol with discounts above-stated and delivery procedure. Supplier shall assume responsibility to maintain adequate inventory to meet Distributor’s orders, particularly to the level of milestones. The Distributor will provide periodic forecasts to the Supplier to assist in the maintenance of adequate inventory.</p>

Issue	Terms
Title and Risk of Loss	Title and risk of loss transfers to Distributor for any given shipment of Products upon receipt of shipment per Incoterms 2010 [or other] (“[Incoterms Choice]”) to Distributor’s locations [specify].
Taxes and Duties	Distributor to be responsible for all taxes and duties except those on Supplier’s income.
Distribution Milestones	Minimum inventory purchase requirements of [\$X] during the Term. In the event of termination due to a material breach by the Supplier, or termination initiated by the Supplier, there will be no additional required purchases after the termination. In the event of termination by the Distributor, the Distributor will be required to purchase an amount of inventory no greater than the amount of inventory purchased during the [X] months prior to the termination date cumulatively during the [X] months between notification of termination and the termination date. If the Supplier fails to meet any Purchase Order, that amount will be counted as a purchase for the purposes of the minimum. If the Supplier elects to no longer manufacture a product, the minimum will be reduced by the <i>pro rata</i> share of that product’s trailing [X] months sales.
Material Adverse Events	Distributor will not be subject to the purchase minimum for products or product lines that experience a collapse in the market or significant competing generic products coming to market. Distributor will also have the right to return inventory at the price purchased for the products that are impacted by the above events.
Termination	<ol style="list-style-type: none"> I. Termination by either party on [X] days’ written notice prior to the end of the Initial Term or any Renewal Term. II. Termination by Supplier or Distributor on [X] days’ written notice in case of material breach, if such material breach is not cured within the [X]-day notice period. III. Termination in the event of bankruptcy, insolvency, receivership, assignment for the benefit of creditors (in the case of involuntary petition, if such petition is not dismissed within [X] days).

Issue	Terms
Post-Termination Obligations	In the event of a termination, the parties will fulfill all existing orders, will cancel all licenses and cross-licenses between them and will return all intellectual property other than intellectual property pre-dating the MDA or that they have agreed will remain with one party post-termination. The parties will further conduct a set-off to determine the monies owed as between them as of the time of termination and the net debtor shall pay to the net creditor the full remaining balance of such account.
Accounting and Reporting	The MDA will establish an accounting/reporting system to account for and report inventory, sales and other data relating to the exclusive distribution appointment during the Term.
Dispute Resolution	<ul style="list-style-type: none"> I. Governing Law for construction of the MDA: [Specify Jurisdiction] law will govern construction of the MDA, unless local national law requires such law to govern. (employment/social issues, real property issues, etc.). II. Disputes to be Resolved [consider designated officers for initial attempt to resolve disputes, then escalation to mediation]. III. Disputes that the parties are otherwise unable to resolve shall be submitted to the exclusive jurisdiction of the [Court, Arbitral Tribunal, etc.].
Warranty	<p>Supplier shall warrant, for each Product and shipment of Products delivered to Distributor for distribution that such Products:</p> <ul style="list-style-type: none"> I. Have been manufactured, inspected, packaged and shipped in accordance with the highest industry standards pertaining to such products and in accordance with all applicable regulations of both country of origin and country of destination; II. Are of merchantable quality and fit for the particular purpose intended; III. Conform to their cataloged and otherwise documented specifications in all respects; and IV. Do not infringe any third party intellectual property rights.

Issue	Terms
Indemnification by Supplier	<p>Supplier shall indemnify Distributor for:</p> <ul style="list-style-type: none"> I. Any breach of warranty; II. All latent defects in the Products; III. All patent defects in the Products not caused by Distributor’s negligence after title and risk of loss to such Products passes to Distributor; IV. All damages to Distributor personnel or property caused by Products or by Supplier’s negligence or willful misconduct V. All damages to third party persons or property caused by Products, including, without limitation, those damages arising from product liability, personal injury or wrongful death claims; or by Supplier’s negligence or willful misconduct; and VI. All damages arising from third party intellectual property claims relating to Products.
Indemnification by Distributor	<p>Distributor shall indemnify Supplier for:</p> <ul style="list-style-type: none"> I. All damages to Supplier personnel or property caused by Distributor’s negligence or willful misconduct; and II. All damages to third party persons or property caused by Distributor’s negligence or willful misconduct.
Limitation of Liability	<ul style="list-style-type: none"> I. Neither party shall be liable to the other party for consequential, exemplary, special or punitive damages, including for loss of profits. II. Except as to matters for which indemnification rights exist, direct damages shall be limited to the price of the Products to which such damages apply.
Force Majeure	<p>The parties shall be excused from performance by events of force majeure amounting to acts of God, war, insurrection, failure of infrastructure and similar exigencies, but not for events amounting merely to commercial impracticality. An event of force majeure lasting for [X] days shall give rise to a right of termination upon written notice of [X] additional days, if not cured within such notice period.</p>

Issue	Terms
Intellectual Property	<p>I. Each party shall retain sole ownership of intellectual property pre-dating the MDA.</p> <p>II. Without limitation of the foregoing, each party shall retain sole ownership of its logos, trademarks, service marks and other branding designations.</p> <p>III. [Notwithstanding the foregoing, Supplier will provide to Distributor on or about [X] its direct sale end-customer data.]</p> <p>IV. [Notwithstanding the foregoing, all lists of customers and associated data developed during the exclusive distribution appointment shall be the exclusive property of Distributor during and at the end of the Term.]</p> <p>V. [Each party will cooperate with the other in seeking redress for breach of the other’s intellectual property.]</p>
Marketing	Simultaneously with the MDA, the parties shall enter into a branding and marketing agreement in furtherance of the goals of the exclusive distributorship appointment, providing, among other things, for the use of Supplier’s brand on Products sold by Distributor and co-branding of Products in furtherance of the exclusive distributorship appointment, and granting the necessary licenses and cross-licenses to accomplish such goals. Distributor will also have the right to place any product purchased from Supplier under alternative brands.
Confidentiality	Supplier and Distributor shall enter into a Non-Disclosure Agreement simultaneously with this Term Sheet, providing that the fact and terms of the transaction provided herein shall be treated as confidential. The MDA will continue confidentiality provisions for the duration of the Term plus [X] years following the end of the Term.
Rules of Construction	Neither party will benefit from any applicable rules of construction to the detriment of the other; the MDA and this term sheet shall be deemed to have been jointly drafted by the parties.
Assignment	No assignment without written consent, except that Distributor shall have the right to assign functions and responsibilities to other members of its corporate group and to sub-distributors, provided that such assignment does not relieve Distributor of responsibility.

Issue	Terms
Payment terms	Payments will be made within [X] days of receipt of products ordered.
Documentation	Supplier and Distributor will enter into the MDA on or before [Date], memorializing the terms contained herein and other terms and conditions common to transactions of this kind, provided that such terms and conditions are not inconsistent with the terms contained herein. Schedule "A," "Products," shall be annexed to and incorporated by reference to the MDA, which shall provide a mechanism for the periodic amendment of Schedule "A" and other changing commercial terms by written agreement of the parties.
Diligence	The parties shall cooperate in providing and allowing commercially reasonable due diligence prior to entering into the MDA and shall designate personnel responsible to providing and receiving, respectively, due diligence materials pertinent to the exclusive distribution appointment.
Regulatory	The parties' regulatory and compliance teams will cooperate during the period leading up to the execution of the MDA to determine a rational allocation given the parties' roles of any regulatory and compliance obligations that the teams identify. Remedies shall be negotiated if any such regulatory approvals are not granted or are conditionally granted.
Other	In the event that the Supplier can no longer produce a product for a given period of time, the Distributor may find an alternative supplier to manufacture the product and place it under the brand of the Supplier. The Supplier will bear the cost of the difference between the alternative supplier's cost of the product and the Supplier's cost.

III. Deal Points.

Deal Point No. 1: Most Fundamental Issue: Consider the Nature of the Appointment. Distributor will generally want exclusivity of distribution rights for the Products subject to the deal. Supplier will generally want to limit exclusivity by the Products subject to the deal: by the Term of the MDA; by exclusivity (as opposed to non-exclusivity) during the Term; by the Territory to which exclusivity, or the deal as a whole, applies; and by Distributor's commitment to purchase from Supplier minimum numbers of products during the Agreement's Term, or defined periods during the Term. These minimum commitments by Distributor to

purchase are generally called “Volume Commitments.” If exclusivity is granted either globally or in given Territories, the Parties may discuss Pricing and Volume Commitments based on exclusivity, as well as termination of exclusivity rights (short of termination of the entire agreement) if targets are not met. Termination of exclusivity may reopen the Pricing and Volume Commitments that were in part based on that exclusivity.

Deal Point No. 2: Volume Commitments. The amounts of Volume Commitments and milestones necessary to for Distributor to meet during the Term of the MDA are often highly negotiated, as are penalties for failure to meet Volume Commitments, which can result in penalties ranging from Distributor paying a fee to Supplier to make up the missed Volume Commitment, to loss of exclusivity, to termination of the MDA as a whole, depending on the level, duration and reasons for the Volume Commitment shortfall. Volume Commitments can be set by SKUs (Product lines) or, when more than one Product line is part of the MDA, by groups of Product lines or by all Products subject to the MDA, in which case the Distributor may be allowed to make up a Product line Volume Commitment shortfall by excess purchases in another Product line.

Deal Point No. 3: Volume Commitment Shortfall Excuses. The Parties can also negotiate into the deal Volume Commitment shortfall excuses, which can range from “force majeure”-like events to “material adverse change”-like events, such as a Product going off patent, market change affecting demand for a Product, a regulatory or legal event such as a Product being subject to new regulatory agency warnings or even banned. Typically, Supplier will want the fewest possible excuses to Volume Commitments, while Distributor will want to negotiate broader excuses to Volume Commitments, especially in cases in which the Supplier was in a better position than Distributor to know about the event affecting purchase and sale of the Product. For example, a threatened, but not yet commenced, litigation against a Product line might be something Distributor would claim should result in a Volume Commitment shortfall excuse if the litigation commences during the MDA’s Term, while Supplier might resist an already-commenced patent infringement action as a Volume Commitment shortfall excuse, on the grounds that the Distributor was in a position to know about that risk to the Product's market and negotiate accordingly. On the other hand, Supplier's own discontinuance of a Product during the Term will typically be claimed by Distributor as a “force majeure”-like event justifying release from the Volume Commitment, at least as to that Product. The Parties may even plan for “mandatory” v. “permissive” Volume Commitment shortfall excuses, and provide different remedies for each type of event.

Deal Point No. 4: Forecasting and Reporting. Forecasting bears a relation to Volume Commitments, in that Supplier will generally ask Distributor to issue annual, quarterly or monthly forecasts during the Term for amounts of Products it will purchase, to give Supplier notice to manufacture and provision adequate amounts of the Products to meet the forecasts and allow Supplier to estimate its revenues and whether Volume Commitments and milestones will be achieved. Accounting, audit and reporting provisions are generally negotiated to ensure that forecasts and milestone achievement can be verified. Remedies for not meeting, and/or “bonuses” for exceeding, forecasts, can be tied to Volume Commitments or negotiated separately.

Deal Point No. 5: Pricing. The Parties will typically negotiate initial prices of each SKU or Product line, range and frequency of permitted price adjustments during the Term, currency and manner of payments, and currency hedges, where the Parties deal in different currencies. These can be collars for currency movements

built into the Master Agreement or actual outside currency hedges.

Deal Point No. 6: Order and Acceptance, Shipments and Deliveries. The Parties will typically provide a detailed (often electronic) order and acceptance procedure, a means to reject or partially accept non-conforming, expired or defective shipments; and a shipment and delivery procedure conforming to a Uniform Commercial Code (for U.S.-only parties) or Incoterms (for international, cross-border) deals. Alternatively, issues like when transfer of title and risk of loss occur in the shipment and delivery process can be customized, and the UCC or Incoterms excluded, or even partly excluded, from application.

Deal Point No. 7: Intellectual Property Rights and Licensing. A license for intellectual property embedded in the Products will probably have to be incorporated into the body of the MDA or annexed to it as a schedule. The license, at a minimum, should convey limited rights to Distributor to use the embedded IP for the purposes of the MDA and to convey the license to that extent to end-customers or resellers (a form of end-customer sale agreement is also often annexed as a schedule to the MDA. The extent of the license is often bound up with the IP warranties of Supplier owning or having the right to use the IP (see below). Distributor will want the license to extend past termination to the sale of any remaining inventory. Separate license rights for branding, labeling, trade dress, trade secrets and other matters may also be negotiated. Typically, each party will reserve the right to maintain ownership of its own IP, including post-termination. However, if any jointly developed IP is in play, other post-termination rights may have to be negotiated, either by sale or assignment of the IP by one party to another, or by license or cross-license (see Termination and Post-Termination Rights and Obligations, below).

Deal Point No. 8: Warranties, Representations, Indemnifications, Limitations of Liability. Issues like warranties of Supplier that it owns or has the right to use intellectual property embedded within the Products will typically be critical to the negotiations (Distributor will expect; Supplier may resist), as will indemnification for damages resulting from third party intellectual property infringement claims. Distributor may demand, and Supplier may resist, Product warranties of greater specificity as to the Products' conformity with market norms and with the Product specifications. Whether indemnified claims, including as to third party intellectual property rights infringement, are or are not carved out of the limitations on liability, and exceptions to any carve-out, are often heavily negotiated.

Deal Point No. 9: Termination and Post-Termination Rights and Obligations. Termination rights are often contentious, and are tied into breach issues like Volume Commitments, representations, warranties and forecast milestones. Typically, some issues may be claimed to justify a right (not an obligation) of immediate termination, while others may activate a notice period, giving the injured party a right to terminate if the breach is not cured within a certain period. Post-termination rights and obligations are also negotiated, such as Distributor's rights to sell already-purchased Products in inventory; the end of intellectual property, branding and marketing licenses and cross-licenses that are part of the MDA; disposition of intellectual property both pre-existing the MDA and developed during its Term, including jointly developed IP; and filling of post-termination orders to end-customers.

Deal Point No. 10: Rights of First Negotiation/First Refusal. Increasingly, large supply and distribution

deals, especially global ones, are done in contemplation of the potential acquisition of the Product line or the subsidiary that produces it by Distributor from Supplier. If that possibility is envisioned, all the rights of Parties to a possible acquisition deal should be considered for inclusion into the MDA, such as rights of first refusal or first negotiation, “go-shop” provisions and others; in cases in which the supply/distribution relationship is really functioning as a “test period” prior to the acquisition, more detailed terms, amounting to a Term Sheet for the acquisition, can be built in to the MDA or annexed as a schedule.

Deal Point No. 11: Choice of Law and Forum of Adjudication. Parties often treat choice of law and forum of dispute adjudication as “boilerplate” and ignore it, but especially in cross-border, international deals, the choices can be critical. In particular, for highly negotiated, documented deals, the question of whether a given choice of law is a jurisdiction that will in most cases respect the parties' expressed intentions is critical, as is whether the chosen jurisdiction for dispute resolution is one known to confer a “home field” advantage. On international deals, the Parties should also consider expressly excluding the applicability of the 1980 Vienna Convention on the International Sale of Goods to avoid the potential disruption of a carefully negotiated MDA by codified terms.

IV. Conclusion.

These are a few of the most important of the many issues that arise in high value Biotechnology, Pharmaceutical and Chemicals distribution deal. Because many of these transactions are of higher value than many M&A or capital-raising transactions, many terms are vigorously negotiated and should not be treated as boilerplate or assumed to be “industry-standard.” Attention to their provisions and the rights, responsibilities, obligations and potential liabilities will pay off in getting the deal that the Party wants.

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