

**NONIN MEDICAL, INC.
TERMS AND CONDITIONS OF SALE**

1. GENERAL

1.1 **Contract Terms.** These Terms and Conditions of Sale apply to the purchase of Nonin Medical, Inc. ("Nonin") products by the customer ("Customer") identified in the invoice, quote or other Nonin document issued by Nonin for the sale of the Products by Nonin to Customer. These Terms and Conditions of Sale, along with the invoice, quote or other Nonin document which these Terms and Conditions of Sale accompany, are referred to as, this "Agreement". "Products" include (i) any products manufactured by Nonin directly, and (ii) any products manufactured by any affiliate of Nonin and offered for sale directly by Nonin as part of Nonin's portfolio of products. "Affiliate" means any entity that is owned or controlled by Nonin, has an ownership interest in or controls Nonin, or is under common ownership or control with Nonin. Except as expressly provide herein or in a separate writing signed by Nonin, this Agreement shall apply to the purchase of all Products. Nonin shall not be bound by, and specifically objects to, any term, condition or other provision that is different from or in addition to the provisions of this Agreement (whether or not it would materially alter this Agreement), which is set forth in any purchase order, receipt, acceptance, confirmation, correspondence or otherwise of or by Customer, unless Nonin specifically agrees to any such provision in a writing signed by Nonin and such writing references this Agreement. Customer acknowledges that this is a commercial and not a consumer transaction.

1.2 **Formation of Contract.** Customer makes an offer to purchase Products when Customer submits an order to Nonin. An order is submitted when (i) Customer submits to Nonin either a phone order, electronically communicated order, or written order for Products, or (ii) a quotation or proposal ("Quotation") is issued for the purchase of Products and Customer either signs such Quotation or submits a purchase order or other writing to Nonin for the purchase of any Products identified on such Quotation. Nonin's acceptance of Customer's offer is expressly made conditional on Customer's assent to all of Nonin's terms and conditions of sale herein. An order shall be binding on Nonin only after a credit approval and an order confirmation have been issued by Nonin to Customer or Nonin ships Products to Customer. The parties agree that any subsequent orders made by e-mail or phone order are also expressly subject to these terms and conditions.

2. PRICES

2.1 **Quotations.** Unless otherwise agreed to in writing or set forth in a Quotation, all prices quoted by Nonin are based on U.S. dollars F.O.B. Nonin shipping point, and include standard and customary packaging. Domestic prices apply only to purchasers located in, and who will use the Products in, the United States. Unless otherwise stated, the Quotation shall only be valid for 30 days from the date of the Quotation.

2.2 **Acceptance of Products.** All Products delivered by Nonin to Customer hereunder shall be deemed to have been accepted by Customer the earlier of (i) the date Customer first uses the Products, or (ii) 30 days after shipment of the Products to Customer.

3. TAXES

3.1 Any sales, use or manufacturer's tax that may be imposed upon the sale or use of Products (including, without limitation, any goods and services tax and value added tax), or any property tax levied after readiness to ship, or any excise tax, license or similar fee required under this transaction, shall be in addition to the quoted prices and shall be paid by Customer.

4. PAYMENT TERMS

4.1 **Due Date.** Unless otherwise set forth in the Quotation, the purchase price for the Products and all other amounts due hereunder are due net 30 days from the invoice date. All amounts payable hereunder are payable in U.S. dollars. Partial shipments of Product(s) shall be billed as shipped.

4.2 **Late Payments.** A service charge of 1.5% per month, not to exceed the maximum rate allowed by law, shall be made on any portion of Customer's outstanding balance that is not paid within 30 days after the invoice date, which charge shall be determined and compounded on a daily basis from the due date until the date paid. Payment of such service charge shall not excuse or cure Customer's breach or default for late payment. In addition, in the event that Customer fails to make any payment to Nonin within this 30-day period, including, without limitation, any payment under any service contract or other agreement with Nonin, then Nonin shall have no obligation to continue performance under any agreement with Customer.

4.3 **Payment of Lesser Amount.** If Customer pays, or Nonin otherwise receives, a lesser amount than the full amount due under this Agreement, such payment or receipt shall not constitute or be construed other than as a payment toward the Customer's account applied first to any accrued but unpaid late payment interest, then to the earliest amount due Nonin. Nonin may accept any check or payment in any amount without prejudice to Nonin's right to recover the balance of the amount due or to pursue any other right or remedy. No endorsement or statement on any check or payment or elsewhere shall constitute or be construed as an accord or satisfaction.

5. EXPORT TERMS

5.1 Unless other arrangements have been made, payment on export orders shall be made by irrevocable confirmed letter of credit, payable in U.S. dollars against Nonin's invoice and standard shipping documents. Such letter of credit shall be in an amount equal to the full invoiced purchase price of the Products and shall be established in a United States bank acceptable to Nonin. Customer shall procure all necessary permits and licenses for shipment and compliance with any governmental regulations concerning control of final destination of Products.

5.2 Customer shall not, directly or indirectly, violate any United States law, regulation or treaty, or any other international treaty or agreement, relating to the export or re-export of any Product or associated technical data, to which the United States adheres or with which the United States complies. Customer has no authority to sell or otherwise redistribute a Product domestically or internationally. Customer shall deliver to Nonin, upon Nonin's request, written assurance regarding compliance with this section in form and substance acceptable to Nonin. Customer shall defend, indemnify and hold Nonin harmless from any loss, claim, damage, liability or expense (including, without limitation, reasonable attorneys' fees) arising out of or in connection with any violation of this section.

6. DELIVERY, RISK OF LOSS

6.1 **Delivery Date.** Delivery and completion schedules are approximate only and are based on conditions at the time of acceptance of Customer's order by Nonin. Nonin shall make every reasonable effort to meet the delivery date(s) quoted or acknowledged, but shall not be liable for any failure to meet such date(s).

6.2 **Risk of Loss, Title.** Unless otherwise agreed to in writing, delivery shall be complete upon transfer of possession of the Products to the common carrier, F.O.B. Nonin shipping point, at which point title to and risk of loss to the Products shall pass to Customer. All freight charges and other transportation, packing, and insurance costs, custom duties and other similar charges shall be the sole responsibility of Customer unless otherwise agree to in writing by Nonin. In the event of any loss or damage to any of the Products during shipment, Customer should make claim against the carrier.

7. RETURN AND REPAIR; CHANGES

7.1 Products delivered by Nonin are not returnable by Customer except in conformity with this Section 7.1 or pursuant to the limited warranty in accordance with Section 9. Within 30 days of

the date of purchase, Customer may return Products to Nonin for a full refund (less a 20% restocking fee) that are in unopened Nonin original packaging and are unused, undamaged and in resalable condition. Any refund shall exclude all applicable shipping, delivery or handling charges. Prior to returning any Product, Customer shall notify Nonin of the intended return and mark the shipping container containing such Products so returned with a return authorization number provided by Nonin. To receive any refund, Customer must provide to Nonin, along with the qualifying returned Products, a copy of the receipt or invoice for such Products. In no event will Nonin be responsible for any damage to or loss of any Products as a result of shipping or delivery. Products returned due to breach of warranty are subject to the terms of the limited warranty set forth in Section 9. All Products to be returned shall be shipped, freight and insurance prepaid, to the following address, unless otherwise advised by Nonin:

Nonin Medical, Inc.
Attn: Returns
13700—1st Avenue North
Plymouth, Minnesota 55441-5443
USA

Upon receipt of returned Products, Nonin will inspect the Products and take appropriate action. Nonin's decision regarding disposition of returned Products is final.

7.2 Nonin shall have the right to change the manufacture and/or design of the Products at any time.

8. FORCE MAJEURE

8.1 Nonin will make every reasonable effort to complete shipment, but shall not be liable for any loss or damage for delay in delivery or any other failure to perform due to causes beyond Nonin's reasonable control, including, without limitation, acts of government or compliance with any governmental rules or regulations, acts of God or the public, war, civil disturbance, fire or other casualty, strike or labor dispute or unavailability of labor, raw materials, power or supplies. Should such a delay occur, Nonin may reasonably extend delivery or production schedules, or, at its option, cancel the order in whole or in part without liability other than to return any unearned deposit of prepayment.

9. WARRANTY; DISCLAIMER

9.1 Nonin warrants to Customer that, during the applicable warranty period specified in Nonin's user manual (or such other warranty period as may be specified in a written Nonin invoice, quotation or other Nonin document to which these Terms and Conditions of Sale are incorporated by reference), the Products will be free from defects in materials and workmanship such that each Product, if properly used, will perform in accordance with the specifications supplied with the Product.

9.2 No warranty extended by Nonin shall apply to any Products: (a) which have been damaged by accident, misuse, abuse, negligence, improper application, alteration or by a force majeure occurrence as described in Section 8 hereof or by Customer's failure to operate the Products in accordance with the manufacturer's instructions or to maintain the recommended operating environment; (b) which are defective due to unauthorized attempts to repair, maintain, service, add to or modify the Products by Customer or any third party or due to the attachment and/or use of non-Nonin supplied equipment without Nonin's prior written approval; (c) which failed due to causes arising from or attributable to non-Nonin supplied equipment; (d) which have expired or exceeded the shelf life date for such Product printed on the Product packaging; or (e) which have been damaged from the use of operating or cleaning supplies or consumable parts not approved by Nonin.

9.3 Nonin's obligation under this warranty is limited to the repair or replacement of, or credit for, at Nonin's option, defective parts. Repairs or replacements shall not interrupt, extend or prolong the term of the warranty. Customer shall, upon Nonin's request, return the non-complying Product or part to Nonin. Customer shall pay Nonin's normal charges for service and parts for any inspection, repair or replacement that is not, in Nonin's sole judgment, covered

by the warranty set forth in this Section 9. Nonin's warranty does not apply to consumable materials, except as specifically stated in writing, nor to products or parts supplied by Customer.

9.4 This warranty is made on the condition that prompt written notice of any noncompliance with the warranty be given to Nonin and Nonin's inspection reveals that the Customer's claim is valid under the terms of the warranty. Prior to returning any Product, Customer shall notify Nonin of the intended return and mark such Products (or shipping container) so returned with a return authorization number provided by Nonin. Customer is responsible for shipping costs for returning the Products to Nonin but, if the repair or replacement is covered by this warranty, Nonin shall pay any shipping costs for returning the repaired or replaced Products to Customer.

NONIN MAKES NO WARRANTY OTHER THAN THE WARRANTIES EXPRESSLY SET FORTH IN THIS AGREEMENT. SUCH WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY EXPRESS OR IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WHICH WARRANTIES ARE EXPRESSLY DISCLAIMED.

10. LIMITATION OF LIABILITY

10.1 In no event shall Nonin's liability hereunder exceed the actual loss or damage sustained by Customer, up to a maximum amount not to exceed the purchase price of the Product in question.

10.2 **NONIN SHALL NOT BE LIABLE FOR ANY LOSS OF USE, REVENUE OR ANTICIPATED PROFITS, LOSS OF STORED, TRANSMITTED OR RECORDED DATA, OR FOR ANY INCIDENTAL, UNFORESEEN, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE SALE OR USE OF THE PRODUCTS. THE FOREGOING IS A SEPARATE, ESSENTIAL TERM OF THIS AGREEMENT AND SHALL BE EFFECTIVE UPON THE FAILURE OF ANY REMEDY, EXCLUSIVE OR NOT.**

11. INDEMNIFICATION

11.1 **Indemnification by Nonin.** Subject to Section 10.1, Nonin will defend and indemnify Customer and hold Customer harmless against costs, expenses and liability upon any claim by any third party (i) arising from any defect in the Product or (ii) that the Product or any part thereof infringes or violates any copyright or patent of such third party, provided that: (a) Customer notifies Nonin promptly in writing of any notice of such claim; (b) Customer cooperates with Nonin in all reasonable respects in connection with the investigation and defense of any such claim; and (c) Nonin shall have sole control of the defense of any action on any such claim and all negotiations for its settlement or compromise.

11.2 Should the Product become, or in Nonin's opinion be likely to become, the subject of a claim of copyright or patent infringement or trade secret misappropriation, Customer shall permit Nonin, at Nonin's option and expense, either to: (i) procure for Customer the right to continue using the Product; or (ii) replace or modify the same so that it becomes non-infringing, provided such modification does not diminish the Product's functionality. If neither of these alternatives is available on terms reasonable to Nonin, then Customer shall return the Products to Nonin and Nonin shall refund to Customer the purchase price paid by Customer less reasonable depreciation for Customer's use of the Products.

11.3 **Indemnification by Customer.** The indemnification provided by Section 11.1 shall not apply to any Product, or any part thereof, manufactured to Customer's own detailed design for unique items of special physical characteristics or to any Product that has been modified by or for Customer in such a way as to cause it to become infringing. As to such Product(s) or part(s) thereof, Nonin assumes no liability, including, without limitation, any liability for patent or copyright infringement or use of a Product past its shelf life date. Should a claim be made against Nonin with respect to such Product(s), then, except to the extent prohibited by law, Customer shall indemnify and hold Nonin harmless against any loss, claim,

damage, liability or expense (including, without limitation, reasonable attorneys' fees), incurred by Nonin in connection therewith.

12. SOFTWARE LICENSE/INTELLECTUAL PROPERTY LICENSE

12.1 Any drawings, data, designs, software programs or other information (collectively, the "Product Software") supplied by Nonin to Customer in connection with the sale of the Products are not included in the sale of the Products to Customer, shall remain Nonin's property and shall at all times be held in confidence by Customer. Product Software includes any and all copies of (i) software programs consisting of a series of statements or instructions to be used directly or indirectly in a programmable controller or computer to bring about a certain result and (ii) databases consisting of systemized collections of data to be used or referenced directly or indirectly by a programmed controller or computer. Customer shall have a license to use the Product Software as it is integrated into or associated with the Products in the ordinary course of business and for the purpose and in the manner for which the Product Software was designed and produced subject to the terms of this Agreement. Customer will not translate, modify, reverse engineer, disassemble, decompile, or create derivative works based on any of the Product Software or permit any third party to do so. The Product Software may not be copied or transferred to another party or made commercially available in any other device.

12.2 For all Products purchased hereunder that utilize Product Software for their operation, such Product Software shall be licensed to Customer under the terms of Section 12.1.

12.3 Diagnostic and maintenance software is not included under this Section 12, but may be available under a separate license agreement and may be subject to a licensing fee.

13. INSURANCE AND LIABILITY

13.1 Nonin will maintain the following insurance:

Commercial General Liability, including Products / Completed Operations Liability: \$1,000,000 each occurrence / \$3,000,000 aggregate for bodily injury; \$1,000,000 each occurrence for property damage OR a Combined Single Limit of \$3,000,000 each occurrence.

14. ASSIGNMENT

14.1 Customer may not assign any rights or obligations under this Agreement without the prior written consent of Nonin and any assignment or attempted assignment shall be null and void. Nonin may assign any of its rights and obligations under this Agreement without notice to or consent of Customer. This Agreement shall inure to and be binding on the parties and their respective successors, permitted assigns and legal representatives.

15. MODIFICATION

15.1 This Agreement may not be changed, modified or amended except in a writing, signed by duly authorized representatives of Nonin and Customer, which explicitly references this Agreement.

16. COMPLIANCE WITH LAW

16.1 All of the Products sold or furnished under this Agreement have been produced, sold, delivered, and furnished by Nonin in compliance with all laws and regulations applicable to Nonin.

17. GOVERNING LAW

17.1 This Agreement shall be governed by the laws of the State of Minnesota without giving effect to its conflict of laws provisions. All actions, suits or proceedings arising out of or based upon this Agreement or the subject matter of this Agreement shall be brought and maintained exclusively in the federal or state courts located in Hennepin County in the State of Minnesota, and Customer consents to the sole and exclusive jurisdiction of such courts.

18. ENTIRE AGREEMENT

18.1 This Agreement, which includes any Nonin document to which it is attached and incorporated by reference, constitute the entire agreement and the complete and exclusive statement of agreement with respect to the subject matter hereof and thereof, and supersede any and all prior agreements, understandings and communications between the parties with respect to the Products.

19. SEVERABILITY; HEADINGS

19.1 No provision of this Agreement which may be deemed unenforceable will in any way invalidate any other portion or provision of this Agreement. Section headings are for reference only and will have no substantive effect.

20. WAIVER

20.1 No failure and no delay in exercising, on the part of any party, any right under this Agreement will operate as a waiver thereof, nor will any single or partial exercise of any right preclude the further exercise of any other right.

21. NOTICES

21.1 Any notice or other communication under this Agreement shall be deemed properly given if given in writing and delivered in person or mailed, properly addressed and stamped with the required postage, to the intended recipient at its address specified on the face of the invoice or confirmation or purchase order to which this Agreement applies. Either party may from time to time change such address by giving the other party notice of such change in accordance with this section.