Software OEM / Remarketing Agreement

- Original Equipment Manufacturer… Michelin OEMs their tires to Mercedes Benz, for example. Read the specs on any good bicycle and they read like a list of other company's parts.

- It is a good thing to seek out companies which have complimentary products and/or services and form an alliance which is good for both companies.

- This sample contract presumes that you are a software developer licensing your software to be included with/in another company's products.

- The first part of the Memorandum should be completed and distributed to the other party along with a copy of the OEM / Remarketing Agreement.

Date: **[Month, Day, Year]**

To: **[Name of Vendor]**

From: **[Owner/Founder]**
                               [Company]

Subject: **OEM / Remarketing Agreement**

_____

Attached is an OEM / Remarketing Agreement in order to allow [Name of other party] the right to use the products manufactured by [OEM] in combination with [list products that the OEM's products are to be used with] in order to provide a combined product directly to an end-user..

I believe that it embodies everything we discussed.

Please read the agreement carefully.

We recommend that you also have it reviewed by your own qualified legal counsel.

Time is of the essence.

Please sign and return it to me asap.

Thank you very much!

From JIAN

NOTICE:

We wish we could provide an agreement that was tailored *exactly* to your business. While this is not always possible, we feel that we've come very close and that this document provides you with the head-start that you need to get your deal moving. Nevertheless, we must make this disclaimer:

❂ **Do Not Use This Agreement 'As-Is.'**

❂ **This Agreement Is Not Legal Advice.**

❂ **Read it Thoroughly and Make All Appropriate Changes to Fit Your Requirements.**

❂ **You Should Have this Agreement Reviewed and Approved by a Qualified Attorney at Law Before Using It.**

❂ **JIAN Accepts No Liability for the Effectiveness of This Document For Your Purposes.**

Free Access to Attorneys, Accountants & Consultants in Your Area

We're building a network of business experts who are eager to help you when you need it. They can review your work, make suggestions, handle unique situations and introduce you to influential people. On our website you can search by expertise and location, then e-mail or jump straight to their website. Although they are professionals and charge for their services, most offer an initial consultation free of charge. They're in your area and you can contact them directly.

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- Please visit our website under **Updates**.
- Remember to bookmark our website: **www.JIAN.com**

Editing Your Sample Contract

Since this entire agreement is formatted in Word, you can edit it like any other Word document. You can jump from variable to variable by clicking the above ←→ green arrows (JIAN Menu) which will take you forward / backward and highlight the entire sample text identified within the "[ ]" brackets – simply edit / type-over with your information.

To make sure your have filled in all the variables, use Word's 'FIND' function to locate any "[ ]" which may contain an unedited variable.

- Click the icon in the JIAN menu above to turn the expert comments on/off.
- Upon completion, delete any unnecessary blank lines that remain.
- You may format this document any way you like.
- Delete this page.

- Considering OEM versus going direct to the end user.

  - It is a quick entry to market with possible immediate customer traction.

  - The revenue that you'll get per copy of your software will be much, much lower than you'll get on an end user sale. The OEM is doing all the marketing and selling (that's the good news), but the way that you'll pay for that is with deep discounts to the OEM for your software. It can still be a good deal, but a system that the end user pays $100K for may only turn into $50K of revenue for you. However, take a lesson Microsoft's playbook and reserve the rights to sell upgrades directly to the end-users.

  - There's also a vulnerability in the OEM model. The nice thing is that developing a relationship with an OEM, particularly one with a substantial business, is that you could potentially get a sharp increase in sales by "piggybacking" on their products. However, relationships are often not permanent, so if that same OEM has a change of heart downstream and stops selling your stuff, you could see the same kind of sharp change in your revenues, this time downward. Be careful about becoming too dependent on that company such that you cannot recover from that loss....

- Make sure you set realistic expectations on the revenue you're going to get and don't get too dependent on a small number of OEMs.

- Some "Gotchas" to ponder

  - Whose brand is getting built here?

  - Can you sell updates directly or must you go thru the integrator? (Think Microsoft 'selling' DOS to/thru IBM) How much support is required? Can you charge separately or is it included?

  - If you sell your company, the agreement should enable you to do so without the integrator's approval, their deal still remains, no $ to them on the sale. An acquirer would likely pay more because you have this deal in place – of course it would pass over to the acquirer unchanged by the OEM.

  - What's the matter with taking a little longer and selling the software yourself? The OEM may take just as long and you will learn less about the actual sales process...

  - How is the support going to work? Is your company 2nd level, third level, ??

- What is your revenue. model vs. their revenue model?

  - i.e., license fees vs. maintenance fees

  - if the ratios vs. fees /maintenance (or vice versa) are very different then their sales force will not execute the same as yours would...

- Collections - will you have to wait an additional 30 days?

- Discounts - do they have control over discounts on your products?

- If product revenues are commissionable through the OEM agreement, but all services revenue stay with OEM, the OEM could drastically discount the product side to get the service business. You could end up with almost no revenue. Suggest having a minimum per unit revenue flow back to you rather than just taking a percentage of their revenue. A percentage with a floor is probably a good idea.

- The same thing can occur after the sale -- recurring revenue such as software maintenance or renewals. There needs to be some split defined as well. Since some of the revenue is for new releases and upgrades and some is to pay for technical support, you should decide up-front who does what, and the basis for all revenue splits.

- Make certain that you have a minimum guarantee of business generated and a business plan in place to show how they intend to market your product with the expected results.

Software OEM / Remarketing Agreement

🔊 This is a standard introductory paragraph that lists the date and the parties to this Agreement.

Effective Date: [Month, Day, Year]

by and between **[Company Legal Name]** ([Company] or "Company"),
located at [Address]
[City], [State] [Zip Code]

and **[OEM Name]** ("OEM"),
located at [Address].

Summary

🔊 The following recitals set forth the basic reason that the parties are entering this Agreement.

[Company] manufactures [computer software that consists of the operating system software for the computer hardware (the "Operating System")], and software designed to allow development of other software applications that will run on the Operating System (the "Developer's Kit").

OEM desires to package [Company]'s [computer equipment and software] along with other [software and computer] equipment (the "OEM Package") and market the OEM Package to consumers.

Now, therefore, in consideration of the foregoing premises and the mutual covenants in this Agreement, the parties agree as follows:

1. Grant of License

🔊 As part of the transaction, [Company] will grant the OEM a limited license to its proprietary software. The following Section 1 describes the scope of the license. You will note that the OEM is not allowed to change the Operating System in any fashion, but is allowed to augment the Operating System by creating derivative applications with the Developer's kit.

🔊 Section 1.1 contains the language establishing the OEM's license to use the Operating System in its OEM Package and the limits on that license.

🔊 Some ideas on Exclusivity…

  o Only give them exclusivity if they perform… x amount of business a year or no exclusivity,,,, Make it an annual contract, with a trial for 3 to 6 months......-to see if they can deliver

  o You can hold several prospects as your own for xxx days/months to complete the sale yourself and give them exclusivity except for these prospects.

  o If you are giving them an exclusive, the main thing is to have them pay you a guaranteed minimum each month for which they have the exclusive. That minimum is applied against the cost of product they resell. If they think they can sell your product, they should be

1.1   Operating System. [Company] hereby grants to the OEM a non-exclusive, non-transferable license to copy and distribute the Operating System, when included as object code in an OEM Package, to end-users (and not for resale) in the [United States/Mexico/Canada/China]. Any such distribution requires that the OEM notify such end-users of [Company]'s right to and in the Operating System. No modification or alteration of the Operating System is permitted by this license.

1.2   Developer's Kit. [Company] hereby grants to the OEM a non-exclusive, non-transferable license to [copy the Developer's Kit in both source code and object code formats] as part of the design and development of derivative works for use in conjunction with the Operating System. All right and title to derivative works designed and developed by the OEM ("OEM Derivative Works") shall be the sole ownership of the OEM excluding [Company]'s intellectual property rights to the Developer's Kit. [Company] hereby grants to the OEM the right and license to copy, sell, sublicense or otherwise transfer or distribute the Developer's Kit, in object code only, when included as part of an OEM Derivative Work.

1.3   Royalty. OEM hereby agrees to pay [Company] a royalty for each OEM Derivative Work transferred or distributed by OEM. The parties agree upon the following royalty payment structure:

- ▪   [Insert royalty terms]
- ▪   [Xxx]
- ▪   [Xxx]

Royalty payments shall be made quarterly as they become due. OEM shall allow [Company] the right to

examine its books and records relating to the transfer or distribution of OEM Derivative Works upon written request of [Company] and at reasonable times.

2. Responsibilities of the Parties

🔊 Section 2 provides a basic statement of the responsibilities of the parties. It is included as more of an overview of the transaction than an explicit, detailed statement of the responsibilities of the parties. The real details of the deal are spelled out in subsequent sections.

🔊 Section 2.1 states [Company]'s' basic responsibilities to license software, sell equipment, provide technical support, indemnify OEM, offer a product warranty and provide software updates.

2.1 [Company]'s Responsibilities. Subject to the terms and conditions of this Agreement. [Company] shall:

(1) sell and ship computer equipment of the type and in the amounts at the prices specified in this Agreement upon receipt of an OEM order for computer equipment;

(2) grant to the OEM the rights and license to the Operating System and the Developer's Kit as specified in this Agreement;

(3) provide technical support for the computer equipment, Operating System and Developer's Kit as specified;

(4) provide a warranty for the computer equipment, Operating System and Developer's Kit as specified herein;

(5) indemnify the OEM as specified; and

(6) offer the OEM any improvements to the Operating System and Developer's Kit on terms no less favorable than those offered to any other OEMs engaged in business with [Company].

🔊 The following section is a basic statement of the OEM's responsibilities. Generally, the OEM agrees to create its own OEM packages, that include [Company]'s software and equipment, for sale to end users in the United States. The OEM also agrees to provide technical support to those end users.

2.2 OEM's Responsibilities. Subject to the terms and conditions of this Agreement, the OEM shall:

(1) combine [Company]'s computer equipment, Operating System and Developer's Kit or applications developed with the Developer's Kit with computer equipment and / or software from other vendors to create OEM Packages;

(2) market and sell the OEM Packages to end users in the United States. The OEM Packages shall not be sold for resale;

(3) order, pay for and take delivery of computer equipment sold and delivered by [Company]; and

(4) provide technical support to end users as specified in this Agreement.

🔊 How do you audit there activity with your product?

🔊 Reporting requirements must be detailed and you should have the right to receive documentation regarding the sale of your product(s).

🔊 For the first insert and last inserts, name the party required to keep the records. For the second insert, indicate the number of years that the records should be kept. For the third insert, describe the nature of the matter(s) that the records are being kept. For the fourth insert name the other party, the one who will be reviewing the records.

2.3 Records. OEM shall maintain for at least [xx] years from the Effective Date above, all records, contracts, and accounts relating to [Describe matters], and shall permit examination by authorized representatives of [Company] at all reasonable times and at the latter's expense in order that it may verify

compliance by OEM with its obligations under this Agreement.

3. Sale of Equipment

🔊 This section discusses the transfer of the computer equipment from [Company] to the OEM. Remember that this Agreement is not only a license for software, but also a sale of computer equipment.

🔊 The OEM agrees to use reasonable efforts to purchase a certain dollar amount of computer equipment each month.

3.1 Equipment Orders. The OEM shall place periodic orders for the purchase of computer equipment identified in the attached Exhibit B. The initial prices for computer equipment are stated in Exhibit B and are subject to change each calendar quarter by mutual written Agreement between the prices. In the event that the parties cannot agree on the price for computer equipment this Agreement shall terminate. Despite the foregoing, the OEM shall use all reasonable efforts to attain a goal of $[x] in minimum monthly purchases. All purchases are subject to [Company]'s standard terms and conditions except as modified in this Agreement.

🔊 Section 3.2 establishes the payment terms.

3.2 Payment. The OEM shall make payment to [Company] for all equipment purchased under this Agreement net thirty (30) days from the date of [Company]'s invoice. [Company] reserves the right to halt shipment of any computer equipment purchased pursuant to this Agreement in the event of (1) any delinquency in payment for any prior shipment; (2) the financial insolvency of the OEM; or (3) the future of the OEM to meet the credit standards of [Company] is determined in the sole discretion of [Company].

🔊 Section 3.3 describes how the parties agree that the OEM will have title to the computer equipment when it is shipped. At that time, the OEM will bear the risk of loss, meaning that if the equipment is lost or destroyed during shipment, [Company] will not be responsible.

3.3 Title & Risk of Loss. Title and risk of loss shall pass to the OEM upon delivery of computer equipment to the carrier. Despite, the foregoing, the title to the Operating System and Developer's Kit shall at all times remain and vest solely with [Company].

🔊 What happens in a situation where [Company] ships computer equipment to the OEM, and the OEM refuses to pay? Well, one way for [Company] to protect itself in this situation is to retain a security interest in the computer equipment. The following section grants [Company] a security interest in the computer equipment purchased by the OEM.

3.4 Security Interest. The OEM hereby grants [Company], and [Company] hereby reserves, a purchase money security interest in and to all the computer equipment and license rights in the Operating System and Developer's Kit delivered at the OEM pursuant to this Agreement from time to time, as security for the payment and performance by the OEM as required in this Agreement. The OEM shall assist and cooperate fully with [Company]'s efforts to perfect and enforce such security interest.

🔊 While the OEM will be required to market the OEM Packages that include [Company]'s software and hardware, [Company] will not be responsible for any related expenses.

3.5 Expenses. [Company] is under no obligation or requirement to reimburse the OEM for any expenses relating to the development, marketing or sale of the OEM Packages. Any costs and expenses incurred by the OEM shall be the sole responsibility of the OEM.

4. Technical Support

🔊 Both parties are required to provide technical support: [Company] provides technical support of the OEM and the end users while the OEM provides technical support only to the end users.

🔊 In the following section, [Company] agrees to provide training and technical support to the OEM.

4.1   [Company] Support. [Company] shall provide initial technical support and training to the OEM's technical personnel relating to the Operating System, Developer's Kit, computer equipment and any and all specifications concerning each. This initial training shall be performed over the course of [xx] consecutive days no later than three (3) months following the date of this Agreement at [Company]'s facility on mutually agreeable dates. Thereafter, [Company] will provide technical support in the amount of [xx] hours per month without charge. If for technical support in excess of this monthly hour limit, the OEM agrees to pay $[x] per hour payable 30 days from date of invoice from [Company].

◄ᴗ   [Company] will provide technical support for its equipment and operating system software the to end users.

4.2   [Company] Support to End Users. [Company] shall provide technical support to the end users for its Operating System and computer equipment subject to [Company]'s policies and requirements.

◄ᴗ   Any other support or maintenance is the responsibility of the OEM.

4.3   OEM Support. The OEM shall provide the end users with all other necessary maintenance, training, and support.

5.   [Company] Limited Warranties

◄ᴗ   [Company] gives a basic warranty for both its software and hardware. This warranty is the exclusive warranty.

5.1   Equipment Warranty. [Company] warrants that the computer equipment delivered under this Agreement will be free from defect in materials and workmanship under normal use and service. The OEM may pass this warranty on to end users.

5.2   Software Warranty. [Company] warrants that the Operating System and the Developer's Kit provided under this Agreement will be free from material defects in workmanship.

5.3   Sole Warranty. The OEM acknowledges and agrees that the provisions of this Section 5 warranty constitute the sole and exclusive remedy available to it regarding defective products. Except for the express warranties provided in this section, all warranties, whether express our implied, all guaranties and all representations as to performance, including all warranties that, but for this provision, might arise from the course of dealing or custom of trade and including all implied warranties of merchantability or fitness for a particular purpose, with respect to the computer equipment and software furnished by [Company] are hereby expressly excluded and disclaimed by [Company].

The exclusive remedy of the OEM and any end user for breach of the foregoing warranties shall be to seek repair or replacement of the affected computer equipment, Operating System or Developer's Kit.

6.   Proprietary Information

◄ᴗ   This is a standard non-disclosure provision whereby both parties agree that any confidential information disclosed to the other is the property of the disclosing party and such information, in addition to the terms of this Agreement, may not be disclosed to third parties. The exception to this is when the disclosing party can prove that it already had the information, or the information becomes available to the general public. This non-disclosure requirement continues to be effective even upon or after termination of this Agreement.

Each party acknowledges that it may be furnished with or may otherwise receive or have access to information or material that relates to past, present or future products, software (including source code and object code), research development, inventions, processes, techniques, designs or technical information and data, and marketing plans. (The "Proprietary Information"). Each party agrees to preserve and protect the confidentiality of the Proprietary Information and all physical forms, whether disclosed to the other party before this Agreement is signed or afterward. In addition, a party shall not disclose or

disseminate the Proprietary Information for its own benefit or for the benefit or any third party unless otherwise provided in this Agreement. The foregoing obligations do not apply to any information that (1) is publicly known; (2) is given to a party by someone else who is not obligated to maintain confidentiality; or (3) a party had already developed prior to the day this Agreement is signed, as evidenced by documents unless, otherwise provided herein. Neither party shall take our cause to be taken any physical forms of Proprietary Information (nor make copies of same) without the other party's written permission. Within three (3) days after the termination of this Agreement (or any other time at the other party's request), a party shall return to the other party all copies of Proprietary Information in tangible form. Despite any other provisions of this Agreement, the requirements of this section shall survive termination of this Agreement.

7. Indemnification

🔊 In Section 6, [Company] agrees to indemnify the OEM for infringement of third party intellectual property rights, while the OEM will indemnify [Company] for claims arising out of the sale of the OEM Packages.

7.1 By [Company]. [Company] hereby indemnifies and holds harmless the OEM from and against any claims, actions, or demands alleging that the computer equipment or Programs infringe any patent, trademark, copyright, or other intellectual property right of any third party. The OEM shall permit [Company] to replace or modify any affected computer equipment or software so to avoid infringement, or to procure the right for the OEM to continue use and remarketing or such items. If neither or such alternatives is reasonably possible, the infringing items shall be returned to [Company] and [Company]'s sole liability shall be to refund amounts paid, by the OEM. [Company] shall have no obligation for or with respect of claims, actions, or demands alleging infringement that arise by reason of combination of non-infringing items with any items not supplied by [Company].

7.2 By OEM. The OEM hereby indemnifies and holds harmless [Company] from and against any and all claims, actions, or demands arising with respect to any OEM Packages, with the sole exception of those matters for which [Company] bears responsibility under Section 8.1 below.

7.3 Notice Requirement. The foregoing indemnities are conditioned on prompt written notice of any claim, action, or demand for which indemnity is claimed; complete control of the defense and settlement by the indemnifying party; and cooperation of the other party in such defense.

8. Termination

🔊 Section 7 states the grounds for termination of this Agreement.

This Agreement may be terminated as follows:

8.1 Should either party commit a material breach of its obligations under this Agreement, or should any of the representations of either party in this Agreement prove to be untrue in any material respect, the other party may, at its option, terminate this Agreement, by [xx] days' written notice of termination, that notice shall identify and describe the basis for such termination. If, prior to expiration of such period, the defaulting party cures such default, termination shall not take place.

8.2 Either party may, at its option and without notice, terminate this Agreement, effective immediately, should the other party (1) admit in writing its inability to pay its debts generally as they become due; (2) make a general assignment for the benefit of creditors; (3) institute proceedings to be adjudicated a voluntary bankrupt, or consent of the filing of a petition of bankruptcy against it; (4) be adjudicated by a court of competent jurisdiction as being bankrupt or insolvent; (5) seek reorganization under any bankruptcy act, or consent to the filing or a petition seeking such reorganization; or (6) have a decree entered against it by a court of competent jurisdiction appoint a receiver, liquidator, trustee, or assignee in bankruptcy or in insolvency covering all or substantially all of such party's property or providing for the

liquidation of such party's property or business affairs.

8.3   Termination of this Agreement shall not relieve either party of the obligations incurred under this Agreement, except that Section 8.5 shall survive termination.

8.4   On termination of this Agreement, no additional [computer equipment or software] shall be shipped to the OEM. The OEM shall, at [Company]'s option, (1) return to [Company] all [computer equipment] purchased by the OEM and delivered to the OEM, including all copies, whereupon [Company] shall refund amounts paid with respect thereto by the OEM; or (2) dispose of any remaining OEM Packages embodying the [computer equipment and programs] obtained from [Company] in accordance with the requirements of this Agreement.

9.   General Provisions

◀») The General Provisions that follow are fairly standard. These provision enhance the balance of the Agreement by explaining issues such as notice, assignment, legal remedies, waiver, and attorney fees.

9.1   **Independent Contractors.** The relationship between both parties established by this Agreement is that of independent contractors, and nothing contained in this Agreement shall be construed to give either party the power to direct and control the day-to-day activities of the other. Neither party is an agent, representative or partner of the other party. Neither party shall have any right, power or authority to enter into any agreement for, or on behalf of, or incur any obligation or liability of, or to otherwise bind, the other party. This Agreement shall not be interpreted or construed to create an association, agency, joint venture or partnership between the parties or to impose any liability attributable to such relationship upon either party.

◀») You must decide which state governs this Agreement and where any legal action would be taken. Generally, it is your (company's) state of residence.

9.2   **Governing Law & Jurisdiction**. This agreement and the parties' actions under this Agreement shall be governed by and construed under the laws of the state of [State], without reference to conflict of law principles. The parties hereby expressly consent to the jurisdiction and venue of the federal and state courts within the state of [State]. Each party hereby irrevocably consents to the service of process in any such action or proceeding by the mailing of copies thereof by registered or certified mail, postage prepaid, to such party at its address set forth in the preamble of this Agreement, such service to become effective thirty (30) days after such mailing.

◀») This Agreement is intended to be the only Agreement, and that no other documents or communications are binding. Therefore, it is very important to make sure that everything [Company] and [Client] have agreed to be included in this Agreement. Otherwise, it is as if it was not agreed to.

9.3   **Entire Agreement.** This Agreement, including the attached exhibits, constitutes the entire Agreement between both parties concerning this transaction, and replaces all previous communications, representations, understandings, and Agreements, whether verbal or written between the parties to this Agreement or their representatives. No representations or statements of any kind made by either party, which are not expressly stated in this Agreement, shall be binding on such parties.

◀») Any changes to this Agreement must be in writing and signed by the party against whom that writing is to be used.

9.4   **All Amendments in Writing.** No waiver, amendment or modification of any provisions of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the party against whom such waiver, amendment or modification is sought to be enforced. Furthermore, no provisions in either party's purchase orders, or in any other business forms employed by either party will supersede the terms and conditions of this Agreement.

🔊 All notices between the parties must be in writing and either delivered in person or by certified or registered mail, return receipt requested.

9.5 Notices. Any notice required or permitted by this Agreement shall be deemed given if sent by registered mail, postage prepaid with return receipt requested, addressed to the other party at the address set forth in the preamble of this Agreement or at such other address for which such party gives notice hereunder. Delivery shall be deemed effective three (3) days after deposit with postal authorities.

🔊 In the event of a lawsuit or any legal proceeding involving this Agreement, the losing party will have to pay the winning party his or her costs and expenses, including reasonable attorney fees.

9.6 Costs of Legal Action. In the event any action is brought to enforce this Agreement, the prevailing party shall be entitled to recover its costs of enforcement including, without limitation, attorneys' fees and court costs.

🔊 Legal remedies, i.e., money damages, may not be sufficient; therefore, both parties agree to equitable remedies such as an injunction where the breaching party would be required to do or not to do something.

9.7 Inadequate Legal Remedy. Both parties understand and acknowledge that violation of their respective covenants and Agreements may cause the other irreparable harm and damage, that may not be recovered at law, and each agrees that the other's remedies for breach may be in equity by way of injunctive relief, as well as for damages and any other relief available to the non-breaching party, whether in law or in equity.

🔊 Assuming the parties wish to use Arbitration in the event of a dispute, the following section should be included. You take your chances with an arbitrator, but it keeps legal costs down and keeps you out of a drawn out legal process.

9.8. Arbitration. Any dispute relating to the interpretation or performance of this Agreement shall be resolved at the request of either party through binding arbitration. Arbitration shall be conducted in [County], [State] in accordance with the then-existing rules of the American Arbitration Association. Judgment upon any award by the arbitrators may be entered by any state or federal court having jurisdiction. [Company] and [Client] intend that this Agreement to arbitrate be irrevocable.

🔊 Merely delaying to bring an action that one party has a right to bring does not cause that party to lose or waive his right to pursue that action.

9.8 Delay is Not a Waiver. No failure or delay by either party in exercising any right, power or remedy under this Agreement, except as specifically provided in this Agreement, shall operate as a waiver of any such right, power or remedy.

🔊 Neither party will be blamed if there is a problem resulting from something beyond its control, such as an earthquake, flood, war.

9.9 Force Majeure. In the event that either party is unable to perform any of its obligations under this Agreement or to enjoy any of its benefits because of any Act of God, strike, fire, flood, governmental acts, orders or restrictions, Internet system unavailability, system malfunctions or any other reason where failure to perform is beyond the reasonable control and not caused by the negligence of the non-performing party (a "Force Majeure Event"), the party who has been so affected shall give notice immediately to the other party and shall use its reasonable best efforts to resume performance. Failure to meet due dates resulting from a Force Majeure Event shall extend such due dates for a reasonable period. However, if the period of nonperformance exceeds sixty (60) days from the receipt of notice of the Force Majeure Event, the party whose ability to perform has not been affected may, by giving written notice, terminate this Agreement effective immediately upon such notice or at such later date as is therein specified.

- ◀» This section limits the ability of either party to transfer any of its rights or delegate any of its duties to third parties.

- ◀» You want to make sure that you can sell your business along with all of the relationships you have developed along the way. (Often these relationships can add tremendous value to your business and you want to make sure that all of your agreements can be transferred to the new owners.) I wouldn't want to seek (let alone pay for) permission to sell my company.

- ◀» Generally, neither party may assign their respective rights to a third party; however, with the possible exception of assignment to a successor corporation or partnership, either party may transfer its rights or obligations under this Agreement without the approval of the other party. This Agreement would be binding on the 3rd party.

- ◀» However, you may want to limit each other's ability to pass along this deal to another possibly unknown and possibly unfriendly entity. The second paragraph prevents unauthorized transfer of responsibilities…

- ◀» CHOOSE one or the other of these two following paragraphs.

9.10 **Assignability & Binding Effect**. Except as expressly set forth within this Agreement, neither party may transfer or assign, directly or indirectly, this Agreement or its rights and obligations hereunder without the express written permission of the other party, not to be unreasonably withheld; provided, however, that both parties shall have the right to assign or otherwise transfer this Agreement to any parent, subsidiary, affiliated entity or pursuant to any merger, consolidation or reorganization, provided that all such assignees and transferees agree in writing to be bound by the terms of this Agreement prior to such assignment or transfer. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

- ◀» This paragraph DOES NOT ALLOW either party to transfer its rights to a successor company without prior approval.

9.10 **Non-Assignability & Binding Effect**. Except as otherwise provided for within this Agreement, neither party may assign any of its rights or delegate any of its obligations under this Agreement to any third party without the express written permission of the other. Any such assignment is deemed null and void.

- ◀» If any part of this Agreement is unenforceable or invalid, the balance of the Agreement should still be enforced. Basically, ignore any sections that are invalid.

9.11 **Certain Sections Invalid.** If any provisions of this Agreement are held by a court of competent jurisdiction to be invalid under any applicable statute or rule of law, they are to that extent to be deemed omitted and the remaining provisions of this Agreement shall remain in full force and effect.

- ◀» The headings of the various sections are meant to explain or otherwise give meaning to those sections; they are for convenience only.

9.13 **Headings.** The titles and headings of the various sections and sections in this Agreement are intended solely for convenience of reference and are not intended for any other purpose whatsoever, or to explain, modify or place any construction upon or on any of the provisions of this Agreement.

- ◀» Even after the termination of the Agreement, the parties may still have certain responsibilities such as keeping information confidential.

9.14 **Survival of Certain Provisions.** The warranties and the indemnification and confidentiality obligations set forth in the Agreement shall survive the termination of the Agreement by either party for any reason.

Understood, Agreed & Approved

We have carefully reviewed this contract and agree to and accept all of its terms and conditions. We are executing this Agreement as of the Effective Date above.

[Company]   **[OEM]**

_____   _____
[Owner/Founder]   [OEM Name]

_____   _____
Title   Title

_____   _____
Date   Date

Exhibit A

This exhibit identifies the parts/products that [Company] will sell to the OEM. You should fill in the components, its description and its initial unit price where indicated.

Products

Description	Initial Unit Price
▪ Xxx	$[00,000]
▪ Xxx	$[00,000]
▪ Xxx	$[00,000]

Exhibit B

Computer Equipment

Description	Initial Unit Price
▪ Xxx	$[00,000]
▪ Xxx	$[00,000]
▪ Xxx	$[00,000]