

# TERMS AND CONDITIONS OF SALE

## 1. APPLICABILITY

These Terms and Conditions of Sale ("Terms") apply to the purchase by the buyer ("Buyer") from Messana Inc. (also referred as to either "Messana", or "Messana Hydronic Technologies", or "Messana Radiant Cooling", or "Seller") of (i) hardware and equipment manufactured by the Seller ("Equipment"), (ii) software developed by the Seller ("Software"), (iii) services provided by the Seller ("Services") and (iv) hardware and software manufactured or developed by a third party ("Third Party Products," and together with Equipment, Software and Services, "Products"), each of which is identified in the accompanying Seller's (i) estimate, quotation, offer or proposal (collectively, the "Estimate"), and/or (ii) credit application, and/or (iii) order acknowledgment, and/or (iv) payment requests, and/or (v) invoice (collectively, the "Sales Confirmation"). These Terms and the Sales Confirmation comprise the entire agreement between the parties (collectively, the "Agreement"). Buyer accepts these Terms by (i) signing and returning the Estimate, (ii) filing a credit applications, (iii) sending a purchase order, (iv) making a payment on the Estimate, or invoice or payment request, (v) requesting or giving instructions to Seller to provide, ship or deliver the Products. No other terms or conditions and no agreements or understanding, oral or written, in any way purporting to modify these Terms, whether contained in Buyer's purchase order or shipping release forms, or elsewhere, shall be binding on Seller unless hereafter made in writing and signed by Seller's authorized representative, and specifically referencing these Terms and stating that it modifies them. Buyer is hereby notified of Seller's express rejection of any terms inconsistent with these Terms or to any other terms proposed by Buyer in accepting the Seller's Estimate, including purchase orders. Neither Seller's subsequent lack of objection to any terms, nor the delivery of the Products, shall constitute an agreement by Seller to any such terms. Trade custom, trade usage and past performance are superseded by these Terms and shall not be used to interpret these Terms.

## 2. CANCELLATION

Cancellation or modifications of all or part of any purchase of Products are subject to Seller's prior written consent in each instance. If cancellation or modification is allowed, Buyer agrees to pay to Seller all expenses incurred and damage sustained by Seller on account of the cancellation or modification, plus a reasonable profit.

## 3. PRICE

(a) Prices for Products covered by this Agreement may be adjusted by Seller, upon notice to Buyer at any time prior to shipment and regardless of the acceptance or issuance of a Sales Confirmation, to reflect any increase in Seller's cost of raw materials, components (e.g., steel, aluminum, copper, electronic components), inability to secure Products, changes in law, labor, taxes, duties, tariffs or quotas, acts of Government, any similar charges, or to cover any extra, unforeseen and unusual cost elements.

(b) All stated prices are exclusive of any taxes, fees, duties, and levies, however designated or imposed, including but not limited to value-added and withholding taxes that are levied or based upon the amounts paid under these Terms (collectively, "Taxes"). Any Taxes related to the Products purchased pursuant to these Terms are the responsibility of Buyer (excluding taxes based on Seller's net income), unless Buyer presents an exemption certificate acceptable to Seller and the applicable taxing authorities. If possible, Seller will bill Taxes as a separate item on the invoice presented to Buyer. In the event Seller is required to pay any such taxes or other charges, Buyer shall reimburse Seller therefor on demand. If any exemption certificate presented by Buyer is held to be invalid, then Buyer will immediately pay Seller the amount of the Tax and any penalties and interest related thereto.

## 4. PAYMENT

(a) All payment terms set forth in these Terms are subject to Seller's approval of Buyer's credit, in Seller's discretion; if such approval is withheld, payment will be due in advance of Seller's performance on the date set forth in the Sales Confirmation. Unless otherwise agreed in writing, payment terms are Cash Before Delivery ("CBD"), or Cash In Advance ("CIA"). Seller accepts check, wire transfer and credit card payments. In the event of a credit card payment, there will be an additional three and one-half percent (3.5%) convenience fee added to the total sales price.

(b) Seller reserves all other rights granted to a seller under the Uniform Commercial Code ("UCC") (or equivalent law in the applicable jurisdiction) for Buyer's failure to pay for the Products or any other breach by Buyer of these Terms. In addition to all other rights and remedies available to Seller (which Seller does not waive by the exercise of any rights hereunder), Seller may suspend the delivery of any Products if Buyer fails to pay any amounts by the applicable due date and the failure continues for five (5) days following Buyer's receipt of notice thereof. Buyer may not withhold payment of any amounts due and payable as a set-off of any claim or dispute with Seller, regardless of whether relating to Seller's breach, bankruptcy, or otherwise.

(c) All purchases and related payments will be in US Dollars unless otherwise stated on the applicable Product price list or Sales Confirmation.

(d) Payment request and invoicing disputes must be identified in writing within 21 days of the date of invoice (or payment request). Payments of any disputed amounts are due and payable upon resolution. The Parties shall seek to resolve any such disputes expeditiously and in good faith within 21 days of the dispute notice.

(e) If payment is not received by the due date, a late charge will be added at the rate of one and one-half percent (1.5%) per month, or eighteen percent (18%) per year, or the maximum rate permitted by applicable law, whichever is less, to unpaid invoiced amounts from the due date thereof.

## 5. COLLECTIONS

In the event any third parties are employed to collect any outstanding unpaid invoiced amounts owed to the Seller by Buyer, Buyer agrees to pay to Seller reasonable collection costs, including attorney fees, whether or not litigation has commenced, and all costs of litigation incurred by Seller.



## 6. DELIVERY; SHIPPING

(a) Seller will deliver or make available the Products, subject to their availability, within a reasonable time after receiving (i) Buyer's purchase order or (ii) Buyer's request for material and (iii) invoice or delivery payment request is paid in full as per payment schedule. The lead-time and delivery date provided by Seller for the Products is only an estimate and is based upon prompt receipt of all necessary information from Buyer.

(b) If Buyer causes Seller to delay shipment or completion of the Products, Seller will be entitled to any and all extra costs and expenses resulting from the delay. Seller will not be liable for: (i) any delays caused, or (ii) any losses or expenses incurred as a result of delay in shipment, or (iii) any damage in transit. Failure to deliver within the time estimated will not be a material breach of contract on Seller's part. Seller will use commercially reasonable efforts to make shipments as scheduled.

(c) Unless otherwise agreed in writing by the parties, Seller will deliver the Products, EXW (Incoterms® 2020) Seller's warehouse, plant or factory (the "Delivery Location"), using Seller's standard methods for packaging and shipping same. Buyer will take delivery of the Products within three (3) days of Seller's notice that the Products have been delivered to the Delivery Location. If Buyer fails to take delivery of the Products within this three (3) day period, Buyer will pay Seller for the Products and all storage expenses incurred by Seller or, in Seller's discretion, Seller may ship the Products to Buyer at Buyer's expense. Seller may, in its sole discretion, without liability or penalty, make partial shipments of Products to Buyer. Each shipment will constitute a separate sale, and Buyer will pay for the units shipped whether the shipment is in whole or partial fulfillment of Buyer's purchase order. Buyer is responsible for obtaining any import licenses and other consents required for a Product shipment at its own expense, and will provide the licenses and consents to the Seller before shipment. Claims for loss or damage to Products in transit must be made to the carrier and not to Seller.

(d) In the case the Seller is required to or offer to ship the Products to a destination chosen by the Buyer (Buyer's Destination or Destination), the Seller will provide a "door to door" shipment service (Products delivered to the Destination, might also be described in the Sales Confirmation as "DDP", or "FOB") to the Buyer and the Seller agrees to arrange all transport in behalf of the Buyer and the Buyer acknowledges and agrees that the Products are priced and sold as per EXW terms (Incoterms® 2020) and Buyer assumes ownership and liability of the Product and all shipping costs (including insurance, customs clearance fees, export and import duties, and VAT) are charged to the Seller and billed separately. Seller and Buyer agree that even if the Sales Confirmation indicated DDP or FOB Destination shipping terms, The Sales Confirmation will not constitute a binding contract and the DDP or FOB terms (Incoterms® 2020) do not apply to the shipment, and the Seller will not take responsibility for any unforeseen costs, shipping delays and will not assume the risk of loss or damage of the goods, should anything go wrong. Claims for loss or damage to Products in transit must be made to the carrier and not to Seller.

(e) If Buyer fails to make the delivery payment on time, the Seller may withhold the delivery of Products and Buyer will be responsible to any and all extra costs and expenses resulting from the delay (including but not limited to demurrage and detention charges, container drop fees, deferment fees, storage charges and transportation).

(f) The quantity of any installment of the Products, as recorded by Seller on the dispatch from Seller's place of business, is conclusive evidence of the quantity received by Buyer upon delivery, unless Buyer provides conclusive evidence to the contrary. Seller will not be liable for any non-delivery of the Products to the Delivery Location, unless Buyer gives written notice to Seller of the non-delivery within five (5) days following the date that Buyer would, in the ordinary course of business, have received the Products. Seller's liability for any non-delivery of the Products will be limited to replacing the Products within a reasonable time or adjusting the invoice for the Products to reflect the actual quantity delivered, at the Seller's option.

(g) If the Products ordered are to be exported from the United States (US), the quoted shipping dates are subject to all export documents and authorizations. Regardless of ultimate destination, the prices quoted are based on packing for domestic shipment unless otherwise stated in writing. Buyer agrees to provide Seller in writing with the ultimate destination, end-use and identity of the end-user at the time the order is placed if the Products are to be exported. Seller reserves the right to choose the freight forwarder, carrier, and/or broker. Buyer acknowledges and agrees that it shall be responsible for compliance with any chemical registration or importation requirements of any country into which it seeks to import the Products. The Buyer of items is solely responsible for complying with applicable US export laws. Seller shall not be the importer of record and is not responsible for compliance with importation requirements of any country to which the Products are shipped.

## 7. INSPECTION; REJECTION OF PRODUCTS

(a) As used in this Section, "Nonconforming Products" means only the following: (i) the items shipped are different from those identified in Buyer's purchase order; or (ii) the labels or packaging of the items incorrectly identifies them. Buyer will inspect the Products within five (5) days following receipt thereof (the "Inspection Period"). The Products will be deemed accepted at the end of the Inspection Period unless Buyer notifies Seller in writing of any Nonconforming Products and furnishes Seller with written evidence or other documentation reasonably required by Seller.

(b) If Buyer notifies Seller of any Nonconforming Products prior to expiration of the Inspection Period, then Seller will, in its sole discretion, (i) replace the Nonconforming Products with conforming Products, or (ii) credit or refund the purchase price for the Nonconforming Products, together with any reasonable shipping and handling expenses incurred by Buyer. At Seller's request and direction, Buyer will return the Nonconforming Products at Seller's expense or dispose of the Nonconforming Products in a manner approved by Seller, and upon request Buyer shall provide Seller with a certificate of destruction of such Nonconforming Products. Upon receipt of the Nonconforming Products, Seller will promptly refund the monies owed or ship the replacement Products to the Delivery Location at Seller's expense, with Seller retaining the risk of loss until delivery.

(c) Buyer acknowledges and agrees that the remedies set forth in this Section are Buyer's exclusive remedies and Seller's sole liability for the delivery of Nonconforming Products, and except as set forth in this Section, Buyer has no right to return the Products to Seller without Seller's written authorization.



## 8. RETURN OF PRODUCTS

All sales are final. Buyer acknowledges that Buyer has no right to return the Products to Seller.

## 9. LIMITED WARRANTY

(a) General. Unless otherwise specified by Seller in separate written product warranty accompanying the Equipment (in which case such other product warranty term shall control), Seller warrants to Buyer that the Equipment will be free from defects in material and workmanship for one (1) year from the original delivery date of the Products from Seller to Buyer (the "Warranty Period"). If, prior to the expiration of the Warranty Period, Equipment fails to conform to this Limited Warranty and Buyer informs Seller in writing of such non conformance, then Seller will either (i) repair or replace the defective Equipment or (ii) in Seller's sole and exclusive discretion, refund the amount that Buyer paid for such defective Equipment at time of original purchase, which amount shall pro-rated for Warranty Periods greater than one (1) year. Repair or replacement may be made with new or refurbished Equipment or component parts (at Seller's option) or, if Seller no longer sells the applicable Equipment, with a similar Equipment of like function. Buyer shall bear the costs of troubleshooting, access, de-installation, re-installation and transportation of the Equipment to Seller and back to Buyer. Any repair or replacement pursuant to this Limited Warranty shall not extend the Warranty Period.

(b) Conditions to this Limited Warranty. This Limited Warranty and remedy are expressly conditioned upon: (i) Buyer's proof of payment of the purchase price in full; and (ii) Buyer giving written notice of the defect, reasonably described, to Seller within ten (10) days of the time when Buyer discovers or ought to have discovered the defect, and (iii) the existence of proper records of Buyer's operation and maintenance of the Equipment during the Warranty Period; and (iv) Buyer providing Seller with a reasonable opportunity to examine the Equipment and the aforementioned records, and (v) the absence of any unauthorized modification or repair of the Equipment, including without limitation the removal or alternation of any serial numbers or warranty date decals.

(c) Before any test may be used to evaluate the Equipment, Buyer will: (i) provide Seller with reasonable written notification of the test, (ii) allow Seller to be present during the test, and (iii) receive Seller's consent to the conditions of the test, which consent will not be unreasonably withheld. If a test is performed on the Equipment, and Seller has not consented to the conditions of the test, then this limited warranty will be void.

**(d) THE REMEDIES SET FORTH IN THIS SECTION ARE BUYER'S SOLE AND EXCLUSIVE REMEDIES FOR ANY FAILURE OF SELLER TO COMPLY WITH ITS OBLIGATIONS UNDER THIS AGREEMENT, INCLUDING ANY BREACH OF THE LIMITED WARRANTY SET FORTH IN THIS SECTION, SELLER MAKES NO OTHER WARRANTIES OF ANY KIND WHATSOEVER, EXPRESS OR IMPLIED, OF ANY KIND, AND SELLER DISCLAIMS ALL OTHER WARRANTIES WHATSOEVER, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.**

(e) What this Limited Warranty does not cover. The foregoing Limited Warranty does not apply to (i) consumable Equipment and components (e.g., batteries, filters, belts and kits); (ii) Equipment subjected to misuse, neglect, accident or improper installation; (iii) Equipment damaged by disaster (e.g., fire, flood, wind, earthquake or lightning) or other causes beyond the control of Seller (e.g., excessive voltage, mechanical shock or water damage); (iv) Equipment whose defect has been caused by alteration or repair by anyone except Seller or Seller's authorized representatives; (v) normal wear and tear; (vi) Equipment not manufactured by Seller or bearing its nameplate ("Other Equipment"); (vii) any Equipment manufactured or customized according to Buyer's specifications; (viii) Equipment that Buyer cannot reasonably evidence have been stored, installed, operated, used or maintained other than in compliance with Seller's published specifications and instructions; (ix) Equipment purchased through other than a Seller authorized channel; (x) Equipment non installed by a Certified Installer as defined in the Terms of Use available online at radiantcooling.com; (xi) Equipment part of a hydronic close loop system (including but not limited to radiant panels, manifolds, fittings, air units) in the case a pressure test was not signed off by an authorized third party and performed following the test procedure as per the Messana System Pressure Test and Fill/Purge Procedure available online at radiantcooling.com, (xii) Equipment installed in a hydronic open loop or close loop with an automatic fill system unless equipped with a manual shut-off valve that is maintained close with a safety lock during normal operation (xiii) any software (any such software being governed under the Terms of Use available online at radiantcooling.com); and (xiv) Equipment that is subject to a separate written warranty ("Other Warranty") accompanying the Equipment, included in the applicable Equipment documentation or set forth in the applicable Equipment documentation (which Other Warranty governs). Other Equipment may be covered by warranties by other manufacturers, suppliers, or publishers, which Seller may assign or pass through to Buyer, without recourse to Seller, to the extent allowable by the other manufacturers, suppliers, or publishers.

(f) How to make a warranty claim. Buyer must notify Seller of any warranty claims and request a Return Material Authorization ("RMA") by contacting: (i) Buyer's place of purchase (e.g., Seller's branch, retailer, distributor or installer) or (ii) Seller's customer support line. Returned Equipment will only be accepted if the RMA is included with the returned Equipment, and Equipment returned without a proper RMA will be returned to Buyer at Buyer's expense. If Seller provides services that are incidental to the sale of the Equipment, such as installation, training and start-up ("Services"), Seller warrants to Buyer that it will perform the Services in a professional, workman-like manner. Seller will re-perform any non-conforming Services for no charge, as long as Buyer provides written notice to Seller within five (5) days following completion of the Services. The limited remedies described herein are the sole and exclusive remedy and Seller's sole responsibility under this Limited Warranty.

## 10. INTELLECTUAL PROPERTY

Buyer acknowledges Seller and its affiliates are the owners or licensors of brands, trademarks, designs, patents, copyrights and other intellectual property relating to Seller's Products, and that no right or license is conveyed by Seller to Buyer to manufacture, have manufactured, modify, import or copy such Products. Buyer agrees that it will reference brands of Seller or its affiliates only in connection with the use or sale of Products delivered to Buyer hereunder, and not in connection with the sale of any other Product, except as separately authorized by Seller in writing. Buyer further agrees that it will not, directly or through intermediaries, reverse engineer, decompile, or disassemble any software (including firmware) comprising or contained within a Product, except and only to the extent that such activity may be expressly permitted, notwithstanding this limitation, either by applicable law or, in the case of open source software, the applicable open source license.



## 11. DATA, DATA ACCESS AND CYBERSECURITY

Buyer acknowledges and agrees to the collection, processing and international transfer of personal data and information related to the business relationship between Buyer and Seller ("Data") for its general business purposes, including but not limited to providing Buyer with service/product recommendations, benchmarking, energy monitoring, maintenance and support, and marketing to Buyer (collectively, "Business Purposes"). Seller shall be the exclusive owner of all Data. Seller may anonymize Data so that Buyer is not readily identifiable (the "De-Identified Data"). Seller shall have the right and ability to use the De-Identified Data for its Business Purposes. In the event Seller does not own or is unable to own the De-Identified Data as a result of applicable law, or contractual commitments or obligations, Buyer grants Seller a non-exclusive, perpetual, irrevocable, fully-paid-up, royalty free license to use, copy, distribute, and otherwise exploit statistical and other aggregated data derived from Buyer's use of the De-Identified Data for Business Purposes. Buyer further acknowledges that Buyer has read and understood the Seller's Privacy Policy available online at radiantcooling.com. Where required under law, and to the extent required, Buyer provides consent to the processing and transfer according to the Seller's Privacy Policy, and further confirms that it has obtained consent from relevant data subjects, including Buyer employees, where required.

## 12. INDEMNIFICATION

(a) Buyer will defend, indemnify, and hold harmless Seller and its affiliates, their respective subsidiaries, affiliates, successors, and assigns and their respective directors, officers, shareholders, and employees from and against any loss, injury, death, damage, liability, claim, deficiency, action, judgment, interest, award, penalty, fine, cost, fees (including import and export customs fees), or expense (including reasonable attorney and professional fees and costs, and the cost of enforcing any right to indemnification hereunder and the cost of pursuing any insurance providers) ("Claims") arising out of or occurring in connection with the negligence or willful misconduct of Buyer or its employees or agents, including but not limited to: (i) any misuse or modification of the Products by Buyer or its employees or agents, (ii) any act (or failure to act) by Buyer or its employees or agents in contravention of any safety procedures or instructions that Seller provides to Buyer or its employees or agents, or (iii) the failure to store, install, operate, or maintain the Products in accordance with the instructions provided with the Products.

(b) Seller will defend, indemnify, and hold harmless Buyer and its subsidiaries, affiliates, successors, and assigns and their respective directors, officers, shareholders, and employees from and against any Claims arising out of or occurring in connection with the negligence or willful misconduct of Seller or its employees or agents.

## 13. LIMITATIONS OF LIABILITY

(a) IN NO EVENT WILL SELLER BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY, OR CONSEQUENTIAL DAMAGES, INCLUDING BUT NOT LIMITED TO ANY LOSS OF USE OR UNDER-UTILIZATION OF LABOR OR FACILITIES, LOSS OF REVENUE OR ANTICIPATED PROFITS, LOST DATA, AND COSTS OF PROCUREMENT OF SUBSTITUTE GOODS, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, OR OTHERWISE, EVEN IF SELLER HAS BEEN ADVISED OF THE POSSIBILITY OF THE DAMAGES.

(b) EXCEPT FOR DEATH OR BODILY INJURY RESULTING FROM SELLER'S NEGLIGENCE OR WILLFUL MISCONDUCT, SELLER'S TOTAL LIABILITY FOR ALL CLAIMS ARISING OUT OF, OR RELATING TO, THE GOODS WILL BE LIMITED TO GENERAL MONEY DAMAGES IN AN AMOUNT NOT TO EXCEED THE TOTAL PURCHASE PRICE FOR THE GOODS GIVING RISE TO THE CLAIM.

## 14. CHANGES

Seller reserves the right to alter, modify, or redesign its products without any obligation to replace previous shipments to Buyer.

## 15. NO LICENSE

(a) Except as provided in Subsection (b), the sale of the Products will not confer upon Buyer any license, express or implied, under any patents, trademarks, trade names, or other proprietary rights owned or controlled by Seller, its subsidiaries, affiliates, or suppliers; it being specifically understood and agreed that all the rights are reserved to Seller, its subsidiaries, affiliates, or suppliers. Without limiting the foregoing, Buyer will not, without Seller's prior written consent, use any trademark or trade name of Seller in connection with any the Products, other than with respect to the resale of the Products pre-marked or packaged by or on behalf of Seller.

(b) If software is provided by Seller under the Agreement, Buyer agrees that the software may only be used in accordance with the terms and conditions of the software license agreement that accompanies the software. Buyer agrees not to directly or indirectly decompile, disassemble, reverse engineer or otherwise derive the source code for the software. If Buyer is a U.S. Government agency, Buyer acknowledges that the software licensed under the Agreement is a commercial item that has been developed at private expense and not under a Government contract. The Government's rights' relating to the software are limited to those rights applicable to Buyer's as set forth herein and is binding on Government users in accordance with Federal Acquisition Regulation 48 C.F.R. Section 12.212 for non-defense agencies and/or Defense FAR Supplement 48 C.F.R. Section 227.7202-1 for defense agencies.



## 16. TERMINATION

In addition to any other remedies that Seller may have, Seller may terminate this Agreement with immediate effect upon written notice to Buyer, if Buyer: (i) fails to pay any amount when due under this Agreement and the failure continues for five (5) days after Buyer's receipt of written notice of nonpayment; (ii) has not otherwise performed or complied with any of these Terms, in whole or in part; or (iii) becomes insolvent, files a petition for bankruptcy or commences or has commenced against it proceedings relating to bankruptcy, receivership, reorganization or assignment for the benefit of creditors.

## 17. CONFIDENTIALITY

All non-public, confidential, or proprietary information of Seller, including but not limited to specifications, samples, patterns, designs, plans, drawings, documents, data, business operations, customer lists, pricing, discounts or rebates, that Seller discloses to Buyer, whether disclosed orally or disclosed or accessed in written, electronic or other form or media, and regardless of whether marked, designated, or otherwise identified as "confidential," in connection with the Agreement is confidential, solely for the use of performing the Agreement, and may not be disclosed or copied unless authorized in advance by Seller in writing. Upon Seller's request, Buyer will promptly return all documents and other materials received from Seller. Seller will be entitled to injunctive relief for any violation of this Section, without having to post bond or establish the insufficiency of a remedy at law. This Section does not apply to information that is: (i) in the public domain; (ii) known to Buyer at the time of disclosure; or (ii) rightfully obtained by Seller on a non-confidential basis from a third party.

## 18. FORCE MAJEURE

Seller will not be liable for any failures or delays caused by strikes, differences with workers, or any causes beyond the reasonable control of Seller, including but not limited to fires, floods, accidents, action of any governmental authority, war, insurrection or riots, or shortages of labor, energy, raw materials, production facilities, or transportation. Where delays or failures are caused by labor difficulties, Seller will not be obligated to seek or obtain any settlement that, in Seller's sole judgment, is not in Seller's best interest.

## 19. COMPLIANCE

Each party will comply with all applicable laws, regulations, and ordinances, and Buyer will comply with the export and import laws and regulations in effect as of the date of shipment of the Products of any country involved in the transactions contemplated by the Agreement.

## 20. GOVERNING LAW; VENUE; DISPUTE RESOLUTION

This Agreement shall be governed and construed for all purposes in accordance with the laws of the State of California, excluding its conflict of laws provisions. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by binding arbitration conducted in Santa Cruz, California by a single arbitrator mutually agreed by the parties and conducted by and in accordance with the rules of JAMS (Judicial Arbitration & Mediation Service). Judgment on the award rendered by the arbitrator may be entered in a court having jurisdiction thereof located in Santa Cruz County, California, provided however, that each party will have a right to seek injunctive or other equitable relief in a court of law. The prevailing party will be entitled to receive from the non-prevailing party all costs, damages and expenses, including reasonable attorneys' fees, incurred by the prevailing party in connection with that action or proceeding, whether or not the controversy is reduced to judgment or award. The prevailing party will be that party who may be fairly said by the arbitrator(s) to have prevailed on the major disputed issues.

## 21. MISCELLANEOUS

Buyer acknowledges that is has not been induced to purchase any the Products from Seller by any representation or warranty not expressly set forth in this Agreement. These Terms and the Sales Confirmation constitute the entire agreement of the parties and supersede all existing agreements and all other oral or written communications between them concerning its subject matter. None of the Terms may be added to, modified, superseded, or otherwise altered, except by a written document signed by an authorized representative of Seller that specifically references these Terms and states that it modifies them. If there is a conflict between the provisions of the Sales Confirmation and these Terms, then the terms of the Sales Confirmation will govern. No waiver by Seller of any of the provisions of these Terms is effective unless explicitly set forth in writing that specifically references these Terms and is signed by Seller. No failure to exercise, or delay in exercising, any rights, remedy, power, or privilege arising from these Terms operates or may be construed as a waiver thereof. No single or partial exercise of any right, remedy, power, or privilege hereunder precludes any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. The Section headings contained in these Terms are for convenience only and will not affect the interpretation of any provision. If any provision of this Agreement is held to be prohibited or unenforceable, the provision will be changed and interpreted to accomplish the objectives of the provision to the greatest extent possible under applicable law and the remaining provisions will continue in full force and effect. Buyer will not assign any quotation or accepted order for the Products, in whole or in part, without Seller's prior written consent.

## 22. SURVIVAL

In addition to any other term whose context may so require, the terms contained in Sections 1, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, 21 and 22 will survive any cancellation of the Sales Confirmation.

