

MERZ NORTH AMERICA, INC. TERMS AND CONDITIONS (SALE OF GOODS)

1. Applicability. These terms and conditions of sale (these "**Terms**") are the only terms which govern the sale of the goods ("**Goods**") by Merz North America, Inc. ("**Merz**") to the buyer ("**Buyer**") named on the accompanying quotation/confirmation of sale/invoice (the "**Sales Confirmation**"). The Sales Confirmation and these Terms (collectively, this "**Agreement**") comprise the entire agreement between the parties, and supersede all prior or contemporaneous understandings, agreements, negotiations, representations and warranties, and communications, both written and oral. These Terms prevail over, and expressly exclude, any of Buyer's general terms and conditions of purchase regardless whether or when Buyer has submitted its purchase order or such terms. Fulfillment of Buyer's order does not constitute acceptance of any of Buyer's terms and conditions and does not serve to modify or amend these Terms.

2. Delivery.

(a) The Goods will be delivered within a +/- three (3) days of the date set forth on Buyer's purchase order and agreed to by Merz. Merz shall not be liable for any delays, loss or damage in transit.

(b) Unless otherwise agreed in writing by the parties, Merz shall deliver the Goods to the carrier designated by Buyer or as otherwise agreed to by Merz (the "**Delivery Point**") using Merz's standard methods for packaging such Goods. Buyer shall take delivery of the Goods upon delivery of the Goods to the Delivery Point. Buyer shall be responsible for all shipping and loading costs and shall provide any equipment and labor reasonably suited for receipt of the Goods at the Delivery Point.

(c) Merz may, in its sole discretion, without liability or penalty, make partial shipments of Goods to Buyer. Each shipment will constitute a separate sale, and Buyer shall pay for the units shipped whether such shipment is in whole or partial fulfillment of Buyer's purchase order.

(d) If for any reason Buyer fails to accept delivery of any of the Goods on the date fixed pursuant to Merz's notice that the Goods have been delivered at the Delivery Point, or if Merz is unable to deliver the Goods at the Delivery Point on such date because Buyer has not provided appropriate instructions, documents, licences or authorizations: (i) risk of loss to the Goods shall pass to Buyer; (ii) the Goods shall be deemed to have been delivered; and (iii) Merz, at its option, may store the Goods until Buyer picks them up, whereupon Buyer shall be liable

for all related costs and expenses (including, without limitation, storage and insurance).

3. Cancellation of Orders. Once Buyer has submitted a purchase order to Merz, Buyer may only cancel the purchase order with the written consent of Merz, whereupon Buyer shall remain liable for non-cancellable cost (which shall not exceed the original purchase order cost).

4. Shipping Terms. Delivery shall be made in accordance with the terms of the purchase order or as otherwise agreed to by Merz and Buyer.

5. Title and Risk of Loss. Title and risk of loss or damage passes to Buyer upon tender of the Goods to Buyer's carrier or upon delivery of Goods at the Delivery Point.

6. Amendment and Modification. These Terms may only be amended or modified in a writing which specifically states that it amends these Terms and is signed by an authorized representative of each party.

7. Inspection and Rejection of Nonconforming Goods.

(a) Buyer shall inspect the Goods within thirty (30) days of (i) tender of Goods to Buyer's carrier or (ii) delivery of Goods at the Delivery Point, whichever occurs first ("**Inspection Period**"). Buyer will be deemed to have accepted the Goods unless it notifies Merz in writing of any Nonconforming Goods during the Inspection Period and furnishes such written evidence or other documentation as reasonably required by Merz. "**Nonconforming Goods**" means only the following: (i) product shipped does not meet the specifications identified on, or included with, Buyer's purchase order; or (ii) product's label or packaging incorrectly identifies its contents.

(b) If Buyer timely notifies Merz of any Nonconforming Goods, Merz shall, in its sole discretion, upon confirming that the returned Goods are Nonconforming Goods, (i) replace such Nonconforming Goods with conforming Goods, or (ii) credit or refund the Price for such Nonconforming Goods, together with any reasonable shipping and handling expenses incurred by Buyer in connection therewith. Buyer shall ship, at its expense and risk of loss, the alleged Nonconforming Goods to such location as is designated by Merz. If Merz exercises its option to replace Nonconforming Goods, Merz shall, after receiving Buyer's shipment of Nonconforming Goods, ship to Buyer, at Buyer's expense and risk of loss, the replaced Goods to the Delivery Point.

(c) Buyer acknowledges and agrees that the remedies set forth in **Section 7(b)** are Buyer's

exclusive remedies for the delivery of Nonconforming Goods. Except as provided under **Section 7(b)**, all sales of Goods to Buyer are made on a one-way basis and Buyer has no right to return Goods purchased under this Agreement to Merz.

8. Price.

(a) Buyer shall purchase the Goods from Merz at the price set forth on Buyer's purchase order or at such price as is mutually agreed to by Merz and Buyer (the "**Price**").

(b) All Prices are exclusive of all sales, use and excise taxes, and any other similar taxes, duties and charges of any kind imposed by any Governmental Authority on any amounts payable by Buyer. Buyer shall be responsible for all such charges, costs and taxes; provided, that, Buyer shall not be responsible for any taxes imposed on, or with respect to, Merz's income, revenues, gross receipts, personnel or real or personal property or other assets

9. Payment Terms.

(a) Unless otherwise agreed to by Merz and Buyer, Buyer shall pay all invoiced amounts due to Merz within thirty (30) days of Merz's invoice. Buyer shall make all payments hereunder in US dollars.

(b) Buyer shall pay interest on all late payments at the lesser of the rate of 1.5% per month or the highest rate permissible under applicable law, calculated daily and compounded monthly. Buyer shall reimburse Merz for all costs incurred in collecting any late payments, including, without limitation, attorneys' fees. In addition to all other remedies available under these Terms or at law (which Merz does not waive by the exercise of any rights hereunder), Merz shall be entitled to suspend the delivery of any Goods if Buyer fails to pay any amounts when due hereunder and such failure continues for ten (10) days following written notice thereof.

(c) Buyer shall not withhold payment of any amounts due and payable by reason of any set-off of any claim or dispute with Merz, whether relating to Merz's breach, bankruptcy or otherwise.

10. Intellectual Property Rights; Ownership.

(a) "**Intellectual Property Rights**" means all industrial and other intellectual property rights comprising or relating to: (i) patents; (ii) trademarks; (iii) internet domain names, web addresses, web pages; (iv) works of authorship, designs and design registrations, whether or not copyrightable, including copyrights and copyrightable works, software, data, data files, records and documentation; (v) trade

secrets; and (vi) all other industrial and intellectual property rights, and all rights, interests and protections that are associated with, equivalent or similar to any of the foregoing, however arising.

(b) Buyer acknowledges and agrees that: (i) except to the extent provided in a separate written agreement between Buyer and Merz, Merz (or its licensors) will retain all intellectual property rights used to create, embodied in, used in, and otherwise relating to the Goods; (ii) any and all Merz's Intellectual Property Rights are the sole and exclusive property of Merz or its licensors; and (iii) Buyer shall not acquire any ownership interest in any of Merz's Intellectual Property Rights under this Agreement.

(c) Buyer shall not: (i) take any action that may interfere with any of Merz's rights in or to Merz's Intellectual Property Rights, (ii) challenge any right, title or interest of Merz's in or to Merz's Intellectual Property Rights; (iii) make any claim or take any action adverse to Merz's ownership of Merz's Intellectual Property Rights; or (iv) engage in any action that tends to disparage, dilute the value of, or reflect negatively on the Goods.

(d) All Tooling used to manufacture the Goods is owned by Merz ("**Merz Tooling**"). Buyer has no right, title, or interest in or to any of the Merz Tooling. "**Tooling**" means, collectively, all tooling, test and assembly fixtures, gauges, patterns, molds, documentation (including engineering specifications and test reports) used by Merz in connection with its manufacture and sale of the Goods, together with any accessions, attachments, parts, machinery, accessories, substitutions, replacements and appurtenances thereto.

11. Limited Warranty.

(a) Merz warrants to Buyer that at the time of delivery of the Goods to the Delivery Point, that such Goods will materially conform to the specifications set forth in Merz's published specifications in effect as of the date of shipment and will be free from material defects in material and workmanship.

(b) **EXCEPT FOR THE WARRANTY SET FORTH IN SECTION 11(A), MERZ MAKES NO WARRANTY WHATSOEVER WITH RESPECT TO THE GOODS, INCLUDING ANY (a) WARRANTY OF MERCHANTABILITY; OR (b) WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE; WHETHER EXPRESS OR IMPLIED BY LAW, COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE OF TRADE OR OTHERWISE.**

(c) Merz shall not be liable for a breach of the warranty set forth in **Section 11(a)** unless: (i) Buyer

gives written notice of the defect, reasonably described, to Merz within thirty (30) days of the end of the Inspection Period; (ii) Merz is given a reasonable opportunity after receiving the notice to examine such Goods and Buyer (if requested to do so by Merz) returns such Goods to Merz's place of business for the examination to take place there; and (iii) Merz reasonably verifies Buyer's claim that the Goods are defective.

(d) Subject to Section 11(c) above, Merz shall, in its sole discretion, either: (i) replace such Goods or (ii) credit or refund the price of such Goods at the pro rata contract rate provided that, if Merz so requests, Buyer shall, at Merz's expense, return such Goods to Merz.

(e) THE REMEDIES SET FORTH IN SECTION 11(D) SHALL BE THE BUYER'S SOLE AND EXCLUSIVE REMEDY AND MERZ'S ENTIRE LIABILITY FOR ANY BREACH OF THE LIMITED WARRANTY SET FORTH IN SECTION 11(A).

12. Limitation of Liability. **IN NO EVENT SHALL MERZ BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, OR PUNITIVE DAMAGES, LOST PROFITS OR REVENUES OR DIMINUTION IN VALUE, ARISING OUT OF OR RELATING TO ANY BREACH OF THESE TERMS, WHETHER OR NOT THE POSSIBILITY OF SUCH DAMAGES HAS BEEN DISCLOSED IN ADVANCE BY BUYER OR COULD HAVE BEEN REASONABLY FORESEEN BY BUYER, REGARDLESS OF THE LEGAL OR EQUITABLE THEORY (CONTRACT, TORT OR OTHERWISE) UPON WHICH THE CLAIM IS BASED, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.**

13. Indemnification. Buyer shall indemnify, defend and hold harmless Merz and its officers, employees, agents, representatives, affiliates, successors and assigns (collectively "**Indemnified Parties**") against any and all losses, damages, liabilities, claims, actions, judgments, penalties, fines, costs or expenses of whatever kind, including reasonable attorneys' fees, and the cost of enforcing any right to indemnification hereunder (collectively "**Losses**") arising from any third-party claim resulting from or related to: (a) use of Goods in combination with any products, materials, or equipment supplied to Buyer by a person other than Merz; (b) goods, products or assemblies manufactured or designed by Buyer; or (c) Buyer's marketing, advertising,

promotion or sale or any product containing the Goods.

14. Insurance. During the term of this Agreement and for a period of one (1) year thereafter, each party shall, at its own expense, maintain and carry insurance in full force and effect which includes, but is not limited to, commercial general liability in a sum no less than \$2,000,000 with financially sound and reputable insurers. Upon request, a party shall provide the other party with a certificate of insurance from such party's insurer evidencing the insurance coverage specified in these Terms.

15. Compliance with Law. Each party shall comply with all applicable laws, regulations and ordinances. Each party shall maintain in effect all licenses, permissions, authorizations, consents and permits that it needs to carry out its obligations under this Agreement. Buyer shall comply with all export and import laws of all countries involved in the sale of the Goods under this Agreement or any resale of the Goods by Buyer. Buyer assumes all responsibility for shipments of Goods requiring any government import clearance.

16. Termination. In addition to any remedies that may be provided under these Terms, Merz 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 such failure continues for ten (10) 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. Waiver. No waiver by Merz of any of the provisions of this Agreement is effective unless explicitly set forth in writing and signed by Merz. No failure to exercise, or delay in exercising, any right, remedy, power or privilege arising from this Agreement 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.

18. Confidential Information. All non-public, confidential or proprietary information of Merz, including but not limited to specifications, samples, patterns, designs, plans, drawings, documents, data, business operations, customer lists, pricing, discounts or rebates, disclosed by Merz to Buyer, whether disclosed orally or disclosed or accessed in written,

electronic or other form or media, and whether or not marked, designated or otherwise identified as "confidential" in connection with this Agreement is confidential, solely for the use of performing this Agreement and may not be disclosed or copied unless authorized in advance by Merz in writing. Upon Merz's request, Buyer shall promptly return all documents and other materials received from Merz. Merz shall be entitled to injunctive relief for any violation of this Section. This Section does not apply to information that is: (a) in the public domain; (b) known to Buyer at the time of disclosure; or (c) rightfully obtained by Buyer on a non-confidential basis from a third party.

19. Force Majeure. Merz shall not be liable or responsible to Buyer, nor be deemed to have defaulted or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement when and to the extent such failure or delay is caused by or results from acts or circumstances beyond the reasonable control of Merz including, without limitation, acts of God, flood, fire, earthquake, explosion, governmental actions, war, invasion or hostilities (whether war is declared or not), terrorist threats or acts, riot, or other civil unrest, national emergency, revolution, insurrection, epidemic, lockouts, strikes or other labor disputes (whether or not relating to either party's workforce), or restraints or delays affecting carriers or inability or delay in obtaining supplies of adequate or suitable materials, materials or telecommunication breakdown or power outage, provided that, if the event in question continues for a continuous period in excess of sixty (60) days, Buyer shall be entitled to give notice in writing to Merz to terminate this Agreement.

20. Assignment. Buyer shall not assign any of its rights or delegate any of its obligations under this Agreement without the prior written consent of Merz. Any purported assignment or delegation in violation of this Section is null and void. No assignment or delegation relieves Buyer of any of its obligations under this Agreement.

21. Relationship of the Parties. The relationship between the parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture or other form of joint enterprise, employment or fiduciary relationship between the parties, and neither party shall have authority to contract for or bind the other party in any manner whatsoever.

22. No Third-Party Beneficiaries. This Agreement is for the sole benefit of the parties hereto and their respective successors and permitted assigns and nothing herein, express or implied, is intended to

or shall confer upon any other person or entity any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of these Terms.

23. Governing Law. All matters arising out of or relating to this Agreement is governed by and construed in accordance with the internal laws of the State of North Carolina without giving effect to any choice or conflict of law provision or rule.

24. Submission to Jurisdiction. Any legal suit, action or proceeding arising out of or relating to this Agreement shall be instituted in the federal courts of the United States of America or the courts of the State of North Carolina in each case located in Wake County, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding.

25. Notices. All notices, request, consents, claims, demands, waivers and other communications hereunder (each, a "Notice") shall be in writing and addressed to the parties at the addresses set forth on the face of the Sales Confirmation or to such other address that may be designated by the receiving party in writing. All Notices shall be delivered by personal delivery, nationally recognized overnight courier (with all fees pre-paid), facsimile (with confirmation of transmission) or certified or registered mail (in each case, return receipt requested, postage prepaid). Except as otherwise provided in this Agreement, a Notice is effective only (a) upon receipt of the receiving party, and (b) if the party giving the Notice has complied with the requirements of this Section.

26. Severability. If any term or provision of this Agreement is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction.

27. Survival. Provisions of these Terms which by their nature should apply beyond their terms will remain in force after any termination or expiration of this Order including, but not limited to, the following provisions: Insurance, Compliance with Laws, Confidential Information, Governing Law, Submission to Jurisdiction, and Survival.