

# BIOMÉRIEUX TERMS AND CONDITIONS

These terms and conditions (the "Terms") govern all transactions involving Products between the Parties. Unless agreed to otherwise by the Parties, the Terms take priority over any conflicting terms in another document. By placing an order related to a Sales Quote, Customer agrees to these Terms. All additional or different terms proposed by Customer are rejected, and null and void.

## 1. Definitions

**"Agreement"** means these Terms, the Sales Quote, and any document signed by the Parties referencing these Terms and a Sales Quote.

**"Consumables"** means those reagents, panels, or bottles which are identified in the Sales Quote or which are otherwise ordered by Customer.

**"Customer"** means the entity or person(s) listed on the Sales Quote or the original lease or purchaser of the Product.

**"Instrument"** means the equipment identified in the Sales Quote or otherwise ordered by Customer.

**"Kit"** or **"Box"** refers to a package containing all the necessary Consumables and materials.

**"Parties"** means Seller and Customer.

**"Permitted Uses"** means the field of use and/or application of the Products (or specific Products or classes of Products) by end-users, as specified on Product labels or inserts affixed to or accompanying the Products, subject to any restrictions or limitations on usage set forth therein.

**"Products"** means Consumables, Instruments, Seller Software, or other items in the Sales Quote, including Services not covered under a separate services agreement.

**"Sales Quote"** means the bioMérieux quote provided to the Customer and made a part of the Agreement between the Parties which identifies the Products.

**"Seller"** means bioMérieux, Inc., including its affiliated companies.

**"Seller Software"** means computer software, machine readable instructions or instruction sets developed by Seller and delivered with or installed, loaded, integrated, embedded, bundled, incorporated, or read into memory on any Instrument.

**"Services"** shall mean the maintenance or repair services described in the Sales Quote.

**"Third Party Licenses"** means the rights or licenses of Customer under contractual agreements between Customer and one or more third parties.

**"Warranty"** means the warranty described herein in Section 12.

Defined terms in the singular shall include reference to the plural and vice versa.

## 2. Orders

By placing an order, Customer agrees to these Terms. Seller reserves the right to reject any Sales Quote prior to execution, or any order for Product (the "Order"), for any reason. Seller's acceptance of a Sales Quote or an Order is established by the earlier of (a) Seller delivering written acknowledgement of acceptance to Customer, or (b) Seller delivering Products to the Delivery Point as set forth in Section 4, whichever occurs first. Any Customer purchase order documentation accepted or signed by Seller is solely for Customer's record keeping and shall not, notwithstanding the terms thereof, add to, modify, amend, supersede, or replace this Agreement in whole or in part. Customer may withdraw an Order or Sales Quote at any time before it is accepted by Seller; provided, however, that any order placed for Consumables will, subject to Section 12 ("Limited Warranty"), be non-cancellable and non-refundable.

## 3. Termination

Either party may terminate this Agreement at any time upon the insolvency of the other Party or in the event of the institution of any proceeding by or against the other party in bankruptcy or insolvency or under the provisions of the Bankruptcy Act or for the appointment of a receiver or trustee or any assignment for the benefit of creditors of the other party. Seller may terminate this Agreement or any Sales Quote (i) for breach of the Agreement by Customer which is not cured within thirty (30) days following receipt of notice thereof, or (ii) as otherwise provided by the Terms. Without limitation, a breach of this Agreement includes but is not limited to, failing to make timely payments, failing to purchase any minimum Consumable commitment, or failing to perform any Customer obligation under this Agreement.

Upon the occurrence of a default, Seller may (a) terminate the Agreement; (b) adjust the pricing available to Customer under the Agreement; and/or (c) accelerate, and declare as immediately due and payable, the outstanding balance of all payments due under the Agreement. The exercise of the foregoing remedies shall be without limitation to remedies available at law, in equity or under this Agreement as applicable, and Seller shall have the right to recover all reasonable and proximate damages suffered by reason of such default, including reasonable attorneys' fees. Upon termination of this Agreement, Customer shall return any Seller owned Instrument to Seller unless otherwise agreed in the Sales Quote.

## 4. Shipping

Unless Customer requests that Products be shipped under its own account, Seller will deliver the Products to a common carrier for shipping, based upon Seller's packaging, shipping, and insurance practices, to the address designated by Customer ("Delivery Point"). Seller ships all Products FOB Origin for delivery in the United States and FCA Origin (INCOTERMS 2012) for delivery outside of the United States. Customer will bear all freight, insurance, and other shipping costs to Delivery Point. Seller may ship in one or more lots, in which case each lot will be deemed a separate sale. Seller will not be liable for any failure or delay in shipping. Seller reserves the right to ship Products freight collect and Seller shall exercise its own discretion with respect to the manner of shipment, packaging, and carrier. Customer shall be responsible for obtaining all necessary import or export licenses or permits for the Product(s). Seller will have the right, in its judgment, to apportion Products among its customers in such manner as Seller deems equitable.

Risk of loss or damage passes to Customer when Products are delivered to a carrier, at which point, Customer is responsible for all loss or damage to the Products. No loss or damage will relieve Customer from its payment obligations under this Agreement. Seller's warranty coverage also begins when Products are delivered to a carrier. In the event of loss or damage during shipping, Customer may make a warranty claim to Seller. After a warranty claim for loss or damage during shipping, any proceeds from insurance on the Products will be paid to Seller.

## 5. Acceptance and Use of Products

Acceptance of any Instruments requiring installation by Seller shall occur upon the earlier of (i) delivery of proof of installation by Seller to Customer, or (ii) use of the Instrument by Customer for clinical testing, in neither case to exceed thirty (30) days following installation. Acceptance of any Instruments that do not require installation by Seller shall be deemed accepted five (5) calendar days after delivery. Customer agrees to comply with all applicable laws and regulations when using, maintaining, or disposing of the Products. Customer acknowledges that Consumables and Instruments are specifically designed and manufactured to operate together. Customer agrees that it will only use Consumables with Instruments. Customer will store Consumables in accordance with Seller's storage and handling instructions (or, absent such instructions, in accordance with generally accepted industry customs and standards), including all temperature and climate control standards and other regulatory requirements.

Instruments may be returned for full credit within five (5) calendar days of delivery, provided that Customer has not damaged the Instruments. Consumables may not be returned except in the event that Customer has a warranty claim. To make a claim for defective or damaged Products, Customer must notify Seller in writing within the applicable warranty period and if applicable, return Products to Seller using a valid return authorization number (RMA). Seller may refuse any Product not timely rejected or returned without a valid RMA. For any valid claim made, Seller may elect to repair or to replace the Product with a comparable Product or to refund the purchase price of the Product. These are Customer's sole and exclusive remedies for defective, damaged, or missing Product(s).

## **6. Price**

Customer will pay for Products no later than thirty (30) days after the date of Seller's invoice, which will include all applicable taxes and shipping costs. If Customer is tax-exempt, Customer will provide Seller with certification of its status. Payments are deemed made by Customer when received by Seller. Interest will accrue on any undisputed, unpaid balances due to Seller at a rate of 1.5% per month (or the maximum legal interest rate allowed by applicable law, if less) from and after the due date. New customer Orders and Sales Quotes are subject to credit approval. Seller reserves the right to require other payment terms, including without limitation, payment in advance and/or letters of credit. Unless approved in writing in advance by Seller, invoices shall be paid by cash, check, or ACH. Seller reserves the right to reject or accept credit card payments on a case by case basis. Customer is not entitled to abate or reduce payments, or to withhold, discount, or offset any amounts or charges against the amounts due to Seller under this Agreement for any reason.

## **7. Software**

Any code or software incorporated into the Product which is not Seller Software ("Third Party Software"), is provided to Customer "as-is" or subject to the terms, if any, set forth in any "shrink-wrapped" license packed with the Products or "click-wrapped" license visually displayed upon installation or execution of the Software, or any other terms and conditions of use by the owner, developer, or manufacturer (the "End-User License Agreement"). Customer hereby agrees to use the Third Party Software in accordance with the terms and conditions of the applicable End-User License Agreement. Nothing in this Agreement is intended or shall be interpreted to grant to Customer any ownership of or title to the any Seller Software or Third Party Software (as used together "Software") and Customer shall not be permitted to use the source code of the Software. SELLER MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE, NOR SHALL SELLER HAVE ANY LIABILITY WITH RESPECT TO, ANY THIRD PARTY SOFTWARE OR THIRD PARTY LICENSES, AS DEFINED IN SECTION 1.

Upon acceptance of the Product, Customer accepts full responsibility to manage and maintain: (i) all critical operating system patches to minimize risk of exposure of the Product to cyber threats; and (ii) the latest Software Updates, upon being provided with same by Seller or applicable third party.

Customer will take all necessary measures to ensure technological and physical security of any Consumables, Instruments, and all Software. Seller shall not be responsible for any contamination of Instruments or Software by any virus and reserves the right to charge Customer for any measures taken by Seller to remedy such contamination.

## **8. Remote Services**

Where applicable, Seller hereby grants Customer non-exclusive, non-transferable, and limited access to VILINK® ("VILINK") to assist with the following:

- A. **Instrument Support.** Seller may remotely access the Instrument to (i) investigate, troubleshoot, diagnose, or resolve Instrument errors or performance issues and (ii) provide training and assistance to Customer. Each VILINK remote access session can only be initiated upon Customer's express authorization.
- B. **Operational Data Management.** Seller may collect technical, operational, and other non-personal data related to the use or performance of the Instrument to monitor performance and for other related analytical, statistical, or benchmarking purposes. Seller may use such non-personal data for (i) improving and enhancing Products or Services, (ii) research and development related to new products, features, or services, and (iii) other internal business and operational purposes.
- C. **Software Update Delivery.** Seller may deliver patches, modifications, enhancements, corrections, and/or security improvements to the Software ("Software Updates"). Seller's obligation under this Section is limited to the remote delivery of the Software Updates to the Instrument. Customer shall be responsible to install the Software Updates on the Instrument.
- D. **Fees.** Customer acknowledges failing to implement VILINK may, at Seller's discretion, result in up to a 20% increase in Service or Extended Warranty costs. For VITEK MS PRIME, additional fees shall apply. Furthermore, if a service dispatch is required that could have otherwise been avoided with the implementation of VILINK, bioMérieux reserves the right to charge a dispatch fee based on its prevailing rates.

## **9. Indemnification**

Seller will indemnify, defend, and hold harmless Customer from and against third party claims, demands, causes of action, or liability arising from a claim that Customer's use or possession of the Products infringes or misappropriates the patent, copyright, trade secret, or other intellectual property right of any third party except to the extent such claim arises in whole or in part from (i) the combination, operation, or use of the Product with products, services, deliverables, materials, technologies, business methods, or processes not furnished by Seller; (ii) modifications which were not made or approved by Seller; (iii) Customer's breach of this Agreement or use of the Product other than in accordance with its Permitted Uses; or (iv) Third Party Software or Third Party Licenses. Seller's indemnification obligation hereunder is contingent upon prompt notice of and full control over the defense of any claim. Unless prohibited by law, Customer will indemnify, defend, and hold Seller harmless from and against any claim, demands, causes of action, or liability asserted by any third party and arising from or related to (a) the use, possession, or operation of the Products inconsistent with their Permitted Uses, (b) the conduct by Customer of its business and operations, or (c) any breach of any covenant or any representation or warranty made by Customer in this Agreement.

## **10. Limitation of Liability**

- A. **General Limitation.** NOTWITHSTANDING ANYTHING IN THE TERMS, CUSTOMER DOCUMENTATION, SALES QUOTE, MASTER AGREEMENT OR ANY ANCILLARY AGREEMENT (COLLECTIVELY THE "DOCUMENTS") TO THE CONTRARY, BIOMÉRIEUX'S CUMULATIVE LIABILITY TO CUSTOMER, OR ITS EMPLOYEES, AGENTS, CUSTOMERS, OR INVITEES, OR ANY THIRD PARTIES, IN CONTRACT, TORT (INCLUDING NEGLIGENCE), INDEMNITY, OR ANY OTHER LEGAL OR EQUITABLE THEORY, ARISING OUT OF OR RELATED TO, WITHOUT LIMITATION, THE DOCUMENTS, PRODUCTS, OR PRODUCT PERFORMANCE (EXCEPT AS EXPRESSLY STATED IN SECTION 12) SHALL BE EXPRESSLY LIMITED TO THE PURCHASE PRICE PAID BY CUSTOMER IN CONNECTION WITH THE SPECIFIC PRODUCT(S) WHICH ARE THE PROXIMATE CAUSE OF ANY SUCH LIABILITY.
- B. **Indirect, Special, and Consequential Damages.** NOTWITHSTANDING ANYTHING IN THE DOCUMENTS TO THE CONTRARY, SELLER SHALL NOT BE LIABLE TO CUSTOMER, OR ITS EMPLOYEES, AGENTS, CUSTOMERS, OR INVITEES, OR ANY THIRD PARTIES, IN ANY INSTANCE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF GOODWILL OR OPPORTUNITY, OR ANY LOST PROFITS, LOSS OF ANY DATA OR USE, EVEN IF SELLER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED WARRANTY MADE HEREIN.
- C. **Exceptions to Limitations.** The limitations set forth in this section shall not apply with respect to: (i) injury to person and/or tangible property arising from the willful misconduct or gross negligence of Seller; (ii) fraud or (iii) to the extent such disclaimer is prohibited under applicable law. Customer acknowledges and agrees Seller has entered into this Agreement in reliance upon the disclaimers of warranties and limitations of liability in the Terms and that the same form an essential basis of the bargain between the parties.

D. NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, SELLER SHALL NOT BE LIABLE FOR ANY DAMAGES, COSTS, EXPENSES, OR OTHER LIABILITIES RELATED TO CUSTOMER'S USE OF THE PRODUCTS OUTSIDE ITS PERMITTED USES.

## 11. Export Controls

The Products, including hardware, software, services, and any related technology, provided to the Customer may be subject to applicable export control laws and regulations including, without limitation, the United States Export regulations. Customer agrees that Products will not be used, in their entirety or in part, directly or indirectly in support of activities, sectors and destinations restricted or prohibited by the United States, the European Union, or any other applicable jurisdiction, except as authorized under applicable laws and regulations. Products will only be used for clinical military use when authorized under applicable laws and regulations and with prior authorization of Seller. Products will not be used in activities relating to biological, chemical, or nuclear weapons or applications. Customer agrees that Products will not be used directly or indirectly, sold, re-exported or incorporated into products for the direct or indirect benefit of any person or entity named on any applicable government's denied or restricted party list.

## 12. Limited Warranty and Service

A. Seller warrants the BioFire FilmArray Products in accordance with the following applicable warranties:

- i. BioFire Products and associated Consumables see Seller's Standard Limited Warranty available at [https://www.biomerieux-usa.com/sites/subsidiary\\_us/files/warranty\\_standard\\_0.pdf](https://www.biomerieux-usa.com/sites/subsidiary_us/files/warranty_standard_0.pdf)
- ii. BioFire Products and associated Consumables see Seller's Extended Warranty (if purchased) available at [https://www.biomerieux-usa.com/sites/subsidiary\\_us/files/warranty\\_extended\\_0.pdf](https://www.biomerieux-usa.com/sites/subsidiary_us/files/warranty_extended_0.pdf)

B. Seller warrants all other non BioFire products and associated Consumables in accordance with the following applicable warranties:

- i. Instruments. Seller warrants the Instruments to the Customer for a period of one (1) year after Products are delivered to a carrier/shipper for delivery to Customer (the "Warranty Period") against defects in material and workmanship and failures to conform to Seller's specifications applicable on the date of shipment. Customer's sole and exclusive remedy for a breach of the above warranty is for Seller to either, at Seller's sole discretion, repair or replace, any defect confirmed by Seller to have occurred, under normal use and service, during the Warranty Period provided Seller is promptly notified in writing upon discovery of such defect.
- ii. Consumables. Seller warrants that Consumables will conform with the specifications set forth in the applicable Product insert. Customer shall promptly notify Seller of any Consumables which are found to be in breach of the above warranty. Upon verification by Seller, Customer's sole and exclusive remedy for said non-conforming Consumables shall be for Seller to either replace or, alternatively, in Seller's sole discretion, issue a credit note equal to the purchase value of the defective Consumables.
- iii. Services. Seller warrants that the Services to be performed hereunder shall conform to Seller's standards and that the parts supplied hereunder are warranted against defects in workmanship and material for a period of thirty (30) days from the date of installation of such part. Customer's sole and exclusive remedy for breach of the above warranty shall be for Seller to provide Customer with a repair or replacement for the part which is found to be defective due to a breach of the above warranty.
- iv. Upon notification, Seller will provide the following: (i) make commercially reasonable efforts to provide on-site engineering support within forty eight (48) hours of determination by Seller that an on-site visit is necessary, Monday-Friday, 8:00AM-5:00PM local time in the Continental U.S., excluding locally observed holidays; and (ii) remote applications and engineering support Monday-Friday, 8:00AM-5:00PM local time in the Continental U.S., excluding locally observed holidays (hereinafter the "Warranty Period Services"). In no event shall these Warranty Period Services include preventative maintenance service. Disposables and replacement items with a normal life expectancy of less than one (1) year such as batteries, lamps, bulbs, and card trays are excluded from this warranty. Seller shall not be liable under this warranty for any defect arising from abuse of the Instrument; failure to operate and maintain the Instrument in accordance with any Seller instruction or instruction manual; operation of the Instrument by a person who has not been trained in its operations by Seller's recommendations; or repair service, alteration, or modification of the Instrument by any person other than the authorized service representative of Seller.
- v. If Customer purchases a Service Agreement, said Services shall be governed by the additional Service Agreement Addendum available at: [https://www.biomerieux-usa.com/sites/subsidiary\\_us/files/clinical\\_service\\_addendum.pdf](https://www.biomerieux-usa.com/sites/subsidiary_us/files/clinical_service_addendum.pdf)

The Warranty is personal to the Customer and may not be transferred in whole or in part to any third party, including an affiliate of Customer. Only the Customer as defined in these Terms may enforce the Warranty. The Warranty is facility specific and does not transfer if the Product is moved to another facility unless Seller conducts such move. Any description of the Products contained on Seller's website or promotional materials is for the sole purpose of identifying them, and any such description is not a part of the basis of the bargain and does not constitute a warranty that a Product shall conform to that description. No affirmation of fact or promise made by Seller, on its website or otherwise, shall constitute a warranty that the Products will conform to the affirmation or promise. Customer acknowledges and agrees Customer has not relied on any other statement, promise, representation, or warranty made by or on behalf of Seller which is not expressly set forth in the Terms.

**THE WARRANTIES AND REMEDIES SET FORTH AND INCORPORATED BY REFERENCE IN THIS SECTION ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES AND REMEDIES OF ANY NATURE WHATSOEVER. TO THE MAXIMUM EXTENT PERMITTED UNDER APPLICABLE LAW, SELLER MAKES NO FURTHER, AND HEREBY DISCLAIMS ANY REPRESENTATIONS, WARRANTIES, OR GUARANTEES WHATSOEVER, EXPRESS OR IMPLIED, STATUTORY, OR OTHERWISE REGARDING THE SUBJECT MATTER OF THIS AGREEMENT, ANY PRODUCT, REAGENT, INSTRUMENT, SOFTWARE, THIRD PARTY LICENSES, OR ANY SERVICES PROVIDED UNDER THIS AGREEMENT, INCLUDING WITHOUT LIMITATION, ANY REPRESENTATION OR WARRANTY WITH RESPECT TO FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, NON-INTERFERENCE, LACK OF INFRINGEMENT OF THE RIGHTS OF THIRD PARTIES, OR WHICH MAY ARISE FROM COURSE OF DEALING OR USAGE OF TRADE, OR REGARDING THE COMPATIBILITY OR INTEROPERABILITY OF THE PRODUCT, INSTRUMENT, OR SOFTWARE WITH OTHER PERSONAL OR THIRD PARTY EQUIPMENT, LICENSES, DEVICES, PROPERTY, OR ACCESSORIES WHICH CUSTOMER USES WITH OR CONNECTS TO THE PRODUCTS.**

## 13. Additional Obligations of Customer

Customer agrees not to send any electronic protected health information (PHI) to Seller unless required by Seller. Further, in any event an Instrument is returned to Seller, Customer shall ensure it will return the Instrument to Seller purged of any and all electronic protected health information (PHI) in accordance with applicable laws and regulatory guidance and in good repair, condition and working order, ordinary wear and tear resulting from proper use thereof alone excepted. Customer is not an authorized dealer, representative, reseller, or distributor of any of Seller's Products. Customer represents and warrants that it (i) is not leasing or purchasing the Product on behalf of a third party, (ii) is not leasing or purchasing the Product in order to resell or distribute the Product to a third party, (iii) is not leasing or purchasing the Product in order to export the Product from the country in which Seller shipped the Product pursuant to the ship-to address designated by Customer at the time of ordering (the "Ship-To Country"), and (iv) will not export the Product out of the Ship-To Country. Customer shall promptly disclose to Seller any communication that it makes or receives from a government body, agency, or other regulatory or accrediting body pertaining to the Products or Customer's use

thereof. Customer shall provide Seller with and shall assist Seller in obtaining all error and other information generated through use of the Products, as reasonably requested by Seller. Customer acknowledges and agrees that Seller shall have the right to use such information, provided that such use follows applicable laws and regulations.

#### **14. Confidentiality**

For the purposes of this Agreement, confidential information shall mean the terms and pricing under this Agreement, materials, data, strategies, systems, pricing or other information, relating to Seller's and/or its parent, related, affiliated or subsidiary companies' products, business, know-how, materials and/or data, including but not limited to financial, marketing, technical, non-technical and/or scientific information of Seller ("Confidential Information"). Any Confidential Information acquired by Customer, in whatever form, shall be kept confidential and shall not be used, published, or divulged by the receiving party to any other person, firm, or corporation, or in any advertising or promotion regarding this Agreement or in any other manner or connection whatsoever. Provided, Customer may disclose Confidential Information to its attorneys, accountants, or consultants who have a need to know to provide services to Customer and who are under an obligation of strict confidentiality and agree not to use Confidential Information for any other purpose except the services to Customer. In the event of any breach of this section, Seller shall be entitled, in addition to any remedies that it may have at law or in equity, to seek injunctive relief or specific performance, or to terminate this Agreement or applicable Sales Order upon receipt of written notice to Customer.

#### **15. Intellectual Property**

Many of the Products are covered by U.S. patents, patents pending, or their foreign counterparts, owned or licensed by Seller or affiliates, which may be viewed at [www.biomerieux-usa.com/patents](http://www.biomerieux-usa.com/patents). Products leased, purchased, and/or sold hereunder are leased or sold by Seller solely for Permitted Uses by Customer, subject to any restrictions on Permitted Uses. Depending on Customer's specific application(s), Customer may need one or more additional licenses or rights to use certain of the Products. Customer represents and warrants that it has, or will obtain, all necessary Third Party Licenses for its specific application(s). Notwithstanding anything to the contrary in this Agreement, nothing contained herein will be deemed, construed or interpreted as a grant, transfer or conveyance to Customer or any third party, expressly or by inference, of any right, title or interest in, or license or right to use, any, all or any portions of Seller's inventions, patents, know-how, processes or procedures, technology, copyrights or trademarks, or other intellectual property, other than the right to use the Products for Permitted Uses only. Customer shall not: (i) have any ongoing right to be supplied with, or to manufacture or to have manufactured, any quantities of Products or Third Party Software beyond those ordered in accordance with the terms and conditions of this Agreement; (ii) modify, copy, translate, enhance, reverse engineer, decompile, disassemble, create derivative works based upon, sublicense, resell, or convey in any manner any Product or Third Party Software or any component thereof to any third party anywhere in the world; or (iii) remove, modify, change, cover, or otherwise obscure from the Products any labels, trademarks, copyright, or other proprietary notices or legends. Any breach by Customer of this section shall entitle Seller to terminate this Agreement or any Sales Quote upon receipt of written notice to Customer.

#### **16. Regulatory**

It is not the purpose of this Agreement to induce or encourage the referral of patients or the payment, directly or indirectly, of any remuneration by one party to the other party in violation of applicable laws, rules, or regulations. Each party agrees that no part of the remuneration provided to the other party is a payment or inducement for, and is not in any way contingent upon, the admission or referral of any patient. Seller shall comply with the reporting requirements of 42 C.F.R. § 1001.952(h), regarding "safe harbor" protection for discounts under the Medicare and Medicaid Fraud & Abuse law. Seller shall disclose to Customer on each invoice, or as otherwise agreed, the amount of the discount or rebate. The statement shall inform Customer, of the amount of the discount or rebate so as to enable Customer to satisfy its obligations to report such discount or rebate to the government. Seller and Customer represent that they have not been, nor are they about to be excluded from participation in the federal Medicare or Medicaid program, Maternal and Child Health Services Block Grant, Block Grants for Social Services, or State Children's Health Insurance (collectively, "Federal Health Care Programs") Each party agrees to notify the other promptly after receipt of final notice of exclusion from any Federal Health Care Program. To the extent that Section 952 of the Omnibus Reconciliation Act of 1980 (the "Act") and the regulations promulgated thereunder are applicable to the Terms, and until the expiration of four (4) years after the last sale of the Products pursuant to the Terms, Seller shall make available, upon written request of the Secretary of Health and Human Services or the Comptroller General of the United States or any of their duly authorized representatives, copies of the Terms and any books, documents, records and other data of Seller that are necessary to verify the nature and extent of the costs incurred by Customer in purchasing such Products. If Seller carries out any of its duties under the Terms through a subcontract with a related organization involving a value or cost of ten thousand dollars (\$10,000) or more over a twelve-month period, Seller shall cause such subcontract to contain a clause to the effect that, until the expiration of four (4) years after the last sale of the Products pursuant to such contract, the related organization shall make available upon written request of the Secretary of Health and Human Services or the Comptroller General of the United States or any of their duly authorized representatives, copies of such contract and any books, documents, records and other data of said related organization that are necessary to certify the nature and extent of costs incurred by Customer in purchasing such Products. Customer will be solely responsible for reporting applicable discounts on its Medicaid/Medicare cost reports.

Each party hereto will comply with all laws, rules and regulations, including without limitation, all applicable laws and regulations regarding the collection, use and storage of protected health information (as defined in 45 C.F.R. 160.103), including the Health Insurance Portability and Accountability Act of 1996, as amended by (a) Subtitle D of the Health Information Technology for Economic and Clinical Health Act, (b) Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5), (c) the Affordable Care Act of 2010; (d) the federal regulations published at 45 C.F.R. parts 160 and 164, and (e) any applicable state privacy and security laws regarding individually identifiable health information as applicable to the agreeing party, which relate to this Agreement.

#### **17. Force Majeure**

Seller is not responsible for any failure to perform or delay attributable in whole or in part to any cause beyond its reasonable control, including but not limited to strike, war, fire, riot, accident, acts of God, hurricane, earthquake, severe weather, interruption of electrical supply to Customer's facilities, supplier-caused delays or shortages, pandemic, epidemic, or compliance with any law, regulation, embargo restrictions or order of any government body or instrumentality thereof. Performance shall be deemed suspended during said circumstances and extended for such time as said circumstances cause delay. Seller will have the right, in its judgment, to apportion Products among its customers in any manner Seller deems necessary in order to comply with its regulatory obligations or in the handling of any force majeure event which affects Seller's obligations to its customers.

#### **18. Miscellaneous Provisions**

This Agreement may only be modified in a writing signed by Customer and Seller which expressly states the intent to modify this Agreement. This Agreement may not be transferred or assigned by Customer in whole or in part, to a third party, including an affiliate of Customer. Any attempted assignment or transfer shall be null, void, and invalid. Seller may delegate, at its sole discretion, to any sales agent or distributor any and all of Seller's duties pertaining to distribution of Products or related activities under the Agreement, so long as any such sales agent or distributor is authorized by Seller. Each clause of this Agreement is distinct and severable. If any provision of this Agreement is declared unenforceable, the other provisions herein will remain in full force and effect. A waiver or modification by Seller of any condition or obligation of Customer hereunder shall not be construed as a waiver or modification of any other condition or obligation and no such waiver or modification granted on any one occasion shall be construed as applying to any other occasion. Any provision of these Terms that by its nature is reasonably intended to survive beyond the termination or expiration of this Agreement shall survive. This Agreement will be interpreted according to the laws of the State of Utah without application of conflict of laws principles. Any legal action or proceeding related to this Agreement shall be brought exclusively in the state or federal courts located in Salt Lake City, Utah. The Parties hereby consent to the personal jurisdiction and venue of such courts and waive any objections to the convenience of this forum. The United Nations Convention on the International Sales of Goods will not apply to the transactions contemplated by this Agreement.